

IN THE MATTER OF an appeal filed  
pursuant to the *Rules for Appeals* under  
the *Pre-1986/Post-1990 Hepatitis C  
Settlement Agreement* and its *Protocols*

CLAIM FILE: 07-05704

**REASONS FOR DECISION**

**INTRODUCTION**

[1] The Claimant has appealed a decision of the Administrator dated August 28, 2009 and reconsidered on March 4, 2010, in which the application for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied. The Claimant had failed to satisfy the Administrator on the balance of probabilities that he was infected with HCV for the first time by a blood transfusion in Canada during the Class Period due to his use of non-prescription intravenous drugs.

**FACTS**

[2] On November 28, 2007, the Claimant delivered an application for compensation under the *Settlement Agreement*. In the General Information Form, he stated that he was a Primarily-Infected Person who was infected with the Hepatitis C virus through a blood transfusion during the Class Period. He was born in 1961. In the “Section G – Other Risk Factors” part of the form, he indicated tattoos as a risk factor in the “1990’s”. In the space beside “Intra-nasal drug use”, he wrote “Canibus [sic] (only)”. He has received compensation under a provincial plan and the *Red Cross Settlement* and in the amounts of \$25,000.00 and \$10,450.00 respectively.

[3] The Treating Physician Form dated September 26, 2007 (“first Treating Physician Form”) was completed by the Claimant’s specialist in hepatology (“specialist in

hepatology”). She had treated the Claimant for approximately 2½ years, from March 31, 2005 to the date of the form. She indicated, among other things, that the Claimant was at Disease Level 4. In response to question 1 in the “Section F – HCV Disease Verification” part of the form, she checked the boxes to indicate non-prescription intravenous drug use and tattoos as risk factors for the Hepatitis C virus. In response to question 2, she indicated that the Claimant had received blood in the Class Period and wrote that he had reported the receipt of blood “at time of trauma to arm” in 1978. She checked the box “Yes” in question 3 to indicate the use of non-prescription intravenous drugs and wrote as follows:

At initial visit on March 31, 2005, [the Claimant] reported to have used IV drugs “a few times” at age 17. [Emphasis Added]

[4] In the Statutory Declaration Form, the Claimant declared that he had never used non-prescription intravenous drugs.

[5] In a letter to the Administrator dated November 26, 2007, the Claimant expressed dissatisfaction with the statement made by the specialist in hepatology in the first Treating Physician Form that he had used non-prescription intravenous drugs. He stated, in part, as follows:

I, [the Claimant] am apolled [sic] that [the specialist in hepatology] indicated that I used non-prescription IV drugs at our first visit. I was so devastated to learn of having Hep C, she could of [sic] told me the world was flat and I would of [sic] believed her. At one point, I recall her asking if I used non-prescription drugs that I said yes to. I had traced back, proved blood transfusion had been done and she was not even aware of why. [...] I’ve since then asked my family Dr to find me a different specialist. [The specialist in hepatology] seems to be quite busy when I tried to talk to her. Always rushing visits and not returning my calls. We are all human, we all make mistakes. I understand [the specialist in hepatology] is also capable of making mistake, just as those 4 Red Cross Drs made. [...] [Emphasis Added]

[6] In support of the application, the Claimant delivered hospital records including a Blood Transfusion Request indicating that he was transfused with units of blood numbered 77849 and 77850 on January 28, 1978 for an arm laceration. He also delivered a laboratory report dated May 12, 2005 indicating a positive Hepatitis C PCR test.

[7] On January 29, 2008, the Claimant delivered a further Treating Physician Form (“second Treating Physician Form”) signed by his family physician who had treated him for 20 years. In the “Section F – HCV Disease Verification” part, the family physician checked the box in question 1 for “tattoos” as a risk factor; he did not check the box for “non-prescription intravenous drug use”. In response to question 3, he checked the box “No” to indicate that there was nothing in the Claimant’s medical history or clinical presentation to indicate the use of non-prescription intravenous drugs.

[8] By letter dated March 27, 2008, the Canadian Blood Services forwarded the final Traceback report to the Administrator, together with a Transfusion Summary confirming that the Claimant was transfused with two units of blood in January 1978; one donor was HCV negative and one donor was deceased.

