

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: 07-02699

REASONS FOR DECISION

INTRODUCTION

[1] The HCV Personal Representative has appealed a decision of the Administrator dated February 9, 2010 and reconsidered on August 10, 2010, in which the application for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied. The HCV Personal Representative failed to satisfy the Administrator on a balance of probabilities that the deceased HCV Infected Class Member was infected with HCV for the first time by a blood transfusion in Canada during the Class Period. The Administrator found, among other things, that there was evidence indicating the use of non-prescription intravenous drugs by the HCV Infected Class Member before her diagnosis of Hepatitis C in 1994.

[2] The HCV Infected Class Member had blood transfusions during Caesarean section surgery in 1983 and was diagnosed with Hepatitis C on September 21, 1994. The claim file consisted of approximately 1000 pages, including extensive hospital records from 1994 to 2003, further evidence of first infection consisting of hospital records from 1983 and an affidavit from the HCV Personal Representative, supplementary evidence and written submissions delivered on several occasions, the opinion of the medical specialist and the decisions of the Administrator. I have carefully read the claim file in its

entirety. I have summarized in this decision, among other things, the relevant facts that are established by the evidence. It should be noted that there were no medical or hospital records for the period predating 1983 or from April 1983 to August 1994.

[3] During her life, the HCV Infected Class Member lived in numerous different places, including City “A” for many years until her move to City “C” in mid-1994. From approximately 1989 to 1993, she worked in a needle exchange program in City “B”, a neighbouring city to City “A”.

FACTS

Red Cross Settlement Application – Physician Form

[4] Dr. “J.E” completed a Form B “Physician Form for Primarily Infected Claimants” dated February 18, 2002 for the *Red Cross Settlement* application.¹ He had treated the HCV Infected Class Member for 2½ years and indicated that she had received a blood transfusion before 1985 for a Caesarean section. He responded “No” to the question “To the best of your knowledge has the Claimant ever used intravenous drugs other than under the direction of a licensed medical practitioner?”

Settlement Agreement – Application for Compensation

[5] On September 7, 2007, the HCV Personal Representative delivered an application for compensation under the *Settlement Agreement* on behalf of the Estate of the HCV Infected Class Member, together with a letter dated September 4, 2007. In the letter, he stated, among other things, that the HCV Infected Class Member had passed away earlier

¹ See pages 756 and 757.

that year at the age of 50. He noted that she had received a benefit under the *Red Cross Settlement*. He enclosed with the letter a CD and stated as follows:

[The HCV Infected Class Member's] medical history is enclosed in the CD accompanying this letter. All relevant information from her doctor is on the CD.

[6] The records that were delivered on September 7, 2007 in support of the application for compensation consisted primarily of hospital records for the period from August 1994 to approximately 2004 from a hospital in City "C" ("Hospital A").

[7] On September 25, 2007, the Administrator sent a deficiency letter due to the incompleteness of the forms. The HCV Personal Representative delivered completed or amended forms on November 20, 2007 and January 21, 2008.

[8] In the General Information Form, the HCV Personal Representative stated that the HCV Infected Class Member was a Primarily-Infected Person who was infected with the Hepatitis C virus through a blood transfusion during the Class Period. In "Section G – Other Risk Factors", he checked the box to indicate that the HCV Infected Class Member had no risk factors for Hepatitis C. She was born in July 1956.

[9] On November 20, 2007 and January 21, 2008, Dr. "J.E" completed the Treating Physician Form. He was a family physician and had treated the HCV Infected Class Member for 6½ years.² He indicated, among other things, that the HCV Infected Class Member was at Disease Level 3. In "Section F – HCV Disease Verification", he checked the box "None" in question 1 to indicate that the HCV Infected Class Member did not have any risk factors for Hepatitis C.³ However, in response to question 3 concerning

² See pages 773 and 778.

³ See page 788, delivered on January 21, 2008.

whether there was anything in the HCV Infected Class Member's medical history or clinical presentation to indicate that she had used non-prescription intravenous drugs at any time, he checked the box "Yes" and wrote "Consultation Report by Dr. F.M. dated Jan 22, 1998".⁴

[10] The Statutory Declaration Form was completed by the HCV Personal Representative.⁵ He indicated that he was the brother of the HCV Infected Class Member and the "closest family member". He declared that, to the best of his knowledge, the HCV Infected Class Member had never used non-prescription intravenous drugs at any time.

[11] The Blood Transfusion History Form was signed by Dr. "J.E". He indicated that the HCV Infected Class Member had received two units of blood in March of 1983 for a "C-section".⁶

Hospital records from Hospital "A" for the period 1994 to 2003

[12] The records that were delivered in support of the application for compensation indicated that the HCV Infected Class Member made numerous visits to the Emergency Department and was hospitalized on several occasions at Hospital "A" in City "C" between 1994 and 2004. The hospital records after February 2003 did not contain any relevant information for the purposes of the appeal.

⁴ See page 773, delivered on November 20, 2007.

⁵ See pages 13 to 14.

⁶ See page 776.

August 8 to 14, 1994

[13] On August 8, 1994 at 0930 hours, the HCV Infected Class Member was treated at the Emergency Department of the hospital for a rash. She was discharged at 1220 hours.⁷

[14] The next day, on August 9, 1994 at 1203 hours, the HCV Infected Class Member was assessed by a nurse in the Emergency Department.⁸ The family physician of the HCV Infected Class Member had referred her to the Emergency Department for a gastrointestinal consultation due to abdominal pain. An Emergency Record and the Nursing Observations indicated that the attending physician at the Emergency Department was Dr. "M".⁹ The HCV Infected Class Member was given Demerol for the pain, and gastrointestinal tests were ordered. An Admission/Separation Record indicated that she was admitted to the hospital at 1704 hours and discharged five days later on August 14, 1994.¹⁰

[15] A Nursing Admission History/Assessment Record prepared at 1800 hours contained a section entitled "Pertinent Health History".¹¹ The nurse checked the box for "Hepatitis" and wrote "A" beside it. She also checked, among others, the boxes for Smoker and Blood Transfusion ("Yes '83"). The box for Alcohol/Drug Use was not checked.

⁷ See pages 737 to 741.

⁸ See page 677.

⁹ See pages 676 and 679. As indicated in paragraph 9, Dr. "J.E" made reference in the Treating Physician Form to the Consultation Report prepared by Dr. "M" in 1998, reproduced in paragraph 87. Dr. "M" was a specialist in gastroenterology and hepatology.

¹⁰ See page 672.

¹¹ See page 719.

[16] The Patient Progress Notes contained various notes concerning, among other things, the analgesics that were given to the HCV Infected Class Member for the abdominal pain throughout her stay in the hospital.¹²

[17] The Doctor's Order Sheet indicated that, on August 9, 1994, the physician ordered, among other things, a Hepatitis C antibody test for the HCV Infected Class Member, as well as Demerol.¹³ She was subsequently placed on Prednisone for the rash. The next day, blood was collected from the HCV Infected Class Member for Hepatitis C testing.¹⁴

[18] On August 10, 1994, Dr. "M" examined the HCV Infected Class Member and prepared a Consultation Report.¹⁵ He outlined the history of the bowel problem leading to her hospitalization, her past medical history, the results of the physical examination and other matters. He stated, in part, as follows:

[...]

PAST MEDICAL HISTORY:

Has been negative apart from an appendectomy and three Caesarean sections. She has been on absolutely no medications and denies a history of allergies. She smokes one package of cigarettes per day and drinks alcohol very infrequently.

[...]

FUNCTIONAL INQUIRY

She has had several needle stick injuries as she has worked with IV drug user needle program in [City "B"]. She, in addition, has had multiple blood transfusions with the birth of her first child. She apparently has been checked for HIV in the past and has been negative. She had no other risk factors however, for the acquisition of viral hepatitis.

[...] [Emphasis Added]

¹² See pages 721 to 724.

¹³ See page 688.

¹⁴ See page 763. A laboratory record printed on January 15, 2002 indicated that blood was collected from the HCV Infected Class Member on August 10, 1994.

¹⁵ See pages 682 to 684.

August 29, 1994

[19] An Emergency Nursing Assessment Record dated August 29, 1994 indicated that the HCV Infected Class Member attended at the hospital for pain.¹⁶ There were no other records relating to this date.

September 5 to 12, 1994

[20] An Emergency Record indicated that the HCV Infected Class Member presented with pain at approximately 1400 hours and the physician ordered, among other things, Demerol for her. She was discharged at 1645 hours.¹⁷ The Emergency Nursing Assessment Record completed at 1400 hours stated, among other things, as follows:¹⁸

Joint achiness [with] shooting RUQ [right upper quadrant] pain frequently since discharged last 2 wks ago – seen in ER last 2 days [...] Doctors have not yet determined GB [gall bladder] disease – Finds Demerol effective.

[21] Later that same day at approximately 2200 hours, the HCV Infected Class Member returned to the Emergency Department for right upper quadrant pain. The Emergency Record indicated that the diagnosis was “Cholecystitis” (gall bladder disease), and she was admitted to the hospital.¹⁹ She was given Demerol for the pain.²⁰ The Nursing Admission History/Assessment Record contained the note “occasional” beside the box “Alcohol/Drug Use”.²¹

[22] A Consultation Report dated September 6, 1994 written by Dr. “R” outlined in detail in the “History” section the rash and right upper quadrant pain experienced by the

¹⁶ See page 668.

¹⁷ Page 105.

¹⁸ See page 106.

¹⁹ See page 110.

²⁰ See page 111.

²¹ See page 128.

HCV Infected Class Member. With respect to the pain, Dr. “R” stated that she had experienced the pain “off and on now for over two years occurring perhaps once each month”. He continued, in part, as follows:²²

She says the previous episodes that occurred once or twice a month were never clearly related to eating, there were no clear initiating factors, no clear relieving factors and would always persist for about two to three days. She claims that she had abnormal liver function tests about six months ago and claims they were abnormal the last time she was in hospital but I cannot find record of a liver function test during her last admission but I will have to check the computer about this.

[...]

She smokes about twelve cigarettes per day. She consumes alcohol she claims occasionally. During one evaluation in the Emergency department her blood alcohol level was quite elevated. [...]

[...]

We will have to see whether her liver enzyme changes remain more consistent with alcohol related problems in the liver or whether these may reflect another process either affecting the biliary tree or liver itself.

[Emphasis Added]

[23] A Progress Note dated September 7, 1994 stated as follows:²³

Hepatitis A in past; transfusion 1983 (PPH) tested 5-6/12 ago for HIV/HBV → neg ((name of her previous family physician, Dr. “H” – City “A”)). Await HIDA scan – unusual personality + behaviours. [Emphasis Added]

[24] Another Progress Note dated September 7, 1994 stated that the HIDA scan did not reveal cholecystitis.²⁴

[25] A Progress Note dated September 9, 1994 that was written by her family physician indicated that, at the request of the HCV Infected Class Member, he had

²² See pages 112 to 114.

²³ See page 116.

²⁴ Ibid.

“relinquished” his responsibility for her care due to a disagreement with her concerning her request for the intramuscular injection of narcotics. He stated as follows:²⁵

- At [the HCV Infected Class Member’s] request, I have relinquished my patient care responsibility towards her and will cease to be her family physician. This stems from a disagreement about her medical management and particularly the use of narcotics and tranquilizers in this admission. She feels that she should be continued on IM [intramuscular]²⁶ Demerol as long as she feels it is necessary for complaints of pain which are vague and unlocalized. She displays no outward stigmata of acute pain and is often found off the ward or in the smoking room and in no acute distress. She does not accept my decision to decrease her analgesic from IM [intramuscular] Demerol to PO [oral] Darvon. On several occasions (both as an inpatient and outpatient) she contacted my office to specifically request that I prescribe Xanax or other drugs to “settle my nerves”. Again, I felt that such a blanket use of a sedative/hypnotic would be irresponsible.
- I contacted [Dr. “H”, her previous family physician in City “A”] who has a great deal of experience with both her and her family of origin. He described the family as “dysfunctional” and noted that she in particular “liked her drugs” typically requesting refills of medications such as Restoril and Valium. He is unaware of any other drug addiction/abuse history, but notes that she worked for the AIDS [City “B”] needle exchange service.
- Throughout this admission her behaviour has become increasingly unsettled and more recently has become abusive at the staff. She has accused others of stealing from her and has recently been noncompliant with the prep for a Ba enema, instead deflecting the blame onto the “incompetence” of the nursing staff.
-
- Although [the HCV Infected Class Member], I feel, does have the organic pathology particularly underlying her presentation on her original admission, I suspect that substance abuse + other psychiatric disturbance (i.e. personality disorder) significantly underlie her current picture. However my contact with her has been very brief. Perhaps the next physician she enlists for her care will be able to better understand her problems. [Emphasis Added]

[26] A Discharge Summary dictated by Dr. “R” on October 21, 1994 stated, in part, as follows:²⁷

DISCHARGE DIAGNOSIS:

1. Abdominal pain NYD, probably related to irritable bowel syndrome.

²⁵ Pages 117 to 118.

²⁶ A syringe is used for the intramuscular administration of drugs.

²⁷ See pages 103 to 104. The Discharge Summary erroneously indicated that it related to the hospitalization of the HCV Infected Class Member from October 2 to 5, 1994. A reading of the Discharge Summary confirms that it related to the hospitalization from September 5 to 12, 1994.

2. Recent vasculitis affecting the skin.
3. Chronic Hepatitis C.
4. Personality disorder with some drug seeking behaviour and demanding personality.

I am doing this discharge summary because [the HCV Infected Class Member], who [sic] I saw in consultation, unfortunately fired her family physician during her hospitalisation and I was left taking care of all this patient's medical problems. She was admitted to hospital on September 5th through the Emergency Department. In the Emergency Department, she was evaluated and felt to have a cholecystitis. Unfortunately this diagnosis just led to further problems with this patient, trying to convince her that her gallbladder did not need to be removed. This woman had been recently in hospital from August 14th for about five days with an acute vasculitis syndrome of uncertain etiology. It was felt to be a leukocytoclastic vasculitis with no clear underlying cause for this. She was subsequently found to have chronic Hepatitis C which has been associated with various vasculitic syndromes including polyarteritis nodosa but her vasculities remained restricted to the skin and perhaps joints with no evidence of involvement of kidneys or more significant regions of the body. [...] She was started on oral Prednisone during that hospitalization with plans for it to be weaned fairly rapidly. [...]

When I saw her for the first time, she was a very difficult historian, very upset and frustrated by medical care and lack of diagnosis and it was very difficult to deal with it, not just on this occasion but on all occasions. My admission note outlines her problems.

A HIDA scan carried out on September 7th demonstrated normal filling of the gallbladder. There was therefore no evidence of acute cholecystitic syndrome. Her pain was ongoing at that time. Ejection fraction was abnormal but only slightly abnormal. It could have been secondary to acute intra-abdominal pathology or narcotic use.

[...] She was in constant conflict with the nursing staff on the ward with regard to analgesic use and bowel preparation and she seemed to do whatever possible to obstruct progress in her medical investigation and care.

[...]

Her abdominal pain that prompted admission was decreasing by September 11 [...].

