

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: 08-12630

**REASONS FOR DECISION**

**INTRODUCTION**

[1] The Claimant has appealed a decision of the Administrator dated June 7, 2010 in which the application for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied. The Claimant, who had used non-prescription intravenous drugs, failed to satisfy the Administrator on a balance of probabilities that he was infected with HCV for the first time by a blood transfusion in Canada during the Class Period.

**FACTS**

[2] On June 10, 2008, the Claimant delivered an application for compensation under the *Settlement Agreement*.

[3] In the General Information Form, the Claimant stated that he 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 various boxes and provided details: non-prescription intravenous drug use – “1996 to 2005 cocaine”; tattoos – “1976 (3) 1993 (4) 1996 (3) 2007 (3)”;<sup>1</sup> intra-nasal drug use – “[Dates] 1989 to

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<sup>1</sup> The Claimant delivered a letter dated June 8, 2008 providing additional details concerning his tattoos.

2005 [Type of drugs] cocaine [Shared paraphernalia] nil". The Claimant has not received compensation under any other settlement or plan. He was born in 1958.

[4] The Treating Physician Form was completed by a specialist in gastroenterology and internal medicine; he had treated the Claimant for 2.5 years. He indicated, among other things, that the Claimant was at Disease Level 3. In response to question 1 in the "Section F – HCV Disease Verification" part of the form, he checked the boxes to indicate non-prescription intravenous drug use and tattoos as risk factors for the Hepatitis C virus. In response to question 3 in that part concerning whether there was anything in the Claimant's medical history or clinical presentation to indicate that he had used non-prescription intravenous drugs at any time, the treating physician checked the box "Yes" and wrote "IVDU post blood transfusions".

[5] In an unsworn Statutory Declaration Form, the Claimant declared that he had used non-prescription intravenous drugs. The Claimant subsequently delivered another Statutory Declaration, sworn on August 27, 2008, that was otherwise identical to the previous one.

[6] In an unsigned Blood Transfusion History Form, the Claimant stated that he had received five blood transfusions in April 1972 for the loss of his right hand. He specified the unit numbers of the transfused blood. The Claimant subsequently delivered a Blood Transfusion Form, signed on August 27, 2008, that was otherwise identical to the previous one.

[7] In support of the application for compensation, the Claimant delivered a laboratory report dated April 19, 2006 confirming positive tests for the Hepatitis C

Antibody and Hepatitis C RNA (“PCR” test). He also delivered documents from a provincial plan application consisting of a Request for Records Search, together with a Blood Transfusion Requisition, and a provincial plan Final Report.

[8] In the Request for Records Search from the provincial plan, a hospital confirmed that the Claimant was transfused with two units of blood on April 21, 1972. The Canadian Blood Services indicated that the two units were traced back and the donors could not be located. A Blood Transfusion Requisition dated April 21, 1972 from a hospital was included and specified the numbers of five units of blood that were requisitioned for the Claimant.

[9] The provincial plan Final Report dated February 2, 2007 indicated that there were “no records for 1972”.

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

[10] In a decision dated October 22, 2008, the Administrator advised the Claimant that the application for compensation would be rejected due to his use of non-prescription intravenous drugs, unless he provided further evidence to establish his eligibility on the balance of probabilities. The Administrator included a Further Evidence of First Infection Form for the Claimant to return 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 Added]

[11] The “How to Proceed” document contained, among other things, the following paragraphs concerning an affidavit and the health records required by the Administrator:<sup>2</sup>

### **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. [...]

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<sup>2</sup> 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.

- 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 18<sup>th</sup> 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. [Emphasis Added]

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

[12] On November 1, 2008, the Claimant signed the Further Evidence of First Infection Form indicating his intention to provide further evidence that he was infected with HCV for the first time by a blood transfusion.

[13] On November 12, 2008, the Claimant delivered further evidence of first infection to the Administrator. The evidence included a medical history, an affidavit from the Claimant and a copy of his criminal record.

[14] The affidavit of the Claimant stated as follows:

Paragraph # 1

Address: [deleted]

Paragraph # 2

Date of birth: [deleted]

Paragraph # 3

I was diagnosed in December 1991 that I had Hepatitis. However, I did get notified by the Canadian Red Cross that I had Non A Non B Hepatitis in my blood in 1984 or 1985.