#### **PRELIMINARY DECISION OF THE ADMINISTRATOR**

[9] In a decision dated June 30, 2008, the Administrator advised the Claimant that the application for compensation would be rejected due to his use of non-prescription intravenous drugs, unless he provided further evidence to establish his eligibility on the balance of probabilities. The Administrator stated as follows:

The Settlement provides that where there is evidence that the HCV Infected Class Member used non-prescription intravenous drugs, the person must establish on the balance of probabilities the following:

- 1) The HCV Infected Hemophiliac or person with Thalassemia Major was infected with HCV for the first time by the receipt of Blood;

OR

2) The HCV Infected Person was infected with HCV for the first time by a Blood transfusion for which an HCV antibody positive donor has been located or for which the status of the donor remains unknown;

OR

3) The Secondarily-Infected Person (Spouse or Parent) was infected with HCV for the first time by the alleged secondary infection.

Because the Statutory Declaration in the Form 3 you submitted, or the medical evidence is indicative of non-prescription intravenous drug use, your claim for compensation under the Pre-1986/Post-1990 Hepatitis C Settlement Agreement will be rejected unless **you provide further evidence to establish your eligibility based on the balance of probabilities.**

A Court Approved Protocol (referred to as the “CAP”) applies in your case. A copy of this CAP is enclosed for your convenience. We encourage you to take the time to read this document.

### **What You Need to Do**

Return the enclosed “Further Evidence of First Infection Form” to the Administrator within 30 days of receipt. [Administrator’s Emphasis]

### **FURTHER EVIDENCE OF FIRST INFECTION**

[10] On July 16, 2008, the Claimant signed the Further Evidence of First Infection Form indicating his intention to provide further evidence that he was infected with HCV for the first time by a blood transfusion.

[11] On January 13, 2009, the Claimant delivered further evidence of first infection to the Administrator. The evidence included extensive medical records from approximately 1990 to 2008. Many of the records were computerized entries in the Claimant’s chart. There was also a Physician Form from the provincial plan application made by the Claimant in which the family physician indicated that tattoos were a risk factor for an HCV infection.

[12] The relevant medical records are described in paragraphs 13 to 17.

[13] On September 16, 2004, the family physician requested an assessment of the Claimant by a specialist due to an abnormality in his liver profile. The Claimant was given an appointment with a specialist in haematology (“specialist in haematology”) on October 12, 2004.<sup>1</sup>

[14] By letter dated October 12, 2004, the specialist in haematology reported to the family physician. The letter was reproduced in two entries in the computerized chart record, each dated October 22, 2004.<sup>2</sup> The relevant portions of the letter stated as follows:

Thank you for referring this 43 year-old man concerning increase in ICC. [...]

As you know, his liver enzymes are abnormal [...].

#### Past Medical History

He sustained burns 10-15 years ago and he had an injury to his arm many years ago requiring plastic surgery. [...]

[...]

#### Social History

[The Claimant] works as a building manager; he is married, with three children. He smokes half a packet of cigarettes daily, and drinks alcohol, as mentioned above.

He has not had blood transfusions to his knowledge. He has a past history of IV drug use about 25 years ago.

#### Examination

[...]. he had many tattoos. [...]

I requested some further blood work, and [the Claimant] consented to Hepatitis C and HIV testing. [...]

He will return to the clinic in four weeks [...]. [Emphasis Added]

[15] By letter dated November 16, 2004, the specialist in haematology wrote to the family physician and confirmed that the Claimant was Hepatitis C positive. She indicated that she would refer the Claimant to the specialist in hepatology.<sup>3</sup>

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<sup>1</sup> See page 192 of the Claim File.

<sup>2</sup> See pages 185 and 186 of the Claim File.

[16] By letter dated March 31, 2005, the specialist in hepatology reported to the family physician concerning her examination of the Claimant.<sup>4</sup> In the letter, she stated, in part, as follows:

I reviewed his liver risk factors. He cannot recall whether he had any transfusions with the arm surgery. He has numerous tattoos at least 10, the first he received 26 years ago at the age of 17 and the last at 6 years ago. He did use IV drugs a few times at age 17. He is also involved in numerous altercations in his teens. In brief, he has had a lot of blood exposure over the years. [...] [Emphasis Added]

[17] Between October 5, 2007 and April 4, 2008, the Claimant was seen by two physicians for a problem with his left shoulder that required surgery. In three of the computerized chart records, physicians noted that the Claimant had acquired Hepatitis C from blood transfusions.<sup>5</sup> Those statements were made by the physicians on the basis of information provided by the Claimant and cannot be considered as evidence of the source of his Hepatitis C infection.

### **OPINION OF MEDICAL SPECIALIST**

[18] Under the provisions of the *Non-Prescription Intravenous Drug Use Protocol*, the Administrator requested an opinion from a medical specialist in infectious diseases.