[...] She was discharged from hospital on September 11 to be followed as an outpatient by myself and trying to make arrangements for her to contact with a new family physician to help with all her other medical problems and the psychosocial aspects of her disease. [Emphasis Added]

September 13, 1994

[27] An Outpatient Record dated September 13, 1994 indicated that the HCV Infected Class Member was admitted to the hospital for a liver biopsy.²⁸

September 20, 1994

[28] An Emergency Record dated September 20, 1994 indicated that the HCV Infected Class Member attended at the Emergency Department at 2355 hours for “chronic recurrent” right upper quadrant pain.²⁹ She was given Demerol and discharged at 0030 hours. The physician noted that he had refused to write a prescription for her for analgesics.

September 21, 1994

[29] A hospital laboratory record printed on September 21, 1994 indicated that blood collected from the HCV Infected Class Member on September 5, 1994 had tested positive for the Hepatitis C antibody.³⁰

September 27, 1994

[30] An Emergency Record dated September 27, 1994 indicated that the HCV Infected Class Member attended at the Emergency Department for chronic right upper quadrant pain and saw the same physician who had treated her on September 20, 1994.³¹ He noted that “as always [she] doesn’t look too sick” and had requested “morphine instead of Demerol”. He gave her a dose of morphine and discharged her at 2240 hours.

²⁸ See page 31. See also paragraph 46 *infra* for the liver biopsy report.

²⁹ See page 97.

³⁰ See page 127.

³¹ See page 92.

September 29, 1994

[31] An Emergency Record and Emergency Nursing Assessment Record, when read together, indicated that the HCV Infected Class Member attended at the Emergency Department on September 29, 1994 at 1530 hours for chronic recurring right upper quadrant pain.³² It was noted in the Health History that she had Hepatitis C. The physician wrote “Drug abuse” for the diagnosis. He also stated that he had discussed the situation with another physician and suggested “no injectable narcotic analgesics for her apparently chronic RUQ pain”. She was discharged at 1635 hours.

September 30, 1994

[32] In a Consultation Note dated September 30, 1994, Dr. “R” stated that the HCV Infected Class Member had telephoned him at home the previous evening complaining of abdominal pain and her inability to obtain analgesics.³³ He agreed to see her at the Emergency Department on September 30, 1994 to evaluate her. However, she did not attend. He wrote as follows:

HISTORY:

This 38 year old woman who has been seen during her last hospitalisation has known vasculitic process and recently has been informed that she has hepatitis C by Public Health. She phoned my home last night in a panic with complaints of abdominal pain for which she was having difficulty getting analgesics. I have since learned that apparently she has been in Emergency on multiple occasions and it has been felt inappropriate for her to continue on this form of analgesic use. I made arrangements, after talking to her last night, to see her in Emergency, so I could evaluate her pain and clarify whether her rash was truly a vasculitis or not. She needs some direction as to what type of doses of medications she should be on and also some instruction and education about her hepatitis C and decisions about what type of treatment, if any, would be appropriate for this. Unfortunately, she did not come to the Emergency Department as scheduled for

³² See pages 87 and 88. The date on the Emergency Record at page 87 is illegible. However, the Emergency Nursing Record on page 88 was dated September 29, 1994 and written by the same nurse who made notes on the Emergency Record.

³³ See page 86.

0900 hours and so she has not been seen and I am not sure if any follow-up has been arranged. There has been some problem with compliance with this patient and certainly is leading to some difficulty in evaluating and treating this woman.
[Emphasis Added]

October 2 to 5, 1994

[33] A Nursing Admission History/Assessment record dated October 2, 1994 indicated that the HCV Infected Class Member was admitted to the hospital for pain on the right side of the abdomen and chest.³⁴ In the “Pertinent Health History”, the admitting nurse noted that the HCV Infected Class Member had Hepatitis C, a blood transfusion in 1983 and bowel problems. She did not check the box for “Alcohol/Drug Use”. However, subsequent records for the admission indicated that the HCV Infected Class Member was admitted to the hospital for narcotic withdrawal.

[34] A Consultation Report dated October 2, 1994 was written by Dr. “R”. He noted, among other things, that the HCV Infected Class Member had “clearly lied to her physicians and probably to family members” about her problems; there was a “great suspicion” that she had “a significant alcohol and drug abuse problem”. Furthermore, she had denied “any use of IV drugs now in the past”. The Consultation Report stated, in part, as follows:³⁵

HISTORY:

This 38 year old woman has been admitted to hospital as initiated [sic] by [Dr. “K”]. [The HCV Infected Class Member] has come in with the agreement, according to [Dr. “K”] that she is going to be cooperative and getting investigations done and has agreed to being seen by the Alcohol and Drug Team and if necessary psychiatrist, psychologist and social workers. She also understands that the objective aim in the admission is not necessarily complete pain relief but that we are investigating the source of her pain.

³⁴ See page 62.

³⁵ See page 35.

[The HCV Infected Class Member] moved to [City “C”] a few months ago and unfortunately I do not have much knowledge what she was like as a patient previously but she is an extremely demanding patient and very inappropriate in her actions and on many occasions has clearly lied to her physicians and probably to family members concerning her problems. She has been very inappropriate in many of her actions and certainly there is great suspicion that there is a significant alcohol and drug abuse problem with this woman. She has been very demanding for analgesics and has been in the Emergency Department on numerous occasions receiving analgesics and then going home. On one occasion on September 4 her blood alcohol level was 30. At times during her admission and other evaluations she has not been compliant with recommendations with regards to medication use. She signed herself out from hospital on one occasion and she has not been very compliant and cooperative with the nurses as far as her hospital stay.

[...]

During her hospitalization, she had abnormal liver enzymes and had hepatitis B and C serology and hepatitis C serology was positive. This was just an initial screening test, not the confirmatory REBA-2 test. Her enzymes, however, were more as consistent with alcohol related liver disease with her AST being greater than her ALT and her GGT being significantly elevated. On several times that she came to the Emergency Department, it was apparently felt that she had been drinking excessive amounts of alcohol.

She has already apparently fired her original family physician in town and [Dr. “K”] has agreed to look after her.

Her abdominal pain now is the same as has been described in consultation before on September 6, 1994. This pain has been present now for over two years. [...]

[...]

Despite suggestions to the contrary, she claims her alcohol consumption is just about 2 ciders every 2-3 days. She denies any alcohol abuse. She denies any use of IV drugs now or in the past. She has been identified as having hepatitis C and 2 potential exposures, if she is telling the truth about things as we are always a little bit unsure in this woman, one is that she was involved in a needle exchange program she says from 1989 to 1993 as a worker and she said she had at least 2 needle pricks during that time. She also received multiple blood transfusions due to post partum hemorrhage in about 1983. These are both potential exposures for chronic hepatitis C. Her hepatitis B serology is negative. She indicated a HIV study has been done at some point in time and was negative.

PHYSICAL EXAMINATION:

[...]

At this time, I have agreed to participate in the evaluation of this woman’s pain to try and clarify an etiology but I will be leaving day to day care and analgesic decisions to her family physician. I am concerned that in view of this 2 year long history of pain that we are dealing with a chronic non-organic origin of pain and

that narcotic use will need to be discouraged and some other alternative identified. Unfortunately, investigations to date have been somewhat blocked by noncompliance with recommendations and follow up by her.

[...]

This woman is aware of the conditions that she has been brought under and as long as she is compliant with these, [Dr. "K"] and I will continue to look after her. Otherwise, I certainly am close to the stage where she will be dropped from further nonemergent care. [Emphasis Added]

[35] The Patient Progress Notes dated October 2 to 5, 1994 were written by various nurses and contained numerous references to requests made by the HCV Infected Class Member for analgesics for pain. A note written on October 2, 1994 at 2320 hours made reference to a request by the HCV Infected Class Member for the intramuscular injection of narcotics and stated, in part, as follows:³⁶

Frequently requesting analgesic [with] no definite explanation of pain. Requesting an increase in analgesic plus requesting IM [intramuscular] administration. [Emphasis Added]

[36] Progress Notes dated October 3, 1994 written by Dr. "R" stated as follows:³⁷

Now admitting to 2 ciders per day – May need liver Bx [biopsy] to clarify effect of Alcohol vs Hepatitis C. [...]

[Illegible] that pain not from Hepatitis C + GB [gall bladder]
Could be [illegible] Alcoholic Hepatitis [Emphasis Added]

[37] On October 3, 1994, a member of the hospital's Chemical Dependency Recovery Program assessed the HCV Infected Class Member. He noted, among other things, that she had a "limited capacity to tell the truth. The report on the initial assessment stated as follows:³⁸

³⁶ See page 65.

³⁷ See page 39.

³⁸ See page 83.

Reason for Referral:

CHEMICAL DEPENDENCY

Initial Assessment:

On meeting the [the HCV Infected Class Member] 3/10/94, she stated she had been sobre [sic] for 11 years but had returned to drinking 1 or 2 cider, three times per week. [...] She told me she also ingested 4 tylenol 1's per day, is on Prednisone and is also prescribed Valium to counter the side effects of the steroids. [She] then went on to say she had no idea why I was seeing her and refused to answer any more questions.

In talking with [Dr. "K"], he states she has a significant problem with both alcohol and narcotics and was admitted to the hospital on the condition she cooperate with the Chemical Dependency Team and the withdrawal process. [She] also has Hepatitis C which she claims was contracted in her alleged work with the Needle Exchange in [City "C"].

So far, the [the HCV Infected Class Member] capacity to tell the truth is limited at best.

Recommendations:

1. [Dr. "K"] will review the conditions of the [HCV Infected Class Member's] admission and we will involve ourselves accordingly. [Emphasis Added]

[38] Patient Progress Notes dated October 3, 1994 at 1530 hours and 1800 hours were written by a nurse and described the insistent denial by the HCV Infected Class Member of a drug problem. The notes stated, in part, as follows:³⁹

1530 hours:

CDT [Chemical Dependency Team] in to see [HCV Infected Class Member] at [Dr. K's] request. [HCV Infected Class Member] very distraught following – states "I have no problem with drugs and don't want to be labelled". [HCV Infected Class Member] extremely offended by referral and threatening to "sue" [Dr. K]. [She] called office [of Dr. K] + left message. [...]

1800 hours:

[...] [HCV Infected Class Member] mentioned anger re CDT referral +++ during day and phoned Dr. K's office multiple times. Then at 1800 – [Dr. R.] in to see [her] and [she] told him she would be receptive to AA meetings. Behavior bizarre – requesting analgesics for abd [abdominal] pain yet up pacing halls + outside. [Emphasis Added]

³⁹ See page 65.

[39] Patient Progress Notes dated October 4, 1994 at 1200 and 1830 hours were written by nurses and stated, in part, as follows:⁴⁰

1200 hours

[...] Pacing halls. Called [Dr. K.] on phone tearful saying she wanted Serax @ H.S. and wanted her valium increased from BID to QID. [HCV Infected Class Member] very angry that Dr. ordered Chemical Dependency team in. [She] stated she thought "2-3 ciders a day were not a problem". Then called [another physician] to see her in addition to [Dr. R.]. At 1115 requested for narcotic & Gravol for extreme pain in joints, then when writer went to give her these meds & [HCV Infected Class Member] had left floor for 20 min. When returned she stated she was talking to social worker and that writer could "chart that".

1830 hours:

[HCV Infected Class Member] very argumentative [with] staff today – continues to discuss anger re CDT referral; telephoned [Dr. K's] office + teary on phone. Subsequently [she] agreed to AA. Following Ba x-ray (which in fact was not done) - [HCV Infected Class Member] was seen by CDT staff reading chart outside of chapel. [She] then removed CDT report form chart as well as photocopied info that she stated was "labelling her as a narcotic abuser and that was illegal". Continues to be difficult to keep track of as up all over hosp and outside in street clothes. [She] agreed to Ba enema prep and then when given to her – refused. [She] states, "I'll only have liver biopsy and then I'm leaving!" Information given to [Dr. "R".] - [Dr. "R".] in to see [HCV Infected Class Member @ present. [Emphasis Added]

[40] Progress Notes dated October 4, 1994 written by Dr. "R" stated, in part, as follows:⁴¹

If she doesn't follow the contract made with [Dr. "K"] should be warned once + if fails discharge

[41] Progress Notes dated October 4, 1994 written by the member of the Chemical Dependency Team who assessed the HCV Infected Class Member stated as follows:⁴²

Met again with [the HCV Infected Class Member] who stated that she was unwilling to agree to my referral yesterday as she had just awoken and was confused. While out for tests she was seen by myself reading her chart. As well she removed my report (now replaced) and objected to my written comment that she had a significant problem with narcotics. She denies agreeing to come into the hospital for narcotic withdrawal and has asked me to clarify with Dr. "K" as

⁴⁰ See pages 66 to 67.

⁴¹ See page 40.

⁴² See page 40.

to his thoughts on her need to withdraw from narcotics. Agrees to attend AA meeting tonight in hospital and plans to attend the [Church] meeting on Monday. She states her husband will be attending Al-Anon on Thursday nights. [Emphasis Added]

[42] Progress Notes dated October 5, 1994 written by the member of the Chemical Dependency Team stated as follows:⁴³

[The HCV Infected Class Member] did not attend AA mtg [sic] apparently due to family visit. Recommend outpatient coverage for her medical concerns as soon as possible.

[43] Patient Progress Notes dated October 5, 1994 at 0540 and 0600 were written by a nurse and made reference, among other things, to a request by the HCV Infected Class Member for an intramuscular injection of a drug. The notes stated, in part, as follows:⁴⁴

0540:

[HCV Infected Class Member] requested analgesic + gravol + was given darvon + gravol PO [oral route of drug administration]. C/O [complained of] not being given gravol IM [intramuscular], but unable to provide rationale for requesting IM [intramuscular] injection. Explained that gravol PO was given. [She] was taking analgesic PO at the same time. [No] wretching or vomiting noted. [She] threatened writer with placing a complaint with administration rather than waiting to see if gravol IM [sic] was effective.

0600:

[HCV Infected Class Member] brought gravol out to nurses' station + stated she was too nauseated to take it. [HCV Infected Class Member was] asked if she was able to take darvon + said no, but refused to give medication to writer + proceeded to use inappropriate language + stormed off ward i.e. walked briskly off ward. [Emphasis Added]

[44] A Discharge Summary dictated by Dr. "R" on October 21, 1994 stated, in part, as follows:⁴⁵

DISCHARGE DIAGNOSES:

1. Abdominal pain NYD.
2. Chronic Hepatitis C.
3. Abnormal personality with bizarre behavior.
4. Recent vasculitis.

⁴³ See page 41.

⁴⁴ See page 68.

⁴⁵ See pages 33 to 34.

5. Resistance to termination of steroid use.

HISTORY:

[The HCV Infected Class Member] was admitted to hospital by Dr. [...] and [Dr. "K"] and a contract was made with the patient at the time of admission which unfortunately was not completely kept. This has been a very difficult demanding patient over the few weeks prior to readmission to hospital and very difficult to deal with as an individual.

He [sic] was admitted to hospital for further investigation of abdominal pain and investigation of her chronic hepatitis C. A HIDA scan was repeated on this occasion because of her pain and was completely normal with an ejection fraction this time in a normal range at 83% and there was no pain experienced at the time. A cholecystectomy was strongly discouraged and certainly I have no intention of referring this woman for a laparoscopic cholecystectomy or open cholecystectomy based on our present understanding of this patient.