## Paragraph # 4

I smoked marijuana in 1976. I did snort cocaine occasionally by myself using a \$50 or a \$100 bill as a straw prior to mid 90's. I was not about to share those bills with anyone.

In the mid 90's I did use Intravenous Drugs approximately once a week until 2005 All use was done in private as I felt ashamed of being a drug user.

## Paragraph # 5

I obtained my needles from a local pharmacy.

## Paragraph # 7

Not once did I ever share needles with anyone. I did all drug use alone.

## Paragraph # 8

Yes, I did give blood in 1984 in [...]. I was sent a letter by the Canadian Red Cross that I could not give blood anymore as they said I had Hepatitis Non A Non B.

## Paragraph # 9

Yes, I was convicted of a criminal offence in 1976 for theft under. This should show on my Police report enclosed. Assault, 3 Driving under the influence of alcohol.

## Paragraph # 10

As I was not an intravenous drug user prior to being diagnosed in 1984 by the Red Cross I feel that there was no other way that I could have contracted Hepatitis C. As under the settlement agreement I would automatically qualify because I receive multi-blood transfusions, five or six in all. I feel it is the administrator's responsibility to prove that any one of these five or six units was not contaminated.

[15] The criminal record of the Claimant consisted of six convictions between 1976 and 1990, including three for impaired driving. There were no convictions for drug related offences.

[16] By letter dated August 2, 2009, the Claimant advised the Administrator that he required additional time to obtain medical records.

[17] By letter dated August 17, 2009, the Administrator extended the time for delivering further evidence to February 2, 2010 and stated as follows:

We acknowledge receipt of your letter dated August 2, 2009.

We understand you are in the process of collecting documentation, and require some additional time to collect and assess this further documentation. The Administrator is agreeable to extending the time you have to submit any further evidence, to February 2, 2010.

Should the Administrator not hear from you by February 2, 2010, your claim will be denied.

[18] The Claimant did not deliver any further evidence.

## **DECISION OF ADMINISTRATOR**

[19] On June 7, 2010, the Administrator denied the application for compensation, stating as follows:

### **Criteria for Class Membership**

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

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

### **Reasons for Decision**

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

Your claim was recently reviewed as part of an audit of inactive claims. In your original application both you and your doctor indicated you had a history of non-prescription intravenous drug use. The Administrator notified you in writing that your claim would be rejected unless you returned the signed Further Evidence of First Infection Form in which you indicate whether you want to provide further evidence which establishes on the balance of probabilities that you were infected for the first time with HCV by a Blood transfusion received during the Class Period. You signed your Further Evidence of First Infection Form indicating that you wanted the six months to provide further evidence to establish on the balance of probabilities that you were infected for the first time with HCV by a Blood transfusion received during the Class Period. At your request you were granted a time extension to gather your medical records. No further medical records have been submitted and we have not received any further communication from you.

*Paragraph 5 of the Non-Prescription Intravenous Drug Protocol reads as follows:*

*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.*

Based on this article the Administrator must reject your claim because your file is incomplete as you have not submitted the required Further Evidence in the time allotted to do so.

The Administrator carefully reviewed all the material that you provided to support your claim. A Committee reviewed your claim and concluded that you do not meet the criteria for Class membership as noted above. [Emphasis Added]

## **REQUEST FOR REVIEW**

[20] On July 7, 2010, the Claimant delivered a Request for Review and specified the reasons for appealing as follows:

I always used brand-new needles and I feel the Administrator did not prove that I did not receive tainted blood in my multi transfusions.

## **SUPPLEMENTARY SUBMISSIONS**

[21] In a letter dated October 5, 2010, the Fund Counsel summarized information received from the Claimant concerning his inability to obtain medical records and stated as follows:

Further to our telephone conversation of today, I confirm that you wish to continue your appeal; however, you indicated that you were unable to obtain copies of your medical records for the following reasons:

- Dr. [name deleted], who was your family doctor in [place deleted] for most of your life, passed away in or about 1999. Your records are unavailable;
- Your health records at the [first ] Hospital have been destroyed. You requested that they provide you with a letter to confirm this but they have not done so;
- Your health records at the [second] Hospital (now known as [name delted] Health System) have been destroyed; and
- The [third] Hospital requested a fee of 150\$ and you are unable to pay this fee as you are on [a disability program]. You were admitted to that hospital in or around 1985 for approximately 1 week.

As discussed, I will forward your complete appeal file to the Appeals Officer for determination.