[19] In a letter dated July 30, 2009, the medical specialist provided an opinion to the Administrator concerning the manner in which the Claimant likely contracted Hepatitis C. He stated as follows:

I have reviewed the file on the above named claimant as requested. This is a 48-year old male who was found to have hepatitis C infection in 2004. He subsequently underwent a year Pegytron Interferon and Ribavirin therapy to 2006 and did sustain a virologic response and today no further virus is present in his blood post-treatment. As part of his work-up for his hepatitis C a liver biopsy was performed which showed stage 3 fibrosis which included bridging fibrosis.

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<sup>3</sup> See the entry dated December 23, 2004 in the computerized chart record at pages 196 to 197 of the Claim File. The referral letter to the specialist in hepatology is reproduced in the entry dated December 19, 2004.

<sup>4</sup> See page 246 of the Claim File.

<sup>5</sup> See pages 228, 234 and 235 of the Claim File.

Initially it was uncertain what the source of infection was and according to the hepatologist specialist that he saw [...] the possibilities were transfusions that he received in 1978 versus multiple tattoos and a remote history of injection drug use at the age of 17. Traceback indicated that he did receive two units of red blood cells after a traumatic injury to his arm in 1978. One of the donors has been found and is hepatitis C negative, the second donor is deceased and therefore the source is unknown.

Complicating the assessment is that the claimant in his attestation categorically states that he never used injection drugs and in fact has written a letter saying that this is a misinterpretation by [the specialist in hepatology]. There is no corroborating evidence in the medical chart to suggest this individual had any history of injection drug use. As well, there is no history of episodes of clinical jaundice and I could not find a Hepatitis B core antibody result in the chart. The chart does indicate that he did have a fairly steady and heavy alcohol use anywhere from 12 to 24 beers per week and a history of a number of traumatic injuries. When he was found to have hepatitis C he was encouraged to significantly cut down on his drinking and from the chart it appears that the patient did so.

Based on the information I am asked to state where his more likely source of infection was based on timing and presentation. A person who is a heavy drinker with stage 3 fibrosis one would assume that he was infected at least 15 years prior to that biopsy which would take us back anywhere prior to 1989. Therefore, being infected with a unit of blood in 1978 certainly would be compatible with his presentation. If he in fact used injection drugs at the age of 17 this would have put it at around the same time period and therefore impossible to differentiate based on the information in the dossier. Also possible infection source could be from contaminated needles from tattoos particularly as in the past tattoo parlours were not regulated and many of the needles were only being cleaned with alcohol which would not have been effective.

In summary, we have one unit of blood that has not been tested as well as a number of other possible sources of infection including tattoos and a discrepant history of whether injection drug use was used or not. As all these episodes seem to have occurred around the same time period, any of these potential sources could have induced hepatitis C infection which would have led to the presentation seen in 2004.

Fortunately this individual has responded well to hepatitis C therapy and has a sustained virologic response indicating that he has an over 97% chance of basically being cured. This was a factor that had not been accounted for when the initial compensation program was designed. If in fact he never did use injection drugs then the risk factors of multiple tattoos performed 25 or more years ago would likely be a similar risk to one unit of blood that has not been tested. [Emphasis Added]

## REVIEW OF DECISION BY ADMINISTRATOR

[20] In an undated memorandum, a Review Committee summarized the facts considered in reviewing the application for compensation and explained its conclusion.

The Review Committee stated as follows:

[The medical specialist's] report received and Claim reviewed under the Non-prescription Intravenous Drug Use Protocol.

### **Pertinent facts**

Pg 36/7 Transfused in 1978 – TB inconclusive one donor is HCV negative and one donor deceased.

Pg 6-12 [the specialist in hepatology] completed the form 2 and answered Yes to claimant having a history of IV drugs. She further wrote “At initial visit on March 31, 2005, patient reported to have used IV drugs ‘a few times’ at age 17”

Pg 21 – Claimant denies IVDU

Pg 246-247 – Copy of the initial consultation letter from [the specialist in hepatology] in which she list the Risk factors for IVDU as

- Numerous tattoos from 26 years before up to 6 years before that appointment
- Used IV drugs a few times at age 17
- Involved in numerous altercations in his teens

The doctor further wrote “In brief he has had a lot of blood exposure over the years” [sic]

With Reference to IVDU CAP paragraphs 7d and 8b: [the medical specialist] wrote “A person who is a heavy drinker with stage 3 fibrosis one would assume that he was infected at least 15 years prior to that biopsy which would take us back to anywhere prior to 1989.”

With Reference to IVDU CAP paragraphs 7g & 8d: There is no evidence of clinical jaundice and there were not any Hepatitis B Core Antibody test results in the file.