She has persistent abnormal liver enzymes and has known chronic hepatitis C based on serologic testing. Her live enzymes were consistent with this although this is also somewhat suggestive of possible alcohol effects on the liver.

It is difficult to convince this woman that her hepatitis C was not responsible for her major underlying problems of pain. [...] It was felt that most likely her pain was related to irritable bowel syndrome and she was educated with regards to a high fibre diet and stress management was also recommended.

Once again I have struggled with this woman trying to convince her to wean off her Prednisone to see what happens. She keeps on stopping weaning from the Prednisone when she develops a purpuric rash on her legs which is almost always related to trauma related to capillary fragility secondary to steroid use. [...] I strongly recommended termination of her steroids [...] but by the time she was seen about a week after her discharge from hospital she still did not follow through with these instructions and I think it is very important that physicians not provide her with further prednisone prescriptions unless there is a clearly defined vasculitic syndrome requiring its use.

The same can be said for analgesic use as there are ongoing problems in hospital with analgesic demand. [...] [Emphasis Added]

[45] A Discharge Report from the Chemical Dependence Recovery Program dated October 11, 1994 described the very limited progress made with the HCV Infected Class Member during the course of her admission and stated, among other things, that she was

“unwilling” to address her narcotic dependency as “she did not have a significant problem in that area”. The Discharge Report stated as follows:⁴⁶

Reason for Consultation

CHEMICAL DEPENDENCY

Assessment Summary

During my initial interview of October 3, 1994, I met with the [the HCV Infected Class Member] briefly and began to explore her chemical dependency issues. Within five minutes of my interviewing [her] she exclaimed that she had no idea as to why I was seeing her and would not answer any further questions.

I then contacted her general practitioner, [Dr. “K”] who indicated that he had repeatedly reviewed the conditions of her admission to hospital, namely that she would agree to see the Chemical Dependency Team and engage in a withdrawal process from both alcohol and narcotics.

When I met with [the HCV Infected Class Member] on the following day she suggested that her response of not understanding at all why I was there related to her confusion associated with being awoken from a sleep.

The contradictory data regarding [the HCV Infected Class Member] continued during her hospital stay. Nurses reported one set of information to me while [she] presented an alternate viewpoint. Clearly it was difficult to ascertain where the truth lay and we wondered if perhaps [she] would best be helped on the psychiatric unit.

Hospital Progress:

Unfortunately there was very little hospital progress with [the HCV Infected Class Member] on this admission. She did agree to attend two A.A. meetings a week and detailed which ones she would attend following discharge. As well, [the HCV Infected Class Member] noted that her husband would be attending AL-ANON meetings in the [...] area. With regard to her narcotic dependency, [she] was unwilling to address that matter, stating that she did not have a significant problem with the area.

On the whole the focus of [the HCV Infected Class Member’s] admission seemed to be more on arguing with the staff than on receiving the treatment deemed necessary by her physician and our team. We would also note that since her arrival into the [area] in August she has been in contact with the hospital through Emergency and during three admissions approximately eleven times.

⁴⁶ See page 81.

Discharge Summary:

[The HCV Infected Class Member] seems to present a very confusing medical, chemical dependency and perhaps psychiatric picture. Therefore it is my recommendation that collateral information be gained with respect to the patient whenever she approaches the hospital for services. The matter of pain management does need to be resolved as it will continue to be presented as an issue for her otherwise. With respect to alcohol or narcotic withdrawal I would recommend that she be redirected to the [...] Centre in [...] on further occasions. [Emphasis Added]

October 18, 1994 – Liver Biopsy Report

[46] A Department of Pathology report dated October 18, 1994 outlined the results of the liver biopsy, in part, as follows:⁴⁷

CLINICAL HISTORY: CHRONIC INCREASED AST AND GGT – HEPATITIS C SEROLOGY POSITIVE – CONCERN RE: ALCOHOLIC HEPATITIS

[...]

MICROSCOPIC:

(10546) NEEDLE BIOPSY OF LIVER SHOWS NORMAL ARCHITECTURE. THERE IS SLIGHT EXPANSION OF THE PORTAL TRIADS AND NONSPECIFIC CHRONIC PORTAL TRIADITIS. THE PORTAL TRIADS CONTAIN AN INCREASED AMOUNT OF CHRONIC INFLAMMATORY INFILTRATE, PREDOMINANTLY COMPOSED OF LYMPHOID CELLS WITH SCATTERED EOSINOPHILS AND PLASMA CELLS. HOWEVER, THERE ARE NO FEATURES OF PIECEMEAL NECROSIS OR BRIDGING FIBROSIS. ALSO THERE IS NO EVIDENCE OF CHOLESTASIS, INCREASED IRON CONTENT OR POSITIVE STAINING FOR HEPATITIS B SURFACE ANTIGEN. THERE IS ALSO NO UNEQUIVOCAL EVIDENCE OF BILE DUCTULAR DESTRUCTION AND GRANULOMATOUS REACTION. ALSO NO HISTOLOGIC CHANGES OF ALCOHOLIC HEPATITIS SUCH AS FATTY CHANGE, MALLORY'S HYALINE OR PERICELLULAR FIBROSIS, ETC., ETC. THE HEPATIC PARENCHYMA SHOWS AN OCCASIONAL COUNCILMAN-LIKE BODY AS SEEN WITH INDIVIDUAL CELL NECROSIS. AS IN THIS CASE, THE HEPATITIS C SEROLOGY IS POSITIVE, THE FINDINGS ARE COMPATIBLE WITH VIRAL HEPATITIS. IN CASE THE CLINICAL SYMPTOMATOLOGY IS MORE THAN 6 MONTHS OLD, THE FINDINGS ARE CONSISTENT WITH THE DIAGNOSIS OF CHRONIC PERSISTENT HEPATITIS, PROBABLY RELATED TO HEPATITIS C INFECTION.

⁴⁷ See page 49.

DIAGNOSIS:
CONSISTENT WITH CHRONIC PERSISTENT VIRAL HEPATITIS, NO
HISTOLOGIC CHANGES OF ALCOHOLIC HEPATITIS (SEE MICRO) –
LIVER BIOPSY [Emphasis Added]

January 1, 1995

[47] On January 1, 1995, the HCV Infected Class Member was treated at the Emergency Department for right upper quadrant pain that had persisted for six months. The Emergency Record and Emergency Nursing Assessment Record indicated that she arrived at 2318 hours and was discharged at 0130.⁴⁸

May 21, 1995

[48] An Emergency Record dated May 21, 1995 indicated that the HCV Infected Class Member arrived at the hospital at 1246 hours. The “Reason for Visit” was noted as “Medication problems/liver problems”. In the “Other Health Hx [History]”, the physician wrote “Hepatitis C. Hx alcoholism”. In the “History//Examination” part, he wrote, in part, as follows:⁴⁹

pHx [patient History] drug/ETOH abuse [consumption of alcohol]

[...]

States she has been drinking 1 case of beer a day x 2/52 requesting detox also states cannot cope [with] 12 + 14 yr daughter [illegible] social assistance

[No] signs of ETOH withdrawal/pt calm/bizarre affect [...]

DIAGNOSIS: personality disorder/ ? ETOH abuse

⁴⁸ See pages 250 to 251.

⁴⁹ See page 242.

[49] An Emergency Nursing Assessment Record dated May 21, 1995 stated in the “Medical History” part “hepatitis C alcoholism”. In the “History of Presenting Complaint”, the nurse wrote, in part, as follows:⁵⁰

Dx [Diagnosis] hepatitis C 7 mos ago – has been drinking a case + beer / day - ↑ pain RUQ abd in last 48 hrs [...]
 - last drink yesterday – thinks had a faint this a.m. “? seizure”
 - pt states wants some help [with] detox
states she has never dealt well since husband’s unexpected death 3 yr ago – has children [Emphasis Added]

[50] A Psychiatric Nursing Assessment dated May 21, 1995 stated, in part, as follows:

PRESENTING SITUATION: “I need help to cope. I need to stop drinking”. Has had several admissions to medical R/T alcoholism but has apparently been non-compliant & manipulative. States she wants help now with her drinking. Is also having trouble with her youngest D [daughter] – 12 y.o. [...]

FAMILY AND SIGNIFICANT OTHERS: 12 y.o. & 14 y.o. D [daughters] living at home

F [father] alive & living in City “A” – dying of CA [cancer] of prostate – very little contact with him!

B [brother] and S [sister] living in City “A” – no contact

[...]

EMPLOYED? [...] No. Occupation: needle exchange worker Last Worked: Jan 1993

[...]

AFFECT:

Drinking/Drug Use: Yes. [...] a case of beer/day off + on [...]

[...]

June 17, 1995

[51] A Crew Report dated June 17, 1995 was prepared by an ambulance employee indicating that the HCV Infected Class Member arrived at the hospital by ambulance on June 17, 1995 at 2102 hours. The report stated, among other things, as follows:⁵¹

CHIEF COMPLAINT

[HCV Infected Class Member] ingested a quantity of alprazolam [Xanax] [illegible] Valium ETOH [illegible]

⁵⁰ See page 248.

⁵¹ See page 241.

Last night in ER [with] boyfriend who O.D'ed. Recent release from [name deleted] sub [substance] abuse clinic [...] [HCV Infected Class Member's] friend.
[Emphasis Added]

DIAGNOSTIC AND ADDITIONAL COMMENTS

Came with us
Gave us Hx of nausea vomiting
Possible suicide attempt [with] knife
Indicates [HCV Infected Class Member] on the edge of a nervous breakdown.

[52] An Emergency Record dated June 17, 1995 indicated that the HCV Infected Class Member arrived at the hospital at 2116 and was discharged at 2300 hours.⁵² In the “History/Examination”, the physician wrote “Dictated”.⁵³

[53] An Emergency Nursing Assessment Record dated June 17, 1995 stated, in part, as follows:⁵⁴

HISTORY OF PRESENTING COMPLAINT

last [illegible] boyfriend OD'd on alcohol and Rx [prescription drugs]. She took “a bunch of drugs”. Does admit to taking a handful of valium and drinking – N + V. Suicide attempt by a knife also – friend (visiting) took it from her. Recently released from [substance abuse clinic].

[54] A Psychiatric Nursing Assessment dated June 17, 1995 stated, in part, as follows:⁵⁵

PRESENTING SITUATION: States she is here b/c she “screwed up”. Was recently released from [substance abuse clinic] and started drinking and taking Valium following D/C a week ago. States she attempted suicide but does not remember it” My friends told me”. Stated B.F. was admitted yesterday for Detox to hospital and if she was not going to be admitted too, she wasn't going to listen to any more “crap” from writer.

[...]

ASSESSMENT: 38 year old female [with] alcohol problem presenting in EM [with] manipulative behaviour & becoming angry & verbally abusive when demands not met.

RECOMMENDATIONS: 1) D/C [discharge]
2) A.A. contacts offered but refused.

⁵² See page 231.

⁵³ The Claim File did not contain the “History/Examination” dictated by a physician on June 17, 1995.

⁵⁴ See page 232.

⁵⁵ See pages 237 to 238.

December 16 to 18, 1995

[55] A Crew Report dated December 16, 1995 was prepared by an ambulance employee indicating that the HCV Infected Class Member had “called friend and stated she had taken ‘a bunch’ of pills”; she was uncooperative and refused to give any information”.⁵⁶ Her physician was noted as Dr. “P”.

[56] An Emergency Record dated December 16, 1995 contained largely illegible notes written by a physician in the “History/Examination” part.⁵⁷ The word “heroin” was the fourth word written in the first line; the words Restoril” and “upset” were written in the second line; the third line stated “wants [illegible] stop [sic] drugs + alcohol”; and the fourth line stated “was dry for 12 years”.

[57] An Emergency Nursing Assessment Record dated December 15 [sic], 1995 indicated that the HCV Infected Class Member arrived at the hospital at 0105 hours and stated, in part, as follows:⁵⁸

HISTORY OF PRESENTING COMPLAINT: Talking to friend ½ hour ago + told her she had taken a bunch of pills - [HCV Infected Class Member] told EHS [ambulance employees] she took a handful of restoril [about 24] [...]. ETOH on breath states has had a lot of alcohol to drink tonite + is upset she started drinking again tonite. Emotional – crying + states she has another bottle of Restoril at home [...].

[...]

MEDICAL HISTORY: Hep C. Alcoholism – states she was sober x 12 years + started drinking 3 years ago.

[...]

PSYCHOSOCIAL COMMENTS: States husband died 3 yrs ago at Xmas time.

[...]

NURSING OBSERVATIONS AND TREATMENT > MEDICATIONS IN RED

[...]

0300 Up for cigarette. States starting to feel [illegible] re: heroin withdrawal.⁵⁹

⁵⁶ See page 230.

⁵⁷ See page 203. See paragraph 60 *infra*. The physician dictated an “Admission History and Physical Report” in which he made references to the use of heroin by the HCV Infected Class Member.

⁵⁸ See pages 204 to 206.

[...]
0555 Admitted to hospital. [...]
[Emphasis Added]

[58] An Admission/Separation Record indicated that the HCV Infected Class Member was admitted to the hospital on December 16 and discharged on December 18, 1995.⁶⁰ The “Admitting Diagnosis” was “Alcohol and heroin withdrawal”. [Emphasis Added] In the part “Medications”, the drug Restoril was noted; “ETOH” was written in “Diagnostic and Additional Comments”. The accompanying Discharge Data Sheet indicated the “Most responsible Diagnosis” as “Alcoholism/Drug Abuse”.⁶¹

[59] A Nursing Admission/History Assessment Record dated December 16, 1995 indicated that the HCV Infected Class Member was admitted to the hospital.⁶² The “History Leading to Admission” was specified as “O.D. on Restoril, & ETOH + heroin”. The “Pertinent Health History” indicated, among other things, “Alcohol / Drug Use” with a note “x 1½ month dry previously 5 months”. There was also a note that stated “heroin x 2 months”. In the part concerning factors that may affect the present or hospital stay, there was a note that stated “No information to be released to brother [name deleted] or to anyone else”. [Emphasis Added]

⁵⁹ The entry at 0300 was written by a nurse who left large spaces between each word. In reading the words “re: heroin withdrawal” that appear on the second line, it is important to recognize that parts of letters from the first and third lines touch the space between “re” and “heroin”.

⁶⁰ See page 201

⁶¹ See page 202.

⁶² See page 214.

[60] An Admission History and Physical Report dictated on December 17, 1995 by the attending physician at the Emergency Department made reference to the heroin use by the HCV Infected Class Member and stated, in part, as follows:⁶³

CHIEF COMPLAINT:

This is a 39 year old female who was drinking heavily and using heroin. She is upset about her recent use of heroin and heavy drinking and took a lot of Restoril trying to hurt herself. She has been dry as long as 12 years while raising her children and has been drinking again and using drugs. Once in the last three years she did go to the [substance abuse clinic] and was able to stay dry for 6 months.

[...]

ON EXAMINATION:

[...] She has apparently taken quite a bit of Restoril but is clearly alert and appears to be just suffering from some alcohol and drug use. She is weepy at the present time and is requesting admission for detox and help withdrawing from alcohol and heroin.