## ISSUE

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

## ANALYSIS

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

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

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

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

## 2.01 Eligibility – Primarily-Infected Class Member

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

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

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

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

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

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

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

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

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

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

[21] In circumstances where a claimant cannot comply with paragraph 2.01(1)(c) of the *Settlement Agreement* by making a declaration that non-prescription intravenous drugs were never used, the provisions of the *Non-*

*Prescription Intravenous Drug Use Protocol* apply to the claim. Since the Claimant admitted in the declaration the use of non-prescription intravenous drugs, the *Non-Prescription Intravenous Drug Protocol* therefore applies to the gathering of evidence and assessment of the claim. For the purposes of the present appeal, it is necessary to reproduce only the following parts of the *Non-Prescription Intravenous Drug Use Protocol*:

**NON-PRESCRIPTION INTRAVENOUS  
DRUG USE PROTOCOL**

1. The Protocol applies where:
  - a. there is an admission that the HCV Infected Class Member used non-prescription intravenous drugs;
  - b. there is no statutory declaration as required under the Settlement Agreement, that the HCV Infected Class Member has never used non-prescription intravenous drugs; or
  - c. despite receipt of a statutory declaration, there is other evidence that the HCV Infected Class Member has used non-prescription intravenous drugs.
2. The Administrator shall conduct a Traceback under the Traceback Protocol. If the result of a Traceback investigation is such that the Traceback Protocol requires the Administrator to reject the claim, the Administrator shall reject the claim.
3. If a Traceback is not required to be conducted under the Traceback Protocol or the claim is not rejected under the Traceback Protocol, the Administrator shall:
  - a. obtain such additional information and records pursuant to section 2.03 of the Settlement Agreement as the Administrator in its complete discretion considers necessary to inform its decision; and
  - b. obtain the opinion of a medical specialist experienced in treating and diagnosing HCV as to whether the HCV infection and the disease history of the HCV Infected Class Member is more consistent with infection at the time of the receipt of Blood or the secondary infection or with infection at the time of the non-prescription intravenous drug use as indicated by the totality of the medical evidence.
4. The Administrator shall weigh the totality of evidence obtained including the evidence obtained from the additional investigations required by the provisions of this Protocol and determine whether, on a balance of probabilities, the HCV

Infected Class Member meets the eligibility criteria of the Settlement Agreement. The burden to prove eligibility is on the claimant. The Administrator shall assist the claimant by advising what types of evidence will be useful in meeting the burden of proof in accordance with this Protocol.

5. In weighing the evidence in accordance with the provisions of this Protocol, the Administrator must be satisfied that the body of evidence is sufficiently complete in all of the circumstances of the particular case to permit it to make a decision. If the Administrator is not satisfied that the body of evidence is sufficiently complete in all of the circumstances of the particular case to permit it to make a decision, the Administrator shall reject the claim. [Emphasis Added]  
[...]

[24] Section 2.03 of the *Settlement Agreement* states as follows:

If requested by the Administrator, a person claiming to be an HCV Infected Class Member must also provide to the Administrator:

- (a) all medical, clinical, hospital or other such records in his or her possession, control or power;

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

[25] In the Statutory Declaration Form, the Claimant admitted that he had used non-prescription intravenous drugs. As a result, subsection 2.01(3) of the *Settlement Agreement* and the provisions of the *Non-Prescription Intravenous Drug Protocol* apply to the application for compensation. Subsection 2.01(3) of the *Settlement Agreement* places the onus on the Claimant by requiring him to deliver evidence to establish on a balance of probabilities that he was infected for the first time with HCV by receiving blood. In circumstances such as the present, where a claim is not rejected under the provisions of the *Traceback Protocol*, section 3(a) of the *Non-Prescription Intravenous Drug Protocol* requires the Administrator to obtain such additional information and records under section 2.03 of the *Settlement Agreement* as it considers necessary “in its complete discretion”. In turn, section 2.03 of the *Settlement Agreement* imposes a

mandatory obligation on a claimant to provide any records requested by the Administrator. Section 4 of the *Non-Prescription Intravenous Drug Use Protocol* directs the Administrator to weigh the totality of the evidence and to determine, on a balance of probabilities, whether a claimant has met the eligibility requirements in the *Settlement Agreement*. Section 4 also clearly dictates that the burden of proving eligibility is on a claimant. Finally, section 5 of the *Non-Prescription Intravenous Protocol* requires the Administrator to deny a claim where it is not satisfied that the body of evidence is sufficiently complete to permit it to make a decision.