With reference to IVDU CAP paragraph 8g: [The medical specialist] wrote “possible infection source could be from contaminated needles from tattoos particularly as in the past tattoos parlours were not regulated and many of the needles were only being cleaned with alcohol which would not have been effective.”

**Conclusion of Administrator's review:** The complete claim has been reviewed including the evidence of the medical expert. It should be noted that although the

claimant has denied the use of non-prescription intravenous drugs the evidence submitted by the Doctor is considered reliable evidence. The past history of IV drug use is normally noted in the initial consultation with a Hepatitis C Specialist. Based on the review of all evidence on file it is concluded the claimant **has not satisfied** the criteria of the Court Approved protocol as he has not provided evidence that supports on a balance of probabilities he was **first infected** with HCV by a Blood transfusion received in Canada during the class period. Based on this the Administrator must reject the claim. [Administrator's Emphasis]

## FINAL DECISION OF ADMINISTRATOR

[21] On August 28, 2009, the Administrator denied the application for compensation, stating as follows:<sup>6</sup>

### Criteria for Class Membership

The Settlement Agreement provides that if a Claimant cannot comply with the provisions of Sections 2.01(1)(c) and 2.01(3), 2.02(1)(a) and 2.02(2) or 3.01(4) because the Claimant used non-prescription intravenous drugs, the Administrator must be satisfied on the balance of probabilities that:

- 1) The HCV Infected Hemophiliac or person with Thalassemia Major was infected with HCV for the first time by the receipt of Blood;  
OR
- 2) The HCV Infected Person was infected with HCV for the first time by a Blood transfusion for which an HCV antibody positive donor has been located or for which the status of the donor remains unknown;  
OR
- 3) The Secondarily-Infected Person (Spouse or Parent) was infected with HCV for the first time by the alleged secondary infection.

### Reasons for Decision

The Settlement Agreement requires the Administrator to determine a person's eligibility for class membership. The Court Approved Protocol ("CAP") for non-prescription intravenous drug use provides that the Administrator shall weigh the totality of evidence obtained from the additional investigations required by the provisions of the CAP and determine whether, on a balance of probabilities, the HCV Infected Class Member meets the eligibility criteria.

In your original application your Treating Physician advised that you had used Non-prescription intravenous drugs. The Administrator has reviewed the entire claim including the opinion of the medical specialist as directed by the Courts. The medical evidence does not support on a balance of probabilities you were

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<sup>6</sup> The original decision issued by the Administrator was dated August 25, 2009. However, it contained an error and was replaced by the decision dated August 28, 2009.

infected for the first time with Hepatitis C from your blood transfusions in 1978. Based on this conclusion your claim must be rejected.

### **REQUEST FOR REVIEW**

[22] On September 25, 2009, the Claimant delivered a Request for Review and wrote lengthy reasons for appealing. Essentially, he stated that the specialist in hepatology had misunderstood his answer concerning drug use. He told the specialist that he had used non-prescription drugs; he did not say that he had used non-prescription intravenous drugs.

### **SUPPLEMENTARY EVIDENCE AND SUBMISSIONS BY THE CLAIMANT**

[23] The Claimant delivered a sworn affidavit in which he stated as follows:

1. I am [the Claimant] and as such have knowledge of the matters hereinafter deposed to save and except where the facts are stated to be based on information and belief, and where so stated, I verily believe those facts to be true.
2. I currently reside at [...] and my date of birth is [...].
3. I was diagnosed with HCV in 2004.
4. The results of the trace-back conducted by the Canadian Blood Services are inconclusive as stated in correspondence dated July 30, 2009 (from the medical specialist to the Administrator) (copy attached). The attached correspondence specifically states the following significant revelations:

Paragraph two states that “the second donor is deceased and therefore the source is unknown”.
5. Based on evidence provided to me I believe that I was first infected with HCV through my blood transfusion in 1978 at the [...] Hospital in [...]. I have never been provided with any evidence to prove otherwise especially since the second donor who is deceased was never proven to me to be hepatitis C negative.
6. I have never in my lifetime used nor do I currently use any non-prescribed injection drugs.
7. Paragraph three acknowledges that I had previously provided written correspondence identifying the misinterpretation by [the specialist in hepatology] in regards to a previous attestation regarding the use of injection drugs by myself. I still maintain that I have never used any non-

prescribed injection drugs and the correspondence attached hereto [the opinion letter of the medical specialist] further states that “There is no corroborating evidence in the medical chart to suggest this individual had any history of injection drug use”. I stated in my written correspondence that I was very distraught during my consultation with the hepatologist specialist and I had actually admitted to the use of non-prescription drugs, not non-prescription injection drugs. I have put forth much effort and money into determining the source of infection and I would not have put forth said effort and money if I knew that there was a possibility that I may have caused HCV to myself.