PLAN: She will be admitted to hospital with alcohol and drug use for detox protocol [...]. [Emphasis Added]

[61] A Doctor's Order Sheet included an entry dated December 16, 1995 that stated, in part "Alcohol + Heroin withdrawal."⁶⁴

[62] A Chemical Dependency Initial Assessment dated December 16, 1995 stated, in part, as follows:⁶⁵

HISTORY

Last Drink and/or Drug: (Describe) Dec 15/95 1 Kuhla [sic] bottle, 1 26 oz vodka, Restoril Zanics [sic] Herion [sic] → once in a while

[...]

Use in last 30 days: Every day 1-2 26 ozers

Longterm Use History: Started at age 12 Stopped between age 22 → 35

Reason for Drinking/Drugs: Started @ age 35 (1) When husband died, (2) Lost her job, (3) Lost their home

Abstinence: Dry from May – Oct this year

Relapse Triggers: started last Oct because relationship [with] BF went sour

⁶³ See page 208

⁶⁴ See page 210.

⁶⁵ See page 223.

[...]

[63] An Assessment & Recommendation Report from the Chemical Dependency Recovery Program dated December 18, 1995 stated, in part, as follows:⁶⁶

Reason for Referral:

ALCOHOL AND HEROIN WITHDRAWAL

Initial Assessment:

[The HCV Infected Class Member] experienced very mild withdrawal symptoms and on assessment, was ready to leave hospital. She expressed some reluctance in talking with someone from Chemical Dependency team as she was aware of our previous assessment and did not agree with it.

[The HCV Infected Class Member] states that she is not using heroin, which contradicts her admission statements in emergency. She acknowledges that she has been drinking. [...]

In any ongoing support work with this woman, it is important to keep her drug seeking history in mind. [Emphasis Added]

[64] Patient Progress Notes from December 16 to 18 noted, among other things, that the HCV Infected Class Member had no tremors or withdrawal symptoms.⁶⁷

[65] The Progress Notes included a note dated December 18, 1995 from an employee of the Chemical Dependency Team indicating that the HCV Infected Class Member saw the situation as a “relapse” and was reporting “alcohol use only”.⁶⁸

August 13 to 20, 1996

[66] A Crew Report dated August 13, 1996 was prepared by an ambulance employee indicating that the HCV Infected Class Member arrived at the hospital by ambulance on at 0324 hours. The Crew Report stated, among other things, that she had a laceration on her left wrist. There was also a note “? use of drugs and alcohol”.

⁶⁶ See pages 225 to 226.

⁶⁷ See page 218.

⁶⁸ See page 209.

[67] An Admission/Separation Record indicated that the HCV Infected Class Member was admitted to the hospital on August 13 and discharged on August 20, 1996.⁶⁹ The “Admitting Diagnosis” was “Personality disorder Suicidal gesture”.

[68] An Emergency Record dated August 13, 1996 indicated, among other things, that the HCV Infected Class Member arrived at the hospital at 0338 and was admitted to psychiatry.⁷⁰

[69] A Psychiatric Nursing Assessment dated August 13 at 0340 hours indicated, among other things, that the HCV Infected Class Member had received sutures for a laceration to her left wrist. Initially, the HCV Infected Class Member would not explain how the injury occurred and refused to answer questions.⁷¹ She eventually stated that she had planned to slash her wrists to die. She was willing to have a friend stay with her and go home. However, after discharge plans were arranged at 0440 hours, she refused to give a “no harm commitment” and was admitted. The nurse checked the boxes “No” for “Drinking/Drug Use” and “Over the Counter Street Drugs” and wrote “Denies any use!” In “FAMILY History/Psych History /Illness”, the nurse wrote, in part, “Lengthy Hx of chemical dependency but states clean x 8 months”. [Emphasis Added]

[70] Progress Notes dated August 13, 1996 at 1300 hours were written by a nurse and stated, in part, as follows:

[...]. Call received from [Dr. “P”, her current family physician] inquiring about her admission. Dr. “P” informed writer that [HCV Infected Class Member] has strong history of drug seeking behaviour & Dr. [“P”] has sent fan outs regarding this. Apparently [the HCV Infected Class member] went to [...] Walkin Clinic

⁶⁹ See page 153.

⁷⁰ See page 157.

⁷¹ See pages 169 to 171.

under an alias seeking meds but was recognized by a staff member. Dr. ["P"] states that [the HCV Infected Class Member] has taken her daughter to EM on previous occasions, hoping to obtain meds for her daughter, which could then be given to [the HCV Infected Class Member]. [...] [Emphasis Added]

[71] A Patient's Care Plan contained notes dated August 13 stating, among other things, as follows:⁷²

Passive/Aggressive

- manipulative
- threatening
- angry behaviour
- ETOH/Drugs
- Clean for 8 months

[72] Progress Notes dated August 14, 1996 included a note written by Dr. "P" that stated, in part, as follows:⁷³

Hostile demeanour + tends to blame other agencies for not helping her sooner (i.e. not her fault she was abusing meds). Reminded her that drug seeking thru dishonesty certainly not helpful in long run + encourage honesty with professionals essential [sic]. She seems angry at me (? For exposing her drug seeking) attempts to help her in past have been met [with] resistance, seems to ensure all Rx + non Rx interventions are of no benefit but always returns to benzo use as outlet. [...]

[73] An Assessment & Recommendation Report by the Chemical Dependency Recovery Program dated August 15, 1996 stated, in part, as follows:⁷⁴

Reason for Referral:

PERSONALITY DISORDER, SUICIDAL GESTURE

Initial Assessment:

[The HCV Infected Class Member] 40 years, entered hospital after slashing her wrist. She stated that it was the only way to get the Ministry of Social Services, Mental Health and the Family Centre to see she needs help. [...]

⁷² See page 173

⁷³ See page 178 to 179.

⁷⁴ See pages 193 to 194.

[The HCV Infected Class Member] reports being sober 8 months and attending 5 meetings per week. [...] She denies any drug use but with prodding admitted that she was not using her prescription medication as prescribed. She denies knowledge of the addictive effects of her prescription medication and appeared to put the responsibility on her family doctor. There appears to be a drug fan out on her. [...]

Impression: [The HCV Infected Class Member] appears to have an external locus of control and is reluctant to take personal responsibility for her life and her parenting. With her extensive history of substance abuse, and apparent work at the street level in [City "B"] it is highly unlikely that her report of being unaware of the addictive nature of her medication is accurate. Her contact with several agencies and counselling professionals may be a defence to working seriously on her issues at any depth. This behaviour also facilitates drug seeking behaviour. [...] [Emphasis Added]

[74] A Discharge Summary dictated by a psychiatrist on November 26, 1996 stated in the “Reason for Admission”, among other things, as follows:⁷⁵

[The HCV Infected Class Member] had been ostensibly clean and sober for one year’s time but had been lapsing intermittently in the form of drinking cough syrup and abusing prescription medications. Her family physician, [Dr. “P”], had put a fan out on her for all local pharmacies.

[75] An undated Request for Consultation contained information, concerning, among other things, the history of the HCV Infected Class Member and stated, in part, as follows:⁷⁶

CONSULTANT’S REPORT

- 40 yr old [female] – separated from most recent husband x 2 yrs – moved to [City”C”] few years ago from [City “A”] living in rented town-home with 2 teenage daughters [...]
- 4 marriages – 1st one briefly age 15 (not pregnant, wanted out of family home) longest one x 11 years to F [father] of daughters – he died suddenly of heart disease [approximately] 4 yrs ago in [City “A”]. She claims she was clean and sober x 10 yrs before his death – started needle exchange program in [City “B”], relapsed after his death.
- Describes [family history] of depression/substance abuse [illegible] on [father’s] side – 2nd of 4 sibs [siblings] – claims all others have been “successful” career-

⁷⁵ See page 155.

⁷⁶ See pages 161 to 162. The context of the document and its placement in the file indicates that it was written in 1996.

- wise – that brother is [name deleted] – very limited relationships left with others – they have pretty much cut her off. F was [details deleted] → frequent moves to various communities in U.S./Canada - [mother] died of MI [mental illness] age 47 ([HCV Infected Class Member] 16 at time)
- Appears to have led fairly chaotic life during teens, early 20's – admits to alcoholism, some street drug abuse, relationship problems [...]
 - During recent months, has apparently presented to Dr. [...] with depression/anxiety symptoms – noted tendency to be manipulative re: prescription meds - [...] – denies ETOH, states she drank cough syrup (claims clean of street drugs/sober x 8/12, attending up to 5 meetings weekly at [...] with sponsorship) - ? reliability of info. – clearly quite clever + experienced. [Emphasis Added]

[76] An undated Psychiatry Data Base record noted, among other things, that the HCV Infected Class Member had lived in 15 cities, states or provinces, was married four times and had been “clean & sober 12 yrs”.⁷⁷ It stated as follows in “Childhood”:

Father was rage-a-holic [sic], alcoholic, physically & emotionally abusive. Mother committed suicide at age 47.

[77] A Consultation Report dated August 15, 1996 from a psychiatrist described, among other things, the background of the HCV Infected Class Member and stated, in part, as follows:⁷⁸

HISTORY:

The [HCV Infected Class Member] is a 40 year old lady who has been separated from her most recent husband for 2 years, shortly after moving to [City "C"] from [City "A"]. At the present time she is living in a rented townhouse with her two teenage daughters.

The [HCV Infected Class Member] was admitted to hospital on an emergency basis after slashing her wrists. [...]

When seen by the writer, the [HCV Infected Class Member] indicated that during recent months she had presented to her family physician, [Dr. P] with symptoms of anxiety and depression. According to [Dr. P] she has displayed a definite tendency to be overly dependent and abusive with regards to medication as well as being potentially manipulative and dishonest. Most recently he had refused to

⁷⁷ See page 167.

⁷⁸ See pages 158 to 159.

refill a prescription early and the [HCV Infected Class Member] had responded the day prior to admission with increased feelings of dysphoria. She denied any recent alcohol abuse and states that she drank some cough syrup. In fact, she stated that she was clean and sober for a period of 8 months attending up to at least 5 meetings weekly at the local [...] Club. [...] She was noted to be rather vague and inconsistent with regards to her history of prescription drug abuse. One would assume that [Dr. "P"] put out a drug fan on her in the community for a good reason.

The [HCV Infected Class Member] describes a fairly interesting personal and family history including four marriages. She states that she has a very strong family history of depression and substance abuse, especially on her father's side. [...] She states that he is an alcoholic who, during her formative years, was prone to rages as well as being controlling, regimented and abusive. She describes him as being overbearing and emotionally aloof [...]. He stopped drinking for a period of over 20 years but relapsed after the death of his wife.

The [HCV Infected Class Member] mother was of [...] extraction and died of a heart attack at the age of 47 at which time the patient was 16 years old. She is described as having been submissive, passive, co-dependent and catering with regards to her husband. The patient is the 3rd oldest of 4 siblings including 3 girls and 1 boy and she claims that the others have all been fairly "successful" career-wise. The oldest in the family, her brother [profession deleted] [...] She does not have any ongoing contact with him at the present time.

The [HCV Infected Class Member] states that she was first married at the age of 15 for 1 1/2 years to an 18 year old farm boy. The second marriage lasted for 3 years between the ages of 17 and 20 to [name deleted]. She moved to [...] with him and that relationship resulted in a son, [name deleted], now 19 and living with his father in [...]. When [her second husband's] father died, he left her to go home and look after his mother and has been there ever since. Originally he left [their son] with her in [...] for a period of 2 years. However, due to her substance abuse and unstable lifestyle, she asked [her second husband] to take over responsibility for his son. She has maintained regular contact with [her son] and feels that she has a fairly good relationship with him now as he continues to come for regular visits.

Following the break up of her second marriage, she moved back to [City "B"] to live with her brother for 6 months, and then went on to her third marriage to [name deleted] with whom she spent 11 years. He was not actively abusing drugs or alcohol during their marriage and worked as a [job deleted] but was a pathological liar and compulsive gambler. She went to [...] College for training as a human services worker in 1981 and subsequently worked at [...] for 3 years, during which she was clean and sober. Subsequently, she stayed at home and raised her children, later working for the [...] Society for the mentally handicapped. She went on to run the [...] needle exchange program for 4 or 5 years before her husband's death. She states she was very involved in that project working up to 10-14 hours daily at times. [Her third husband] died suddenly of some form of heart failure; she met her fourth husband, [name deleted], prior to his death. He was [job deleted] "who seemed to be a nice person" at the time they met. After being married for 2 1/2 years he found that he

could not handle living with her children and left and moved to [...] about 2 years ago.

Initially in [City "C"], she drank a fair amount and also abused drugs to some extent. However, she ended up at [a treatment centre] about a year ago and subsequently became involved in meetings in the community on a regular basis.

[78] The HCV Infected Class Member wrote an undated letter to two psychiatrists involved in her care and described various matters that she had forgotten to raise during their interviews. She stated, among other things, as follows:⁷⁹

- At age 13 I slashed my wrist; age 15 injected draino into both arms, slashed wrist while in most recent depression.

February 3 to 4, 1997

[79] An Emergency Record dated February 3, 1997 indicated that the HCV Infected Class Member requested help for addiction and claimed to be using “a lot of Bz [Benzodiazepine] and Darvon”.⁸⁰ There was a note in “Medications and Other Health Hx” that stated:

Past month back to drinking and drugs. Alcohol withdrawal and tranquilizers > almost clean 1 year”.

[80] An Emergency Nursing Assessment Record dated February 3, 1997 at 1905 stated, in part, as follows in the “History of Presenting Complaint:⁸¹

Hx Alcohol and tranquilizer abuse – today 1730 had 1 seizure
In Detox x 1 year – tapered off phenobarbitols
In past month back taking tranquilizers + alcohol – 1st seizure since drinking + taking drugs.

[81] An Admission History and Physical report dictated on February 4, 1997 stated, in part, as follows:⁸²

⁷⁹ See page 199.

⁸⁰ See page 396.

⁸¹ See page 398.

HISTORY:

This 40 year old lady is admitted with substance use disorder and personality disorder. This quiet, calm lady says that she needs help with her addictions. She thinks she has had two seizures today, she is not entirely sure. [...]

The patient freely admits that in the last 1-2 months she has resumed taking a lot of drugs. She says that she is using sleeping pills and sedatives and Darvon. She said that she used 30 Restoril capsules in the last 1 ½ days. She also says she uses large amounts of Ativan and Darvon. She could not tell me exactly how many. She says she attends many doctors and Walk-In Clinics and gets these medications quite readily. She volunteered that she is on a drug fanout and finds it amazing and indeed annoying that she can so readily obtain these prescriptions. She says this in a rather ambivalent manner. [...]

PHYSICAL EXAMINATION: [...]

This patient will be admitted to try and sort this out. If she truly has a large benzodiazepine addiction she certainly would have a difficult time withdrawing as an outpatient, however, her calm manner and odd affect make me unsure that she is really taking this amount of medication. She has no slurred speech or other sign of intoxication. Unfortunately but not surprisingly she has no local family doctor. Her various doctors have parted ways with her when she has been noncompliant and went drug seeking to other physicians. [...]

[82] Progress Notes dated February 4, 1997 stated, among other things, as follows:⁸³

Discharged Dec. 17, 1996 from [treatment centre]. Claims she went off antidepressant [...] three weeks ago. This triggered off her binge on Darvon, Ativan, Valium, cough syrup + anything else the doctors at the walk in clinic would prescribe.