[26] The evidence in the claim file establishes that the Claimant was born in 1958. In 1971, he received a transfusion of two units of blood. At the time of the transfusion, he was 13 years of age.

[27] In the preliminary decision reproduced in paragraph 10, the Administrator advised the Claimant that he would be required to deliver further evidence of first infection to establish that he was first infected with Hepatitis C by a blood transfusion. In the “How to Proceed” document reproduced in paragraph 11, the Administrator stated, among other things, that the Claimant would be required to deliver an affidavit and various records.

[28] The Claimant delivered an affidavit indicating, among other things, that he was diagnosed with Hepatitis C in 1991 and was notified by the Canadian Red Cross in 1984 or 1985 that he had “Non A Non B Hepatitis” in his blood. He detailed his drug use history and stated, among other things, that he started to use drugs in 1976 (at the age of 18) by smoking marijuana. He began snorting cocaine and using non-prescription intravenous drugs in the mid 1990’s.

[29] In all cases involving an indication of the use of non-prescription intravenous drugs, the Administrator requires the delivery of hospital and medical records in order to enable a decision to be made. As indicated in the “How to Proceed” document reproduced in paragraph 11, the Administrator requires two types of records to be delivered: first, health records relating to all hospitalizations and treatments for 10 years preceding the date that of the first receipt of blood or dating back to the 18<sup>th</sup> birthday of the HCV Infected Class Member (whichever was the shorter period); and second, all relevant medical records outlining the history of infection with Hepatitis C “from the date of diagnosis to the present”. The Administrator requires the first category of records to enable a determination to be made as to whether an HCV Infected Class Member used non-prescription intravenous drugs before the date of a blood transfusion. The second category of records relates to the history of the Hepatitis C infection from the date of diagnosis to the present. In circumstances where a claim is not rejected under the Traceback Protocol (as in the present case), section 3(b) of the *Non-Prescription Intravenous Drug Protocol* requires the Administrator, in mandatory terms, to obtain the opinion of a medical specialist concerning whether the disease history is more consistent with an infection at the time of the blood transfusion or the time of the non-prescription intravenous drug use.

[30] In the context of the present case, the absence of any records relating to the period before the blood transfusion may arguably be overlooked given the fact that the Claimant was 13 years of age at the time of the transfusions. However, the complete absence of the second category of records makes it impossible for the Administrator to investigate the case and to obtain an opinion from a medical specialist concerning the progression of the

disease and the probable timing of the infection. In the present case, evidence concerning the progression of the disease would be critical in view of the lapse of almost twenty years between the date of the transfusions and the stated dates of non-prescription intravenous drug use. In other words, the medical specialist would be able, on the basis of the evidence, to indicate whether the state of the Claimant's health was more consistent with a Hepatitis C infection that began around the time of his blood transfusion or around the time of his stated non-prescription intravenous drug use approximately 20 years later. Finally, although the Claimant did deliver an affidavit, there is no evidence from records or any other independent source to corroborate any of the statements in his affidavit.

[31] As indicated previously, the Claimant did not deliver his medical records as required by the Administrator. I have carefully considered all of the evidence in the claim file and have concluded that the Claimant has failed to establish his infection for the first time with HCV by his blood transfusions in 1972, as required by subsection 2.01(3) of the *Settlement Agreement* and the provisions of the *Non-Prescription Intravenous Drug Protocol*. The appeal must therefore be dismissed.

[32] I recognize the frustration that this decision will cause to the Claimant in view of his inability to obtain records. However, it is important to recognize that the terms of the *Settlement Agreement* are the result of an agreement between the Parties which was approved by the Courts; neither the Administrator nor the Appeals Officer has any power or discretion to alter those terms.<sup>3</sup>

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<sup>3</sup> See two recent decisions on further appeals to the Court concerning the binding nature of the provisions of the *Settlement Agreement*: Claim Files 08-15662, 08-13831 and 07-10252 dated March 25, 2010 (Chief Justice Winkler) and Claim File 07-01482 dated April 7, 2010 (Mr. Justice Pitfield).

**CONCLUSION**

[33] The appeal is dismissed.

"D. McGillis"

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

DATED October 29, 2010

TO: Claimant  
Fund Counsel  
Administrator