8. I have not in my lifetime had any other risk factors other than tattoos.
9. I do not have a medical history of Hepatitis B and the correspondence, clearly states in paragraph three “I could not find a Hepatitis B core antibody result in the chart”.
10. I was provided with a small compensation in the amount of \$9,000.00 from the Red Cross in 2005 and I received \$25,000.00 from the Ontario Government. I feel that the compensation is a reflection of the Red Cross’ admittance [sic] to liability.
11. There is one unit of blood that has not been tested and I believe that it is unfair to discriminate this possibility against the number of other possible sources of infection. The unit of blood that has not been tested may very well prove to be the source of infection and evidently this leaves me with no conclusive proof that the units of blood which I received prior to 1986 are definitely not the source of infection.
12. As I previously stated I misunderstood [the specialist in hepatology] with respect to the use of injection drugs and I feel that doctors are just as capable of making mistakes just as [the Administrator] did in correspondence to me. [Emphasis Added]

## **RECONSIDERATION OF DECISION BY ADMINISTRATOR**

[24] By letter dated March 4, 2010, the Administrator advised the Claimant that it had reviewed the claim in view of the supplementary material and had decided to maintain its decision to deny the claim. The Administrator provided the Claimant with the following summary of its review:

### **Supplementary Submissions**

#### **Introduction**

1. [The Claimant’s] claim was rejected because the evidence provided did not support on a Balance of Probabilities that he was infected with HCV for

**the first time** by the Blood transfusion received in the Class Period. [The Claimant] submitted a Request for Review asking for review of the rejection of his claim. As per the Rules of Appeal, Fund Counsel has forwarded the Claimant's Supplementary Submission and Evidence on February 22, 2010 to the Administrator, requesting the Administrator reconsider the Decision on the claim.

2. Paragraph 14 of the Rules for Appeals states the Administrator *shall reconsider its decision taking into account the supplementary evidence and/or submissions of the claimant*. The document package from [the Claimant] consisted of documents from claim file that have been previously considered and an Affidavit from the claimant dated February 17, 2010.

### **Summary of Written Submissions**

3. [The Claimant] submitted a copy of his acceptance letter from the Ontario Hepatitis C Assistance Plan.
4. [The Claimant] affirmed that he also received compensation from the Red Cross Settlement and stated he feels that the compensation is a reflection of the Red Cross' admittance [sic] to liability.
5. [The Claimant] indicated in his affidavit that he believes he was infected by his blood transfusion in 1978 and wrote "I have never been provided with any evidence to prove otherwise especially since the second donor who is deceased was never proven to me to be hepatitis c negative." He has also indicated that the fact they cannot test the donor of the second unit it leaves him with no conclusive proof that the units of blood which he received before 1986 are definitely not the source of infection.
6. [The Claimant] has also indicated in his affidavit that he admitted to the specialist that he used non-prescription drugs, not non-prescription injection drugs.

### **Analysis**

7. [The Claimant] submitted his [provincial plan] acceptance and noted his acceptance by the Red Cross Settlement. The Administrator recognizes that it may be frustrating for claimant's to be approved in one Plan and then not meet the criteria of this plan however the Administrator is bound by the Rules of the Pre1986/post 1990 Settlement Agreement.
8. [The Claimant] also expressed his frustration with the fact that he is unable to obtain the results of a Traceback of the second donor to prove he was first infected by the Blood transfusion. He then indicated the Administrator cannot prove he was not infected by the blood transfusion. The Settlement Agreement Article 2.01 (3) clearly puts the onus of proof onto the Primary Infected claimant to provide evidence they were first infected by their class period blood transfusions. The results of the Traceback investigation are

considered in the final review of the file; however they are only one part of that review.