Poly drug abuse

[83] A Discharge Report from the Chemical Dependency Recovery Program dated February 4, 1997 stated, in part, as follows:⁸⁴

Reason for Consultation

SUBSTANCE ABUSE DISORDER AND PERSONALITY DISORDER

Assessment Summary

⁸² See pages 137 to 138.

⁸³ See page 139.

⁸⁴ See pages 150 to 151.

[The HCV Infected Class Member] has a horrendous history of substance abuse, drug seeking, doctor shopping and generally very shifty behaviors to get medications. It was thought at one time she could have been responsible for medications missing in the hospital. She indicated that she wanted discharge as soon as possible as she was very active in her recovery program. The one request she did have was for a prescription of Effexor because it had helped so much with her depression and her addiction problems.

She claims to have had a 3 week slip back into her substance abuse. She has mainly been taking Valium 15-20, 5 or 10 mgm tabs per day; Darvon and Ativan --- as many as she could get; and drinking cough syrup.

[The HCV Infected Class Member] appeared quite together until she was informed that she was to be discharged. [...]

This lady is definitely a personality disorder with drug seeking behaviors. It is best her hospitalization be as brief as possible. She is well aware of the community supports and is a very resourceful lady. [...]

Discharge Summary:

Discharge home. She was encouraged to find a G.P. as she doesn't have a doctor as yet. She does not think anyone will take her because of her behavior. She admitted to a fan out being in effect at one time because of her drug and doctor seeking. It would appear, this is happening once again.

She plans to return to counselling and groups at the Alcohol and Drug Clinic next week. I don't believe she was too happy about discharge when it came down so quickly. This would mostly be due to drugs being cut off. [Emphasis Added]

[84] A Discharge Summary indicated that the HCV Infected Class Member was discharged from the hospital on February 4, 1997 and contained essentially the same comments as the Progress Notes described in paragraph 82.⁸⁵

July 9, 1997 – Endoscopy Report

[85] A “Summary and Endoscopy” report dated July 9, 1997 provided the results of an endoscopy conducted on the HCV Infected Class Member by a specialist. The report

⁸⁵ See page 395.

included a reference to a statement made by the HCV Infected Class Member concerning intravenous drug use and stated, in part, as follows:⁸⁶

HISTORY:

Thank you very much for having me see this lady who has been followed by Dr. ["R"] in the past mainly because of her Hepatitis C. She has had a problem with Hepatitis C drug abuse in substantial proportions over the years and had alcohol use and abuse. Dr. ["P"] told me that she had been clean for 6 weeks, having no drugs at all. She told me today that she has not had any drugs or alcohol for four months. Last IV use of drugs of which there was "4 times in my life" was 8 months ago. She also says that she has had transfusions in the past but is really not sure how she could get the Hepatitis C and it could have been from the transfusions. Dr. ["R"] was treating her for chronic progressive Hepatitis with Interferon but she broke the protocol and started drinking heavily. The Interferon was used for 2 weeks and it was stopped because of her drinking.

That is not the reason for her being here today as she has had right upper quadrant pain for the past year and probably more than that [...] She has not been jaundiced, even with Hepatitis C, whenever she got that disease. She has had no pruritus. The pain has never been disabling pain, never severe biliary colic like pain. [...]

PHYSICAL EXAMINATION:

Reveals a pleasant lady of 41 years. [...] Her liver is very definitely enlarged, palpable 5 cm. above the right costal margin in the midclavicular line and 5.5 to 6 cm. in the midline below the xiphoid. It is hard, irregular and slightly tender. [...]

UPPER GI ENDOSCOPY: [...]

IMPRESSION:

This study is for the most part normal. [The HCV Infected Class Member] did have mild duodenitis but there is nothing on this study that might explain her abdominal pain. The pain is on the basis of hepatomegaly, stretching of glycine's capsule. She almost certainly has ongoing progressive hepatitis as documented on biopsy previously. It was definitely progressive rather than active Hepatitis. There was no bridging and no piecemeal necrosis suggestive of active Hepatitis on that biopsy. She did not comply with the Interferon and I do not think that Interferon is indicated at this time. [...] [Emphasis Added]

⁸⁶ See pages 382 to 383.

December 15, 1997 – Letter concerning blood transfusions

[86] By letter dated December 15, 1997, a hospital wrote to the HCV Infected Class Member concerning two blood transfusions that she had received on March 14, 1983 and stated, in part, as follows:⁸⁷

The risk of being infected with hepatitis C virus before Red Cross started to screen blood donors in June 1990 is estimated to be about 3%. A test for hepatitis C will indicate if you are infected.

January 22, 1998 – Report from Dr. “M”, Specialist in Gastroenterology and Hepatology

[87] By letter dated January 22, 1998, Dr. “M” provided a report to Dr. “P” concerning an evaluation that he had conducted on the HCV Infected Class Member. He made reference, among other things, to some instances of intravenous drug use by the HCV Infected Class Member. In the letter, he stated, in part, as follows:⁸⁸

Thank you for asking me to see this 41-year old woman for evaluation of her hepatitis C.

[...]

In the past, [the HCV Infected Class Member] had seen Dr. R who had performed a liver biopsy in October of 1994. At that time there was evidence of chronic persistent hepatitis with no features of piecemeal necrosis or bridging fibrosis and certainly no cirrhosis. Because of this and quite markedly elevated transaminases (interestingly, however, the AST always seemed to be greater than the ALT) a course of Interferon therapy was initiated. However, unfortunately [the HCV Infected Class Member] was unable to be compliant with the therapy and the recommendations to abstain from alcohol and therefore she did not finish the course of therapy.

[The HCV Infected Class Member] has reviewed all of her previous records and tells me today that she was quite upset that the records stated that she was noncompliant with drug seeking behavior and had a demanding personality. She now feels as though things are under control and that those labels do not apply to her any more.

⁸⁷ See page 785.

⁸⁸ See pages 781 to 784.

She has come to see me today because of persistent problems with right upper quadrant pain and as well she is concerned about progression of her hepatitis C and is wondering as to whether or not we should be performing another liver biopsy to see what is going on.

[...]

She states that over the last ten months she has been clean and sober. There is a considerable history of alcohol abuse. From the time she was a teenager until 23 years of age she drank steadily on a daily basis. From 1979 until 1993 she states that she was entirely sober, however, unfortunately she had a relapse in 1993 and continued to drink until ten months ago. At the time that she was drinking she was drinking to black out and was consuming at least ten ounces of alcohol per day as well as ten beer per day.

She states that she has been off of all drugs for approximately a year and a half. In the past she has been abusing prescription drugs, most recently Percodan. She also states that she has had a couple of episodes of IV drugs use, most recently five years ago. She apparently did not share needles. She had a blood transfusion of four units of blood in 1983. She has not had any tattoos. She has had ear piercing performed in a store. There have been no other risk factors for the acquisition [sic] of hepatitis C.

[...]

Opinion and Recommendations:

Hepatitis C. [The HCV Infected Class Member] has probably acquired hepatitis C either from her former blood transfusions or from her previous IV drug use. She unfortunately has also a long history of alcohol abuse which tends to compound the problem. I am pleased to hear that she has not been drinking in the last ten months and have advised her to abstain completely from now on.

In the past she has had quite significantly abnormal liver enzymes, however, her AST has always been greater than the ALT indicative of ongoing alcohol abuse which she now admits to. Previously she has had a trial of Interferon, however, she could not be compliant with this at the time because of the ongoing alcohol use.

[...] [Emphasis Added]

January 13 to February 24, 2003

[88] The HCV Infected Class Member was hospitalized from January 13 to February 24, 2003 for progressive Multiple Sclerosis. Various records make reference to a history of intravenous drug use by the HCV Infected Class Member. However, the timeframe of the intravenous drug use was not specified in the records.

[89] Progress Notes included the following notations concerning the HCV Infected

Class Member:⁸⁹

Jan 14/03

Problems

[...]

→ Hep C from blood transfusions

→ Hx ETOH abuse but sober for 4 – 5 years.

[...]

Jan 15/03 Rehab

45 yr old woman [with] probable 1° M.S. [...]

Past med 1) I.V. drug use Hep C +

[...] [Emphasis Added]

[90] A M.S. Clinic Social Work Consult dated January 15, 2003 was written by a social worker and stated, in part, as follows:⁹⁰

Contact was made by coworker, [name deleted], who provided the following information. She has been involved with [the HCV Infected Class Member] from the community and informed that [the HCV Infected Class Member] was recently diagnosed with MS and her physical deterioration has been rapid. She has a history of ETOH and IV drug use and currently lives alone [...].

[The HCV Infected Class Member] has a brother [name and other details omitted]. He was also here recently and although their relationship is described as somewhat strained, he has been supportive and making a number of calls to community professionals to try to increase her support network.

[Emphasis Added]

[91] A Physiotherapy Department Rehab Neurological Assessment Form indicated that the HCV Infected Class Member was assessed and admitted to rehab on January 27, 2003. The History part of the form stated as follows:⁹¹

HISTORY: C – section x 3

Hep C positive

ETOH IV drugs [Emphasis Added]

⁸⁹ See page 428 for January 14, 2003 and page 426 for January 15, 2003.

⁹⁰ See page 468.

⁹¹ See page 440. Another Physiotherapy Department Rehab neurological Discharge Form, found at page 446, contained the same note in the History part.

[92] An Occupational Therapy Assessment Home Assessment Report dated February 17, 2003 stated, among other things, that the HCV Infected Class member and her brother were “[...] in touch now after having been estranged for many years”.

[93] A Planning for Discharge Report contained notes dated from February 7 to 22, 2003 made by a nurse, including the following:⁹²

INTRODUCTION:

07/02/03

[The HCV Infected Class Member] is a 46 year old woman who was admitted to [...] with dehydration and a recent diagnosis of progressive M.S.

Her health history includes Hep C+ from blood transfusion, ETOH and IV drug abuse.

[...]

18/02/03

ASSESSMENT UPDATE

[...]

Relevant Health History: Hep C+ from blood transfusions, ETHOH [sic] & IV drug use

[...]

OUTCOME

24/02/03

[The HCV Infected Class Member] was discharged today. [...] [Emphasis Added]

TRACEBACK

[94] By letter dated May 14, 2008, the Canadian Blood Services forwarded the final Traceback report to the Administrator, together with a Transfusion Summary dated May 12, 2008 that stated as follows:⁹³

Results of Search:

The following products were determined to be transfused, and matched against CBS records to determine if Donor status is known:

2 units were transfused in March 1983

1 donor HCV neg

1 donor unlocatable

⁹² See pages 360 to 364.

⁹³ See page 790.

PRELIMINARY DECISION OF THE ADMINISTRATOR

[95] In a decision dated June 30, 2008, the Administrator advised the HCV Personal Representative that the application for compensation would be rejected due to the use of non-prescription intravenous drugs by the HCV Infected Class Member, unless he provided further evidence to establish eligibility on the balance of probabilities. The Administrator provided a Further Evidence of First Infection Form to be returned within thirty days. In the decision, 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. [...]

How to Proceed with your Claim

The Administrator will require the following evidence to determine your eligibility:

- A sworn affidavit; and
- Medical records that outline the HCV infection history of the HCV Infected Class Member

Please refer to the enclosed document entitled “How to Proceed” for more detailed instructions. In any given case, the Administrator may require additional evidence and information. [Emphasis by Administrator]

[96] The “How to Proceed” document contained, among other things, the following paragraphs concerning an affidavit and the health records required by the Administrator:⁹⁴

AFFIDAVIT

- The Administrator requires an affidavit confined to a statement of facts within the personal knowledge of the HCV Infected Class Member about his/her non-prescription intravenous drug use. [...]
- The contents of the affidavit must be sworn or affirmed to be true in the presence of a person authorized to administer oaths or affirmations [...]
- The affidavit should include, at a minimum, the facts indicated in the chart below. [...]

HEALTH RECORDS

HCV Infected Person

- The Administrator requires the HCV Infected Class Member’s health records relating to all hospitalizations and treatments for the 10 years preceding the date he/she first received Blood in the Class Period or dating back to his/her 18th birthday, whichever is the shorter period.
- The Administrator requires all relevant medical records that outline the HCV Infected Class Member’s history of infection with HCV from the date of diagnosis to the present.

FURTHER EVIDENCE OF FIRST INFECTION AND SUBMISSIONS

[97] On January 19, 2009, the HCV Personal Representative signed the Further Evidence of First Infection Form indicating his intention to provide further evidence that the HCV Infected Class Member was infected with HCV for the first time by a blood transfusion.⁹⁵

⁹⁴ The “How to Proceed” document is provided to all claimants in cases where the Administrator makes a preliminary decision to deny a claim on the basis of the use of non-prescription intravenous drugs.

⁹⁵ See page 793.

[98] On April 17, 2009, the HCV Personal Representative delivered a letter dated April 15, 2009 to the Administrator, together with further evidence of first infection that consisted of an affidavit affirmed by him, a letter from a hospital (Hospital “B”) in response to his request for information, and hospital records from March of 1983 relating to the admission of the HCV Infected Class Member to Hospital “B” in March 1983 for her Caesarean section operation. He also delivered written submissions.

[99] The letter dated April 15, 2009 from the HCV Personal Representative to the Administrator stated that “no other hospital records exist from 1974 to 1983”, other than the records relating to the March 1983 admission for the Caesarean section operation. He further stated that the relevant medical records from the date of the Hepatitis C diagnosis in August 1994 to her death in 2007 were in the possession of the Administrator. His letter stated as follows:⁹⁶

I am writing in response to the request for further evidence on the abovenoted claim under the provisions of the *Non-Prescription Intravenous Drug Protocol*. Enclosed with this letter are the following:

- Sworn affidavit by [the HCV Personal Representative], brother of the late [HCV Infected Class Member]
- Submission [...]
- Documentation from [name deleted – Hospital “B”] confirming admission during caesarean section birth of daughter [name deleted], no other hospital records exist from 1974 to 1983

All relevant medical records outlining the history of the [HCV Infected Class Member’s] infection with HCV from the date of diagnosis in August 1994 to the date of her death in April 2007 are already in the possession of the Administrator.

Please confirm receipt of the above-noted documents, and confirm that no further documentation is required from me in order to make a decision on the claim. Thank you very much for your assistance. [Emphasis Added]

⁹⁶ See page 794.