9. As noted in paragraph 6 above [the Claimant] further stated that he misunderstood [the specialist in hepatology] when she asked him about injection drug use. The evidence from [the specialist in hepatology] was reviewed by the Administrator prior to the claim being sent to the [medical specialist] and again upon final review of the claim before the claim was rejected. In summary the review of the evidence shows that [the specialist in hepatology] clearly indicated on the Treating Physician Form that [the Claimant] advised her on his initial visit that he used non-prescription intravenous drugs “a few times” at age 17. She referred to her initial consultation note (p 246 of the Appeal file). [The Claimant] clearly listed all of his risk factors in her initial consultation summary. [The specialist in hepatology] wrote “*I reviewed his liver risk factors. He cannot recall whether he had any transfusions with the arm surgery. He has numerous tattoos at least 10, the first he received 26 years ago at the age of 17 and the last 6 years ago. He did use IV drugs a few times at age 17. He is also involved in numerous altercations in his teens. In brief, he has had a lot of blood exposure over the years.*”

### Conclusion

The Administrator has an obligation to assess each claim and determine whether the required proof for compensation exists. The Pre1986/Post1990 Hepatitis C Settlement Agreement Article 2.01 (3) states *Notwithstanding the provisions of Section 2.01(1)(c), if a claimant cannot comply with the provisions of Section 2.01(1)(c) because the claimant used non-prescription intravenous drugs, then he or she must deliver to the Administrator other evidence establishing on a balance of probabilities that he or she was infected for the first time with HCV by Blood in Canada during the Class Period.*

Review of the Supplementary submissions and evidence of the claimant as summarized above does not change the decision of the Administrator. The Administrator considers the the [sic] evidence of [the specialist in hepatology] regarding the non-prescription intravenous drug use is reliable evidence. The specialist was very detailed in her summary of the claimant’s other risk factors. As directed by the Court Approved protocol the totality of the evidence on file is reviewed on a balance of probabilities. The records reveal the claimant had several risk factors for Blood exposure to contract hepatitis C including use of non-prescription intravenous drugs, at least 10 tattoos and being involved in numerous altercations in his teens. The opinion of the Hepatitis C Expert, [the medical specialist] was that all of the risk factors occurred around the same time period and therefore any of these potential sources could have led to the presentation seen in 2004. The Traceback Investigation did not reveal a donor who tested positive for Hepatitis C. The Administrator has weighed all of this evidence and it does not support on a Balance of Probabilities that the claimant was infected **for the first time** with HCV by his class period transfusions and the claim remains rejected.

[25] On March 15, 2010, the Claimant elected to continue with the appeal.

### **SUPPLEMENTARY EVIDENCE DELIVERED ON APPEAL**

[26] The *Rules for Appeals* do not contain a provision permitting a claimant to deliver supplementary evidence at this stage of the process. In any event, I have considered the three reference letters delivered by the Claimant as evidence on appeal. One person stated, among other things, that he had known the Claimant for over 25 years and had not “known him to use drugs of any manner”. Another person stated, among other things, that he had known the Claimant for many years and had “[...] never seen him use drugs other than prescription drugs”. All three persons spoke very highly of the Claimant.

### **WRITTEN SUBMISSIONS OF THE CLAIMANT ON APPEAL**

[27] By letter dated April 17, 2010 to the Fund Counsel, the Claimant provided the following written submissions on appeal in response to the reconsidered decision of the Administrator:

Further to your correspondence dated March 23, 2010 I still hold issue to the Administrator’s Revised Decision and I wish to point out new issues with respect to the Administrator’s Decision.

With respect to the first conclusion paragraph, I had previously submitted my sworn Affidavit stating that I have never used non-prescription intravenous drugs and as I had also advised in my Affidavit my medical records prove that I have no history whatsoever of any type of non-prescription intravenous drug use, therefore, the “probability” that I could have contracted Hepatitis C through non-prescription intravenous drugs is irrelevant.

In the second conclusion paragraph of the Administrator’s Decision they briefly discuss my involvement in altercations. During my involvement in numerous altercations I had never been in direct blood to blood contact with any other person. I have never been diagnosed with Hepatitis B, which as I understand, is contracted through blood to blood contact such as during a physical altercation. I feel that the “probability” that I could have contracted Hepatitis C due to a school yard altercation is very unreliable.

I still maintain the fact that the deceased donor was never tested for Hepatitis C and could quite possibly have been the source of my Hepatitis C. I

feel that this possibility is being overlooked and that any onus that is put on me to prove the primary source of infection is not realistic.

The matter of fact is that I received blood in [the province] in 1978 and was diagnosed with Hepatitis C in 2004. This fact is a much more reliable probability than any other probability that has been presented to me. The Balance of Probabilities is all circumstantial and from what I understand is that circumstantial evidence is not dependable. I feel that it is very unfair to use a balance of probabilities to make a decision and a conclusion that affects my life and my wellbeing. As I have previously said, I feel that if the healthcare system is going to base all of their conclusions on “probabilities” then that is unjust.

I am an honest, hard working individual who contributes to society and I have written letters of proof from several individuals whom can vouch for same which I have enclosed herewith.

## ISSUE

[28] The issue to be determined is whether the Administrator erred in denying the application for compensation.

## ANALYSIS

[29] In the Reasons for Decision on the appeal in Claim File 07-07727, I analysed the provisions in section 2.01 of the *Settlement Agreement* and the applicable provisions of the *Non-Prescription Intravenous Drug Use Protocol* and stated as follows:

*i) Section 2.01 of the Settlement Agreement and the Non-Prescription Intravenous Drug Use Protocol*

[20] Under the terms of the *Settlement Agreement*, a person claiming to be a Primarily-Infected Class Member, such as the Claimant, must satisfy the eligibility requirements in section 2.01 in order to make a successful claim for compensation. Section 2.01 states as follows:

### **2.01 Eligibility – Primarily-Infected Class Member**

(1) A person claiming to be a Primarily-Infected Class Member must deliver to the Administrator an application form prescribed by the Administrator together with:

- (a) medical, clinical, laboratory, hospital, The Canadian Red Cross Society, Canadian Blood Services or Hema-Québec records demonstrating that the claimant received Blood in Canada during the Class Period;

(b) an HCV Antibody Test report, PCR Test report or similar test report pertaining to the claimant;

(c) a statutory declaration of the claimant including a declaration

(i) that he or she has never used non-prescription intravenous drugs, and

(ii) as to where the claimant first received Blood in Canada during the Class Period, and

(iii) as to the place of residence of the claimant, both when he or she first received Blood in Canada during the Class Period and at the time of delivery of the application hereunder; and

(iv) where the claimant is a Primarily-Infected Person, that to the best of his or her knowledge, information and belief, he or she was infected with HCV during the Class Period;

(2) Notwithstanding the provisions of Section 2.01(1)(a), if a claimant cannot comply with the provisions of Section 2.01(1)(a), the claimant must deliver to the Administrator corroborating evidence independent of the personal recollection of the claimant or any person who is a Family Member of the claimant establishing on a balance of probabilities that he or she received Blood in Canada during the Class Period.

(3) Notwithstanding the provisions of Section 2.01(1)(c), if a claimant cannot comply with the provisions of Section 2.01(1)(c) because the claimant used non-prescription intravenous drugs, then he or she must deliver to the Administrator other evidence establishing on a balance of probabilities that he or she was infected for the first time with HCV by Blood in Canada during the Class Period.

[21] In circumstances where a claimant cannot comply with paragraph 2.01(1)(c) of the *Settlement Agreement* by making a declaration that non-prescription intravenous drugs were never used, the provisions of the *Non-Prescription Intravenous Drug Use Protocol* apply to the claim. Since the Claimant admitted in the declaration the use of non-prescription intravenous drugs, the *Non-Prescription Intravenous Drug Use Protocol* therefore applies to the gathering of evidence and assessment of the claim. For the purposes of the present appeal, it is necessary to reproduce only the following parts of the *Non-Prescription Intravenous Drug Use Protocol*:

#### **NON-PRESCRIPTION INTRAVENOUS DRUG USE PROTOCOL**

1. The Protocol applies where:

- a. there is an admission that the HCV Infected Class Member used non-prescription intravenous drugs;
  - b. there is no statutory declaration as required under the Settlement Agreement, that the HCV Infected Class Member has never used non-prescription intravenous drugs; or
  - c. despite receipt of a statutory declaration, there is other evidence that the HCV Infected Class Member has used non-prescription intravenous drugs.
2. The Administrator shall conduct a Traceback under the Traceback Protocol. If the result of a Traceback investigation is such that the Traceback Protocol requires the Administrator to reject the claim, the Administrator shall reject the claim.
  3. If a Traceback is not required to be conducted under the Traceback Protocol or the claim is not rejected under the Traceback Protocol, the Administrator shall:
    - a. obtain such additional information and records pursuant to section 2.03 of the Settlement Agreement as the Administrator in its complete discretion considers necessary to inform its decision; and
    - b. obtain the opinion of a medical specialist experienced in treating and diagnosing HCV as to whether the HCV infection and the disease history of the HCV Infected Class Member is more consistent with infection at the time of the receipt of Blood or the secondary infection or with infection at the time of the non-prescription intravenous drug use as indicated by the totality of the medical evidence.
  4. The Administrator shall weigh the totality of evidence obtained including the evidence obtained from the additional investigations required by the provisions of this Protocol and determine whether, on a balance of probabilities, the HCV Infected Class Member meets the eligibility criteria of the Settlement Agreement. The burden to prove eligibility is on the claimant. The Administrator shall assist the claimant by advising what types of evidence will be useful in meeting the burden of proof in accordance with this Protocol.
  5. In weighing the evidence in accordance with the provisions of this Protocol, the Administrator must be satisfied that the body of evidence is sufficiently complete in all of the circumstances of the particular case to permit it to make a decision. If the Administrator is not satisfied that the body of evidence is sufficiently complete in all of the circumstances of the particular

case to permit it to make a decision, the Administrator shall reject the claim. [Emphasis Added]  
[...]