Affidavit of the HCV Personal Representative

[100] The affidavit affirmed by the HCV Personal Representative on April 14, 2009 stated as follows:⁹⁷

1. I make this affidavit on behalf of [...] an HCV Infected Class Member [...]. I am [her] brother, and the executor of her last will and testament.
2. [The HCV Infected Class Member] was born [in] 1956.
3. [The HCV Infected Class Member] was diagnosed with Hepatitis C in August, 1994. She received Blood at the age of 26, in March 1983, during the birth of her third child, [...].
4. I was the closest family member to [her] during her life. She lived together with me for several periods of time after the age of 16. I provided her with support and assistance during much of her adult life, and was very much aware of her personal and family circumstances during all of the period prior to her move to [City "C"] in 1994. From 1988 until the time of her move to [City "C"] in 1994 she lived in a house located directly behind my [premises in City "A"] and I saw her and her family regularly. After she was diagnosed with multiple sclerosis, while she was living in [City "C"] I arranged for her to move [back to City "A"] to be close to me, and she lived here, and in a care facility in [City "B"] until the time of her death. During that time I was her closest family member, and looked after all of her personal needs, visiting with her at least once a week. For the two years prior to her death, I had her legal power of attorney and was her personal representative on all decisions, including health care decisions.
5. I am absolutely certain that [the HCV Infected Class Member] never used non-prescription intravenous drugs during all of the time she was living in [the area of City "A"], prior to moving to [City "C"] in 1994. While [the HCV Infected Class Member] had problems with alcohol abuse, and sometimes with prescription drug abuse, she never injected any intravenous drugs during all of that time. [The HCV Infected Class Member] was always totally open with me about her personal situation and challenges, and I attended many of her "cake" celebration ceremonies at [...], during the period the period of approximately 12 years that she was completely free of any substance abuse following the birth of her children. [The HCV Infected Class Member] categorically denied to me ever taking any non-prescription intravenous drugs prior to her diagnosis with Hepatitis C in 1994. Following the sudden death of her husband [...], she did go through a very difficult time, and started drinking and abusing prescription drugs again. This would have been around 1995-1998, in [City "C"].⁹⁸ I do not believe that she used

⁹⁷ See pages 795 to 796.

⁹⁸ The evidence in the hospital records established that the HCV Infected Class Member "relapsed" and began abusing drugs and alcohol after the death of her third husband in 1992, not in 1995 as indicated in the affidavit.

intravenous drugs at that time, and her daughter [...] who lived with her informed me that she is certain that she never injected any drugs. However, I did not have much contact with [the HCV Infected Class Member] at that time so cannot state with certainty that this was the case. Certainly if [the HCV Infected Class Member] had ever used intravenous drugs in that time frame she would have done so in a safe way, as she was one of the founders of the [City "B"] Needle Exchange program and worked for several years helping to educate IV drug users in [City "B"] about the importance of using clean needles and not sharing needles.

6. [The HCV Infected Class Member] never donated blood in Canada prior to receiving Blood in March, 1983.
7. [The HCV Infected Class Member] has never been convicted of any drug-related criminal offence. [Emphasis Added]

Letter concerning a request for the release of information from Hospital "B"

[101] By letter dated April 7, 2009, the Health Record Department of Hospital "B" provided records to the HCV Personal Representative and included the following note:⁹⁹

Note: Enclosed are ALL the records from [Hospital "B"] for the dates listed on your request – July 1974 to April 1983.

Hospital records from Hospital "B" relating to Caesarean section operation in 1983

[102] The hospital records concerning the admission of the HCV Infected Class Member for Caesarean section surgery in 1983 confirmed that she had received two blood transfusions during her hospitalization. She had undergone two previous Caesarean section operations.¹⁰⁰ Her two children were aged six and 2½ years.¹⁰¹ The records contained no relevant evidence concerning intravenous drug use.

⁹⁹ See page 800.

¹⁰⁰ See, for example, the History and Progress Notes dated September 16, 1983 at page 803.

¹⁰¹ See Assessment at page 807 and Nurses' Notes at page 837.

Written submissions

[103] The HCV Personal Representative delivered written submissions entitled “Submission on behalf of the children of the Late [HCV Infected Class Member]”.¹⁰² I have carefully read and considered all the submissions and will address only one matter for clarification purposes. In paragraph 5, of the submissions, the HCV Personal Representative made reference to “two separate, sworn declarations” by the HCV Infected Class Member’s family physician in City “C”, Dr. “J.E” and stated that “[...] he never had any reason to believe that [she] had used non-prescription intravenous drugs”. The documents described as “two separate sworn declarations” were the Physician Form and the Treating Physician Form delivered respectively in support of the applications for compensation in the *Red Cross Settlement* and the *Settlement Agreement*.¹⁰³

OPINION OF MEDICAL SPECIALIST

[104] By letter dated October 13, 2009, the Administrator requested an opinion from a medical specialist in infectious diseases. The letter stated, in part, as follows:

According to the Court Approved Protocol for Non-prescription intravenous drug use, the Administrator must 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, the Class Period Blood transfusion(s) 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.

Attached to this document, you will find a copy of the claimant’s file. Could you please review and provide an opinion to the Administrator.

The Administrator will weigh the totality of evidence obtained including the evidence obtained from the additional investigations required by the provisions

¹⁰² See pages 797 to 799.

¹⁰³ See paragraphs 4 and 9.

of this Court Approved Protocol and will determine whether, on a balance of probabilities, the HCV Infected Class Member meets the eligibility criteria.

[105] In a letter dated January 19, 2010, 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 extensive file of the above named claimant as requested. Briefly in 1983 at the age of approximately 27 she underwent a C-section for her third child. As part of the post operative period she received two units of packed red blood cells. Subsequent trace-back indicated that one of these donors was hepatitis C negative, the other could not be traced. In 1994 she was having abdominal pains and discomfort and hepatitis C antibody testing was done and was positive.

This individual had a significant drug and alcohol use problem. In 1994, it is documented that she had high ethanol levels at least on one occasion from the Emergency Department in [City "C"]. The Gastroenterology consult in 1998 indicated the pattern of the AST and ALT was much more in keeping with alcohol use as opposed to hepatitis C. However, in 1994 as part of her extensive work-up she had some mild inflammation of the gallbladder based on HIDA scanning when she presented with right upper quadrant pain. Subsequent scanning two months later showed that this had resolved however the pain continued. She then underwent a liver biopsy which showed some inflammation but no fibrosis and was interpreted as chronic persistent hepatitis under the assumption that she had been infected for more than six months.

During those admissions it is documented that she had significant drug seeking behaviour and was difficult to deal with by the medical team and initially did not want to enter rehabilitation however later on she apparently was admitted to at least one or several rehab programs for drug and alcohol abuse. In 1995 she came into hospital where she in fact was using heroin for a several month period of time and elsewhere the patient admitted to using IV drugs on at least five occasions. Of note is that she previously had worked in [City "B"] in a needle exchange program. She relates that she had received two needle stick injuries during that time. It is somewhat unclear to me how she would have sustained a needle stick injury working in that program. However working in an environment of needle exchange in a person who has had drug seeking behaviour as well as a history of depression and previous suicide attempts it would be consistent that she may have used injection drugs for example in the late 80s and that would be totally consistent with her pattern of disease.

She was started on interferon for a very short period of time because of elevated liver function tests and diagnosis of hepatitis C antibodies. She only took this for about two weeks and it was discontinued because she did not abstain from alcohol. She was reassessed several years later with her liver function tests being at or near the normal range and it was felt that therapy was not indicated.

Nowhere in the chart was I able to find hepatitis C viral RNA PCR and therefore could not state definitively that in fact she has an active infection.

Unfortunately this woman at the end of 2002 had progressive neurologic myopathy and spasticity and in January 2003 was diagnosed to have multiple sclerosis. As part of her treatment she was started on high dose Prednisone to no effect. Sometimes high dose corticosteroids can exacerbate a chronic viral hepatitis. There are no notes in the chart indicating that in fact this occurred. I do not have any information as to her final demise but progressive problems related to mobility and pneumonia were certainly all likely associated with her progressive neuromuscular disease and not consistent with being caused by hepatitis C.

There are many inconsistencies in the chart related to when alcohol was being abused and stopped and certainly alcohol intake was quite considerable at, around and prior to the diagnosis of hepatitis. As well the fact that she did work in a needle exchange program, even if she did use clean needles it is often not known that people who share drugs, paraphernalia etc. can be infected with hepatitis C even if clean needles are used. Her pattern of disease certainly indicates infection before 1994 however this individual has a heavy alcohol intake with such little damage almost 12 years after blood transfusion, this could suggest that the infection in fact was more recent to the time of diagnosis. This is based on the fact that no fibrosis was seen in the liver biopsy and although it usually takes at least 15 years to see problems related to hepatitis C, the lack of fibrosis in an individual with significant drug and alcohol problems is somewhat remarkable. As mentioned before, I do not have the PCR evidence so in fact she could have been infected and spontaneously cleared the infection. As well her death which appears to be most likely from multiple sclerosis would not be attributable to hepatitis C. Therefore if one assumes that the transfusion was the source of infection it appears that she would be a level 1 compensation. Whether in fact she has other exposures either prior to 1983 or anytime before 1994 is speculative. [Emphasis Added]

REVIEW COMMITTEE RECOMMENDATION

[106] In undated memorandum, the Intravenous Drug Use Committee stated as follows:

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

Pertinent facts

Pg 789/90 Transfused in 1983 – TB inconclusive 1 donor Negative, 1 donor – not locatable.

Pg 763 – August 1994 – HCV positive Ab test

Pg 683 – Note in 1994 medical history that while working in the needle exchange program had “several needlesticks”.

Pg 782 – Consultation written in January 1998 indicated IVDU last 5 years.

Pg 795 -- [The HCV Personal Representative] wrote in his affidavit that he did not believe she used IV drugs until after she moved to Kelowna in 1994.

With Reference to IVDU CAP paragraphs 7d and 8b: [the medical specialist] wrote “Her pattern of Disease certainly indicated Infection before 1994 however this individual has a heavy alcohol intake with such little damage almost 12 years after Blood transfusion, this could suggest that the infection was in fact more recent to the time of diagnosis. This is based on the fact that no fibrosis was seen in the liver biopsy and although it usually takes at least 15 years to see problems related to Hepatitis C; the lack of fibrosis in an individual with significant alcohol and drug problems is somewhat remarkable.”

Conclusion of Administrator’s review: The complete claim has been reviewed including the evidence of the medical expert. The HCV Infected Class Member has risk factors of transfusions in 1983 for which no HCV positive donor has been found, needlestick injuries while working at needle exchange and non-prescription intravenous drug use from some time before 1994. The Medical Expert’s opinion was that her disease level progression indicated she was infected “more recent to the time of diagnosis.” Based on this it is concluded that the claimant has not satisfied the criteria of the Court Approved protocol as the evidence provided does not support on a balance of probabilities that the HCV Infected Class Member was first infected with HCV by Blood transfusions received in Canada during the class period. Based on this the Administrator must reject the claim. [Emphasis Added]

DECISION OF ADMINISTRATOR

[107] On February 9, 2010, the Administrator denied the application for compensation, stating as follows:

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.

The medical records submitted with the Original Application indicated that the HCV infected Class Member had used Non-prescription intravenous drugs. The HCV Infected Class Member had risk factors of transfusions in 1983 for which no HCV positive donor has been found, needlestick injuries while working at

needle exchange and non-prescription intravenous drug use from some time before 1994. The Medical Expert's opinion was that her disease level progression indicated she was infected "more recent to the time of diagnosis". The Administrator has reviewed the entire claim including the opinion of the medical specialist as directed by the Courts. The medical evidence on file does not support that on a balance of probabilities she was infected for the first time with Hepatitis C from the Blood transfusions in 1983. Based on this conclusion the claim for her Estate must be rejected. [Emphasis Added]

REQUEST FOR REVIEW

[108] On March 16, 2010, the HCV Personal Representative delivered a Request for Review and indicated in an accompanying letter dated March 5, 2010 that he would provide supplementary evidence and submissions. In the Request for Review, he specified the following reasons for appealing:

This decision ignores the key evidence submitted which confirms that there is no evidence of any IV drug use prior to 1994 + no evidence of any needlestick injury. The only positive source of infection was the 1983 transfusion. I will elaborate in full submission to follow.

SUPPLEMENTARY EVIDENCE AND SUBMISSIONS

[109] By e-mail dated April 30, 2010, the HCV Personal Representative forwarded a letter to the Fund Counsel from Dr. H, the former family physician of the HCV Infected Class Member in City "A". The letter from Dr. H was dated April 22, 2009 and stated as follows:

I am writing to follow up on our recent telephone conversation concerning [the HCV Infected Class Member]. As I informed you, I retired from the practice of medicine in 2006 after some 45 years. During that time I was the family doctor to your family in [City "A"] [...]. I was [the HCV Infected Class Member's] family doctor from the time she was a child until she moved to [City "C"] in the early 1990's. During that time she had three children, [...].

Unfortunately I have no medical records for [the HCV Infected Class Member] as all medical records from the time I saw her as a patient have been destroyed.

You have asked about my knowledge of any evidence of IV drug use by [the HCV Infected Class Member] during the time she was my patient. While there

were periods when she was clearly abusing prescription drugs, I can confirm that I never saw or heard any evidence whatsoever of IV drug use by [the HCV Infected Class Member] while she was my patient. [Emphasis Added]

[110] In the e-mail dated April 30, 2010, the HCV Personal Representative also made certain submissions, including the statement that there was “no evidence whatsoever on the file that [the HCV Infected Class Member] did in fact have a needlestick injury from her work at the needle exchange”.¹⁰⁴

[111] By letter dated May 10, 2010, the Fund Counsel forwarded the supplementary evidence and submissions to the Administrator.

[112] By letter dated may 18, 2010, the Fund Counsel advised the Administrator that the HCV Personal Representative intended to deliver additional submissions and requested that the file be held in abeyance.

[113] In a letter to the Fund Counsel dated July 12, 2010, the HCV Personal Representative indicated that he was providing supplementary submissions to be forwarded to the Administrator for a reconsideration of the claim. The supplementary evidence consisted of the letter dated April 22, 2009 from Dr. “H”, reproduced in paragraph 109. There was no other evidence delivered. On the same date, the Fund Counsel forwarded the letter from the HCV Personal Representative to the administrator.

[114] The submissions made by the HCV Personal Representative were over six typed and single-spaced pages in length. I have carefully read the submissions and will not reproduce them due to their length.

¹⁰⁴ See paragraphs 18, 34 and 37 for evidence of needlestick injuries.

RECONSIDERATION OF DECISION BY ADMINISTRATOR

[115] By letter dated August 10, 2010, the Administrator advised the HCV Personal Representative that it had considered the supplementary material and had decided to maintain the decision to deny the claim. The reviewed decision stated as follows:

Introduction

1. This claim was rejected because the evidence provided did not support on a Balance of Probabilities that the HCV infected person was infected with HCV for the first time by the Blood transfusion received in the Class Period. The Representative for the Estate submitted a Request for Review asking for review of the rejection of the claim. As per the Rules of Appeal, Fund Counsel has forwarded the Claimant's Supplementary Submissions and Evidence on July 12, 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 HCV Personal Representative] consisted of his written submissions and two letters from Dr. ["H"] [her previous family physician] from childhood until she moved to [City "C"] in the early 1990s.¹⁰⁵

Summary of Supplementary Evidence

3. [The HCV Personal Representative] has stated in his submissions there is no evidence of non-prescription intravenous drug use until after his sister's HCV diagnosis. He has pointed out [the medical specialist's] portions of report that he believes are erroneous and also the Administrator's decision was incorrect due to lack of evidence of the IV drug use before the HCV diagnosis in 1994. [The HCV Personal Representative] has also stated there was no evidence of his sister abusing alcohol in the pre 1994 time frame.

Analysis and Decision

4. [The HCV Personal Representative] has indicated the Administrator erred in the rejections of the claim as there is no evidence of non-prescription intravenous drug use before the August 1994 diagnosis of HCV. There was no medical evidence submitted that contradicts the evidence that was previously reviewed by the Administrator in rendering the original decision on the claim. The letter written by [Dr. "H", her former family physician] in April 2009 indicates only that he does not recall seeing or hearing of any evidence of IV drug use while she was in his care. However this statement is

¹⁰⁵ Dr. "H" only wrote one letter, reproduced in paragraph 109.

contradicted in the medical records previously reviewed. (see pages 199 and 782).¹⁰⁶

5. [The HCV Personal Representative] indicated [the medical specialist] was incorrect when he commented on the timing of her alcohol abuse and thus his opinion on her disease progression. It is noted that [the HCV Infected Class Member's] timing if her problems with alcohol are noted throughout her medical records for example the notation on pages 35, 36, 83 and 204.

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 evidence in the medical records that indicates the IV drug use took place before her diagnosis with HCV in 1994 is considered reliable evidence. The opinion of the Specialist in HCV indicates that her infection with HCV was more recent to the time of diagnosis. Based on this it is concluded that the claimant has not satisfied the criteria of the Court Approved protocol as the evidence provided does not support on a balance of probabilities that the HCV Infected Class Member was first infected with HCV by Blood transfusions received in Canada during the class period. Based on this the Administrator must reject the claim.

[116] On September 10, 2010, the HCV Personal Representative elected to continue with the appeal.

¹⁰⁶ The evidence in the hospital records at pages 199 and 782 is reproduced respectively in paragraphs 78 and 87.

WRITTEN SUBMISSIONS ON APPEAL

[117] On September 14, 2010, the HCV Personal Representative delivered written submissions on appeal.¹⁰⁷ I have carefully read and considered those submissions in their entirety. The HCV Personal Representative submitted, in part, as follows:

The key, fundamental issue in this appeal is the continued serious error in the consideration by the Administrator, and earlier by [the medical specialist] of the issue of the time of alleged non-prescription IV drug use by [the HCV Infected Class Member]. Despite claims by the Administrator and speculation by [the medical specialist] to the contrary, *there remains no credible evidence whatsoever in the entire 852 page medical dossier that [the HCV Infected Class Member] ever used IV drugs prior to her diagnosis with Hepatitis C shortly after arriving in [City "A"] in the fall of 1994. [...]*

In paragraph 4 of the Administrator's 10 August Decision, he stated that the statement of [the HCV Infected Class Member] to [Dr. "H", her previous family physician] set out in the letter submitted in July (and not available to [the medical specialist] earlier) is "contradicted in the medical records previously reviewed." His only evidence to support this conclusion is a reference to "pages 199 and 782". Out of 852 pages he points these two pages as supporting his position that there was evidence of IV drug use by [the HCV Infected Class Member] prior to August 1994. Yet *neither* of these pages supports his rejection of [Dr. "H", her previous family physician's] observation.

Page 199 contains no reference whatsoever to IV drug use by [the HCV Infected Class Member] at any time. [The HCV Infected Class Member] writes on this page of her earlier history of childhood depression and self-destructive behaviour in her teenage years. She refers to an incident in which she injected Drano [drain cleaner] into her arms at the age of 15. This sad incident is certainly not any evidence of IV drug use prior to 1994. Why the Administrator would include it is unknown, but it is clearly an error.

Page 782 includes notes from Dr. ["M"] in January 1998 based on conversations with [the HCV Infected Class Member] at around that time. In this document he notes that [the HCV Infected Class Member] "states that she has been off of all drugs for approximately a year and a half and writes that she "has had a couple of episodes of IV drugs use, most recently five years ago". Yet these statements are totally lacking in evidentiary weight and credibility, given the many other contradictory statements and medical evidence in the years after 1995 on this subject. For example, at page 382 another hospital record from July 1997, some six months earlier than the page 782 reference, has [the HCV Infected Class Member] stating that the last use of IV drugs, of "which there were 4 times in my

¹⁰⁷ In an e-mail dated September 17, 2010, the HCV Personal Representative amended the wording in the second paragraph of the written submissions on appeal due to a suggestion made by the Fund Counsel in a letter of the same date.

life”, was 8 months ago, or late 1996. Not the “five years earlier” or January 1993. As well, Dr. [...] notes in a report at page 208 that [the HCV Infected Class Member] was admitted to hospital for among other things heroin use in December 1995, long after the January 1993 reference at page 782. So there is absolutely no credibility to that statement, it is certainly not medical evidence sufficient to rebut the clear statements of both [her previous family physician] and [the HCV Infected Class Member] brother as well as the absence of any other evidence, including any medical evidence, of IV drug use prior to diagnosis in 1994.

Thus neither reference by the Administrator, at pages 199 or 782, supports his position.

At paragraph 5 of the Administrator’s 10 August decision, he rejects the supplementary submissions concerning [the medical specialist] errors in considering the timing of [the HCV Infected Class Member] alcohol abuse. In doing so he refers to pages 35, 36, 83 and 204. Yet once again he errs in these references. None of these pages contains any evidence to rebut the central point of the earlier submission, namely that [the medical specialist] medical speculation re [the HCV Infected Class Member] disease progression was erroneously based on his assumption that she had been abusing alcohol for many years prior to the 1994 diagnosis. All of the references cited by the Administrator only confirm that she had taken up drinking shortly before arriving in [City "A"] following the sudden death of her husband [...]. She had in fact been clean and sober for 11-12 years following the birth of her daughters.

It is therefore respectfully submitted that the “Analysis and Decision” set out in operative paragraphs 4 and 5 of the 10 August decision of the Administrator are both fundamentally flawed, and in consequence his rejection of the claim should be overturned. [The HCV Infected Class Member] was diagnosed with Hepatitis C in 1994. She met the traceback protocol with respect to the blood transfusion during the Class Period. There is no evidence whatsoever of any IV drug use between that date and her diagnosis. As [the medical specialist] himself underlines in his 19 January 2010 letter “Whether in fact she had other exposures either prior to 1983 or anytime before 1994 is speculative”. Surely it is totally unjust and outside the framework of the Settlement Agreement to reject [the HCV Infected Class Member] claim based, not on medical evidence, but on speculation. That the two grounds set out in the Administrator’s 10 August decision are both based on serious errors of fact is equally serious. [...].

ISSUE

[118] The issue to be determined on appeal is whether the decision of the Administrator to deny the application for compensation was reasonable on the basis of the evidence.

ANALYSIS

Applicable Provisions of the Settlement Agreement and the Non-Prescription Intravenous Drug Use Protocol

[119] Section 3.01 of the Settlement Agreement contains the eligibility requirements for HCV Infected Class members who have died. In cases involving a question concerning the use of non-prescription intravenous drugs, section 3.01 must be read in conjunction with the applicable parts of section 2.01, as well as the provisions of the Non-Prescription Intravenous Drug Use Protocol. The relevant portions of section 3.01 state as follows:

3.01 Eligibility – HCV Infected Class Members Who Have Died

(1) A person claiming to be the HCV Personal Representative of an HCV Infected Class Member who has died must deliver to the Administrator, within three years after the death of such HCV Infected Class Member or within two years after the Implementation Date, whichever event is the last to occur, an application form prescribed by the Administrator together with:

(a) an original or notarial copy of the death certificate of the HCV Infected Class Member; and

(b) unless the required proof has already been previously delivered to the Administrator:

(i) if the deceased was a Primarily-Infected Class Member, the proof required by Sections 2.01 and 2.03

[...]

(4) For the purposes of Sections [sic] 3.01(1) the statutory declaration required by Sections 2.01(1)(c) and 2.02(1)(a) must be made by a person who is or was sufficiently familiar with the HCV Infected Class Member to declare that to the best of his or her knowledge, information and belief the HCV Infected Class member did not use non-prescription intravenous drugs and, in the case of Primarily-Infected Persons that they were infected with HCV during the Class Period. If such a statutory declaration cannot be provided because the HCV Infected Class member used non-prescription intravenous drugs, the HCV Personal Representative must deliver to the Administrator other evidence establishing on a balance of probabilities that:

- (a) A Primarily-Infected Person was infected for the first time with HCV by receiving Blood in Canada during the Class Period.
[...]

[120] 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, in part, 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;

[...]

(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] [...] 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]
[...]

The reasonableness of the decision made by the Administrator

[121] In order to provide a context for the analysis, it is important to begin with an overview of the evidence in the hospital records and the inferences that may be drawn from it.

[122] The evidence in the hospital records reveals that the life of the HCV Infected Class Member was tragically affected by difficult family circumstances, alcohol and drug abuse, a personality disorder and physical illness. She was born in 1956 as the third of four children in a family that was described as “dysfunctional”.¹⁰⁸ Her father was an abusive alcoholic.¹⁰⁹ A medical professional noted that she appeared to have led a “fairly chaotic life during teens, early 20’s – admits to alcoholism, some street drug abuse,

¹⁰⁸ See paragraph 25.

¹⁰⁹ An overview of the background of the HCV Infected Class Member and her family was provided in the psychiatric Consultation Report reproduced in paragraph 77.

relationship problems [...].”¹¹⁰ Indeed, she started using alcohol and drugs at the age of 12 (approximately 1968).¹¹¹ At the age of 13, she slashed her wrists; at 15, she injected Draino into both of her arms.¹¹² She was married four times.¹¹³ Her first marriage was at the age of 15 (in approximately 1971). She got married because she “wanted out of the family home”.¹¹⁴ When she was 16 years old, her mother committed suicide at the age of 47.¹¹⁵ Her first marriage lasted for 1½ years (until approximately early 1973). At the age of 17, she was married for the second time (in or about 1973). The second marriage lasted for three years, until she was 20 years old (in or about 1976). During the course of her second marriage, she gave birth to a son. Following the separation, her son lived with her for a period of time. However, “[...] due to her substance abuse and unstable lifestyle, she asked [her second husband from whom she was separated] to take over responsibility for their son”. She was married for a third time in or about 1979 or 1980, when she was around 23 or 24 years old; the marriage lasted for about 11 years.¹¹⁶ During the course of her third marriage, she was “clean and sober” for a period described variously as 10 years and 12 years.¹¹⁷ She went to college, worked, gave birth to and raised her two daughters, and started the Needle Exchange program in City “B”. During the Caesarean section birth

¹¹⁰ See paragraph 75.

¹¹¹ See paragraph 62.

¹¹² See paragraph 78.

¹¹³ The timing of the marriages of the HCV Infected Class Member was referred to in various records. A detailed overview was provided in the Consultation Report dated August 15, 1996, reproduced in paragraph 77. All references in paragraph 122 to the timing of the marriages of the HCV Infected Class Member are based on information in the Consultation Report, unless otherwise noted.

¹¹⁴ See paragraph 75.

¹¹⁵ See paragraphs 76 and 77.

¹¹⁶ The timing of the third marriage was not specified anywhere in the records. However, the records from Hospital “B” concerning the HCV Infected Class Member’s Caesarean section surgery in 1983 for the birth of her third child, described in paragraph 102, indicated that she had a 6 year old son and a 2½ year old daughter. The 2½ year old daughter, who was the first child of the HCV Infected Class Member and her third husband, was therefore born in 1980 or 1981.

¹¹⁷ See paragraphs 57, 75, 76 and 87.

of her second daughter in 1983, she was transfused with two units of blood.¹¹⁸ Her third husband died suddenly of heart failure in 1992 at Christmas.¹¹⁹ Although she was “clean and sober” during the marriage, she “relapsed” after his death (at the end of 1992 or early in 1993).¹²⁰ Before her third husband died, she met the person who would become her fourth husband. Shortly after the death of her third husband, she married for a fourth time. She and her fourth husband were married for a period of 2½ years and moved from City “A” to City “C” in about mid-1994.¹²¹ They separated sometime between January and May 1995.¹²²

[123] No medical and hospital records were delivered for the period between the 1992 death of the HCV Infected Class Member’s third husband and her move to City “C” in 1994 with her fourth husband. A letter from Dr. “H”, her former family physician in City “A”, indicated that his records were destroyed. However, there was nothing in the claim file to indicate whether the HCV Personal Representative had made a request for the release of records from any hospital in City “A” for the period between the end of December 1992 and early 1994.

[124] The records from Hospital “A” in City “C”, when considered in their totality, establish that the HCV Infected Class Member was severely addicted to drugs and

¹¹⁸ See paragraph 102.

¹¹⁹ See, for example, the Emergency Nursing Assessment Record dated May 21, 1995, reproduced in paragraph 49. The HCV Infected Class Member stated that her third husband had died 3 years earlier at Christmas. In a Request for Consultation in 1996, reproduced in paragraph 75, she stated that her husband had died four years earlier.

¹²⁰ See paragraphs 62, 75 and 87.

¹²¹ See paragraph 77 for the length of the fourth marriage. The numerous hospital records beginning in August 1994 indicated that the HCV Infected Class Member lived in City “C” with her fourth husband at least as early as the beginning of August 1994. Other evidence indicated that she was married to her fourth husband for 2½ years, and it is clear that he separated from her sometime in early 1995. The evidence therefore indicates that they were married shortly after the death of her third husband.

¹²² The last notation of the name of the fourth husband as the “next of kin” in the hospital records was on January 1, 1995. On the next admission, on May 21, 1995, he was not listed.

alcohol when she sought medical assistance at the hospital beginning in August of 1994 and consistently denied or tried to hide her addiction to drugs. Although reference will only be made to some of the evidence concerning her denial of her addiction to drugs, the hospital records contained numerous instances of such behaviour, as detailed in many places in the outline of the facts.

[125] Following her arrival in City “C” in 1994, the HCV Infected Class Member had a total of 11 Emergency Department visits and hospital admissions in the last six months of 1994 alone. She attended at the Emergency Department and was hospitalized from August 8 to 14, 1994 for abdominal pain.¹²³ Over the course of several days, she was treated with the narcotic Demerol for the pain. She advised that she drank alcohol “infrequently” and gave no indication that she had any sort of a drug problem. However, she told Dr. “M” that she had suffered “several needlestick injuries” due to her work with the “IV drug user needle exchange” in City “B”.¹²⁴

[126] During her next hospital admission, from September 5 to 12, 1994, the family physician of the HCV Infected Class Member in City “C” had a disagreement with her concerning the use of narcotics and tranquilizers in the hospital.¹²⁵ In particular, the HCV Infected Class Member wanted to continue with the intramuscular administration (i.e. injection by syringe) of Demerol for as long as she felt that it was necessary, and the physician wanted her to take Darvon orally due to the absence of any “outward stigmata of acute pain”. Dr. “H”, her former family physician in City “A”, advised the family physician in City “C” that the HCV Infected Class Member “liked her drugs”; he was

¹²³ See paragraphs 13 to 18.

¹²⁴ See paragraph 18.

¹²⁵ See paragraph 25.

“unaware of any other drug addiction/abuse history”. The family physician in City “C” began to suspect that substance abuse and a psychiatric disorder were the underlying problems and, due to the disagreement with the HCV Infected Class Member concerning the intramuscular administration of narcotics, he withdrew as her family physician.¹²⁶ On September 20, 1994, approximately a week after her previous discharge from the hospital, she returned for abdominal pain. Although the physician on duty gave her Demerol, he refused to give her a prescription for analgesics. A week later, on September 27, 1994, she returned to the Emergency Department and requested morphine rather than Demerol.¹²⁷ She was given a shot of morphine, even though she did not “look too sick” and was released. Two days later, on September 29, 1994, she returned to the Emergency Department. This time, the physician wrote “Drug abuse” as the diagnosis and noted that there would be “no injectable narcotic analgesics for her apparently chronic RUQ pain”.¹²⁸ The next day, September 30, 1994, she called Dr. “R” at home to complain about her inability to get analgesics for pain. He agreed to meet her at the Emergency Department, but she did not show up.¹²⁹ On October 2, 1994, she was admitted to the hospital for pain and again requested the intramuscular administration of analgesics.¹³⁰ On October 5, 1994, she made another request for the intramuscular administration of medication and “was unable to provide a rationale for requesting IM

¹²⁶ See paragraph 25.