*ii) Did the Administrator commit an error in denying the application for compensation?*

[30] The evidence indicates that the Claimant told two different specialists on separate occasions that he had used non-prescription intravenous drugs in the past. First, in a letter dated October 12, 2004, reproduced in paragraph 14 and found at pages 185 and 186 of the Claim File, the specialist in haematology summarized the “Social History” of the Claimant and stated, among other things, that he had “[...] a past history of IV drug use about 25 years ago”. Second, in a letter dated March 31, 2005 and reproduced in paragraph 16, the specialist in hepatology indicated that she had reviewed the “liver risk factors” with the Claimant who “[...] did use IV drugs a few times at age 17”. The Claimant was born in 1961. His respective statements to the specialists in haematology and hepatology that he had used non-prescription intravenous drugs “about 25 years ago” and “at age 17” would have placed the drug use in approximately 1978 or 1979, within the same timeframe as his blood transfusion in 1978.

[31] The medical specialist inadvertently missed or overlooked the letter from the specialist in haematology and stated that there was “no corroborating evidence in the medical chart” to suggest that the Claimant had a history of injection drug use. To the contrary, the evidence in the letter of the specialist in haematology concerning the use of non-prescription intravenous drugs was in the computerized medical chart. Furthermore, it was consistent with and corroborated the information that the Claimant gave to the specialist in hepatology approximately five months later. The letters of the two specialists, when considered together and in the context of the totality of the evidence,

constitute reliable and trustworthy evidence establishing that the Claimant had used non-prescription intravenous drugs around 1978 or 1979. In the circumstances, the statements of the Claimant in his affidavit denying the use of non-prescription intravenous drugs are lacking in credibility and can be given no weight. Similarly, his assertion that the specialist in hepatology had misinterpreted his statement concerning his drug use is not credible.

[32] Subsection 2.01(3) of the *Settlement Agreement* places the onus on the Claimant by requiring him to deliver evidence to establish on a balance of probabilities that he was infected for the first time with HCV by receiving blood. I have carefully reviewed all of the evidence and have concluded that the Claimant has failed to establish on a balance of probabilities his infection for the first time with HCV by his blood transfusions in 1978, as required by subsection 2.01(3) of the *Settlement Agreement* and the provisions of the *Non-Prescription Intravenous Drug Protocol*. The Administrator therefore did not commit an error in denying the application for compensation, and the appeal must be dismissed.

*iii) Compensation under another program or agreement*

[33] The Claimant has received compensation under the *Red Cross Settlement* and a provincial plan. In the Reasons for Decision rendered in Claim File 07-00464, I commented on the perception of inequity that may arise when compensation is awarded under one plan or agreement and denied under another. In particular, I stated as follows in paragraph 41 of that decision:

[41] I can appreciate the frustration and distress that this decision will cause to the Claimant, particularly given that the member of the provincial review committee found him to be eligible for a benefit under that program. It must be recognized that the framework governing eligibility for compensation under the

terms of the *Settlement Agreement* is completely different from the one applied by the member of the review committee in the context of the provincial agreement.

[34] Although I fully understand that it must be confusing and upsetting when compensation is granted under the auspices of one program or agreement and yet denied under another one, the terms of the *Settlement Agreement* govern the present claim and must be applied. It is also important to recognize that the terms of the *Settlement Agreement* are the result of an agreement between the Parties which was approved by the Courts; neither the Administrator nor the Appeals Officer has any power or discretion to alter those terms.<sup>7</sup>

#### CONCLUSION

[35] The appeal is dismissed.

"D. McGillis"  
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The Honourable D. McGillis, Q.C.  
Appeals Officer

DATED June 11, 2010

TO: Claimant  
Fund Counsel  
Administrator

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<sup>7</sup> See two recent decisions on further appeals to the Court concerning the binding nature of the provisions of the *Settlement Agreement*: Claim Files 08-15662, 08-13831 and 07-10252 dated March 25, 2010 (Chief Justice Winkler) and Claim File 07-01482 dated April 7, 2010 (Mr. Justice Pitfield).