¹²⁷ See paragraph 30.

¹²⁸ See paragraph 31.

¹²⁹ See paragraph 32.

¹³⁰ See paragraph 35.

injection”.¹³¹ On October 19, 2004, it was noted that there were “ongoing problems with analgesic demand.”¹³²

[127] As indicated in the preceding paragraph, the HCV Infected Class Member requested the intramuscular injection of narcotics or drugs on three separate dates between September 9 to October 5, 1994,. There was also a diagnosis by a physician of “drug abuse” and a note prohibiting “injectable narcotic analgesics” for her.

[128] On December 16, 1995, the HCV Infected Class Member was admitted to the hospital following a suicidal gesture; the diagnosis was “Alcohol and heroin withdrawal”.¹³³ A nursing record of the same date recorded two statements made by the HCV Infected Class Member: first, she had used heroin for two months; and second, no information was to be released to her brother (the HCV Personal Representative) or anyone else.¹³⁴ Two days later, on December 18, 1995, she denied the use of heroin and acknowledged alcohol use only.¹³⁵

[129] From August 13 to 20, 1996, the HCV Infected Class Member was admitted to the hospital for a suicidal gesture.¹³⁶ She denied any drug use or drinking, but admitted a lengthy history of chemical dependency; she stated that she was “clean” for eight months.¹³⁷ Dr. “P”, her family physician at the time, indicated that she had a “strong history of drug seeking behaviour”; he had sent “fan outs”.¹³⁸ A report from the Chemical

¹³¹ See paragraph 43.

¹³² See paragraph 44.

¹³³ See paragraph 58.

¹³⁴ See paragraph 59.

¹³⁵ See paragraph 63.

¹³⁶ See paragraphs 66 and 67.

¹³⁷ See paragraph 69.

¹³⁸ See paragraph 70.

Dependency Recovery Program indicated that she eventually admitted not using prescription medication as prescribed and denied knowledge of the addictive effects of the medication. However, the Chemical Dependency Team worker disbelieved the denial of the HCV Infected Class Member, noting that her purported unawareness of the addictive nature of medication was “unlikely” in view of “her extensive history of substance abuse” and “apparent work at the street level” in City “B”.¹³⁹ A report prepared in a Request for Consultation described her background and noted that she appeared “to have led fairly chaotic life during teens, early 20’s – admits to alcoholism, some street drug abuse, relationship problems [...]”.¹⁴⁰ In the next paragraph of the report, the author addressed the situation “during recent months” and noted, among other things, that the HCV Infected Class Member claimed to be “clean of street drugs/sober x 8/12”.

[130] Hospital records from August 1996, described in the preceding paragraph, recorded two statements made by the HCV Infected Class Member concerning street drugs”: first, she was “clean” of “street drugs” for eight months; and second, she admitted to “some street drug abuse” during her teens and early 20’s. With respect to her statement that she was clean of street drugs for eight months, it is significant to note that she was admitted to the hospital six months earlier, in December 1985, for problems including heroin use. The evidence therefore leads to the inference that she used the term “street drugs” to include heroin. Significantly, she also indicated that she had engaged in “some street drug abuse” during her teens and early twenties.¹⁴¹ I note that in the further appeal

¹³⁹ See paragraph 73.

¹⁴⁰ See paragraph 75.

¹⁴¹ See also paragraph 78. At the age of 15, the HCV Infected Class Member injected herself in both arms with Drano. Although that evidence does not indicate the use of non-prescription intravenous drugs, it does demonstrate that she used a syringe on herself within the timeframe that she used street drugs (i.e. in her teens and early 20’s).

to the Court in Claim File 07-02070, released on August 16, 2010, Chief Justice Winkler observed as follows:

Presumably, this use of the term “street drugs” was not intended to include prescription drugs.

[131] The evidence in the affidavit of the HCV Personal Representative and the letter from Dr. “H”, the former physician of the HCV Infected Class Member in City “A”, reproduced respectively at paragraphs 100 and 109, must next be considered.

[132] With respect to the affidavit of the HCV Personal Representative, I accept that he has made his affidavit in good faith and honestly believes that the HCV Infected Class Member did not use non-prescription intravenous drugs before her diagnosis with Hepatitis C. In his affidavit, he stated, among other things, that the HCV Infected Class Member had “categorically denied” ever taking non-prescription intravenous drugs before her diagnosis with Hepatitis C. I do not doubt at all that she denied her drug use to him. She also undoubtedly hid it well, given her documented history of denial and lies about her drug addiction. I also note that, on the occasion when she was admitted to the hospital in December 1995 for problems including heroin use, she gave specific instructions that no information was to be released to her brother, the HCV Personal Representative, or anyone else.¹⁴² Finally, the HCV Personal Representative stated in his affidavit that the HCV Infected Class Member went through “a very difficult time and started drinking and abusing prescription drugs again [...] around 1995-1998 in [City “C”]”. It is important to recall that the evidence clearly establishes that the HCV Infected Class Member relapsed into alcohol and drug addiction in late 1992 or early 1993 while living in City “A”.

¹⁴² See paragraph 59.

[133] With respect to the letter from Dr. “H”, he indicated that there were “periods when [the HCV Infected Class Member] was clearly abusing prescription drugs”. He did not specify when those periods occurred, perhaps due to the destruction of his records. He further stated that he had never seen or heard “any evidence whatsoever of IV drug use” by the HCV Infected Class Member. However, he did not indicate in the letter that he was aware of her use of street drugs as a teenager and young adult or that he had seen her as a patient in the crucial period of her relapse following the death of her third husband. In any event, taken at its highest, the evidence of Dr. “H” indicates that he was unaware of any non-prescription intravenous drug use by the HCV Infected Class Member. As indicated previously, the HCV Infected Class Member denied or minimized her drug use to medical personnel. In the circumstances, it is understandable that Dr. “H” would be unaware of any non-prescription intravenous drug use.

[134] I have considered the assertions of the HCV Personal Representative and Dr. “H” that the HCV Infected Class Member did not use non-prescription intravenous drugs before her diagnosis with Hepatitis C. I have concluded that, when their evidence is considered in the context of the totality of the evidence, it is entitled to little or no weight.

[135] The HCV Infected Class Member made two specific statements to physicians concerning the timing of her non-prescription intravenous drug use. First, on July 9, 1997, a specialist recorded in the “History” part of the endoscopy report various statements made by the HCV Infected Class Member, including a statement that the “Last IV use of drugs of which there was ‘4 times in my life’ was 8 months ago”.¹⁴³ Second, in a letter dated January 22, 1998, Dr. “M”, a specialist in hepatology, recorded a statement

¹⁴³ See paragraph 85.

made to him by the HCV Infected Class Member that “[...] she has had a couple of episodes of IV drugs use, most recently five years ago” and “apparently did not share needles”.¹⁴⁴

[136] The HCV Personal Representative submitted on appeal, among other things, that the statement made by the HCV Infected Class Member to Dr. “M” in 1998 concerning her “episodes of IV drug use, most recently five years ago [in 1993]” was “totally lacking in evidentiary weight and credibility, given the many other contradictory statements and medical evidence in the years after 1995 on this subject”. In particular, he referred to her statement to the specialist recorded in the endoscopy report on July 9, 1997 that she had “last” used non-prescription intravenous drugs “8 months ago”. He also relied on the evidence in his own affidavit and the letter of the former family physician Dr. “H” and submitted that the statement made by the HCV Infected Class Member to Dr. “M” was “certainly not medical evidence sufficient to rebut” their evidence. Finally, he stated that there was “an absence of any other evidence, including medical evidence, of IV drug use prior to diagnosis”.

[137] I cannot accept the submissions of the HCV Personal Representative that the statement made by the HCV Infected Class Member to Dr. “M” concerning her use of non-prescription intravenous drugs “most recently five years ago [in 1993]” was “totally lacking in evidentiary weight and credibility”. The statements made by the HCV Infected Class Member to Dr. “M” and to the specialist conducting the endoscopy each contained two discrete elements: an admission of non-prescription intravenous drug use in a particular time frame and a statement that the use at that particular time was the “last” or

¹⁴⁴ See paragraph 87.

“most recent”. In particular, she told the specialist in endoscopy in 1997 that she had last used intravenous drugs eight months previously (in 1996) and told Dr. “M” in 1998 that her “most recent” use of intravenous drugs was five years ago (in 1993). The fact that she chose, for whatever reason, to tell two different specialists on occasions a year apart that each admitted use of intravenous drugs was her “last” or “most recent” does not undermine the actual admissions of use that she made for the two different time periods, namely 1993 and 1996.

[138] Alternatively, I have concluded that each admission of non-prescription intravenous drug use is supported by other evidence. With respect to the statement made by the HCV Infected Class Member to the specialist in endoscopy in 1997, her admitted use of non-prescription intravenous drugs eight months previously is substantiated by the evidence that she had sought treatment for problems including heroin use in December of 1995.¹⁴⁵ With respect to her statement to Dr. “M” in 1998 that she had used non-prescription intravenous drugs in 1993, the evidence indicated that the HCV Infected Class Member was addicted to alcohol and used street drugs as a teenager and young adult. She relapsed into severe drug and alcohol addiction in late 1992 or early 1993. When she moved to City “C” in 1994, she repeatedly sought narcotics as medical treatment at the hospital August to October 1994 and denied the existence of her drug addiction to medical personnel. Her numerous attendances at the hospital seeking injections of narcotics for pain quickly raised addiction concerns. Furthermore, her repeated requests for the intramuscular administration of hospital narcotics in September and October 1994 were an indication of both drug addiction and experience in taking

¹⁴⁵ See paragraphs 56 to 62.

drugs by syringe. All of this evidence leads to the inference that she was using non-prescription intravenous drugs as a result of her severe drug addiction at least at the time of her move to City “C” in 1994. The evidence therefore lends credence to her statement to Dr. “M” that she had used intravenous drugs in 1993, given her relapse into drug abuse in that period and her continuing addiction in the ensuing years.

[139] The HCV Personal Representative also submitted on appeal that the opinion of the medical specialist on disease progression was “erroneously based on his assumption that [the HCV Infected Class Member] had been abusing alcohol for many years prior to the 1994 diagnosis”. I cannot agree with this statement. With respect to the issue of disease progression, the medical specialist prefaced his opinion by stating that there were “many inconsistencies” in the hospital records “related to when alcohol was being abused and stopped and certainly alcohol intake was quite considerable at, around and prior to the diagnosis of hepatitis”. The rest of his opinion with respect to the issue of disease progression must be read in the context of the introductory sentence in which he referred to the “considerable” alcohol intake “at, around and prior to the diagnosis of hepatitis”. He expressed the opinion that the pattern of disease indicated an infection before 1994 and further stated that “the heavy alcohol intake with such little damage almost 12 years after transfusion could suggest that the infection was in fact more recent to the time of diagnosis”. In making the latter statement, the medical specialist was clearly referring to the “heavy alcohol intake” amply demonstrated in the evidence during the relapse period from late 1992 or early 1993 until after the Hepatitis C diagnosis in 1994. In short, I am satisfied that the opinion expressed by the medical specialist was supported by the evidence.

[140] The HCV Personal Representative also made submissions concerning the last line of the medical specialist's opinion in which he stated that "whether she in fact has other exposures either prior to 1983 or anytime before 1994 is speculative". The HCV Personal Representative properly submitted that it would be unjust to reject the application for compensation on the basis of speculation. However, it must be noted that the last sentence of the medical specialist's lends itself to two interpretations: the reference to "other exposures" prior to 1983 or 1994 may indicate a reference to the possibility of other risk factors for Hepatitis C in periods for which there are no medical records; or, the reference may be intended to refer to other exposures involving non-prescription intravenous drug use. I would agree that it would be speculative whether the HCV Infected Class Member had exposure to any other risks for Hepatitis C in the periods prior to 1983 or from 1983 to her move to City "C" in 1994. However, in the event that the medical specialist intended to indicate that it was speculative whether there was other non-intravenous drug use in the period before 1983 or in the relapse period before 1994, I must disagree on the basis of the evidence. For reasons previously given, there is evidence to indicate that the HCV Infected Class Member used non-prescription intravenous drugs during two time periods prior to her diagnosis with Hepatitis C: before 1983 in her teens and early 20's, and also between the death of her third husband in late 1992 and the date of diagnosis in 1994.

[141] The HCV Personal Representative stated in his affidavit that, if the HCV Infected Class Member had used non-prescription intravenous drugs, she would have "done so in a safe way", as she was aware of the "importance of using clean needles and not sharing needles. The medical specialist addressed this issue in his opinion and stated as follows:

[...] even if she did use clean needles it is often not known that people who share drugs, paraphernalia etc can be infected with hepatitis C even if clean needles are used.

[142] Finally, it should be noted that the needlestick injuries described by the HCV Infected Class Member on various occasions also constitute a risk factor for Hepatitis C.¹⁴⁶

[143] I have carefully reviewed all of the evidence in the context of the eligibility requirements in sections 2.01 and 3.01 of the *Settlement Agreement* and the applicable provisions of the *Non-Prescription Intravenous Drug Protocol*. For the reasons given, it was reasonably open to the Administrator, in weighing the totality of the evidence, to conclude that the HCV Personal Representative had not established on a balance of probabilities the infection of the HCV Infected Class Member for the first time with Hepatitis C by blood transfusions received in Canada during the Class Period. Indeed, I would have reached the same conclusion as the Administrator in this matter on the basis of the totality of the evidence.

Compensation under another program or agreement

[144] The Claimant has received compensation under the *Red Cross Settlement*. 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

¹⁴⁶ See, for example, paragraph 18.

by the member of the review committee in the context of the provincial agreement.

[145] 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.¹⁴⁷

CONCLUSION

[146] The appeal is dismissed.

"D. McGillis"

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

DATED October 25, 2010

TO: HCV Personal Representative
Fund Counsel
Administrator

¹⁴⁷ 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).

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: 07-02699

AMENDMENT TO REASONS FOR DECISION

[1] Words were inadvertently deleted from Footnote 14 relating to paragraph 10 of the Reasons for Decision. Footnote 14 should read as follows:

14. See page 763. A laboratory record printed on January 15, 2002 indicated that blood collected from the HCV Infected Class Member on August 10, 1994 was "Reactive" for the Hepatitis C antibody.

"D. McGillis"

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

DATED October 26, 2010

TO: HCV Personal Representative
Fund Counsel (copy of Notice for information only)
Administrator (copy of Notice for information only)

IN THE MATTER OF an appeal filed
pursuant to the *Rules for Appeals* under
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Appeals Officer

DATED October 26, 2010

TO: HCV Personal Representative
Fund Counsel (copy of Notice for information only)
Administrator (copy of Notice for information only)