

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: 07-07575

REASONS FOR DECISION

INTRODUCTION

[1] The HCV Personal Representative has appealed a decision of the Administrator dated September 16, 2010, in which the application for compensation made in relation to the deceased HCV Infected Class Member under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied on the basis that there was no proof of an infection with the Hepatitis C virus.

FACTS

[2] On October 29, 2007, the HCV Personal Representative delivered an application for compensation under the *Settlement Agreement*, together with various documents. Some of the forms were not properly completed, and the Administrator sent several letters advising the HCV Personal Representative of various deficiencies to be corrected. The HCV Personal Representative delivered further forms and documents on dates including January 18, 2008, May 7, 2010 and August 3, 2010. The documents included records indicating that the HCV Infected Class Member was hospitalized on four occasions at two hospitals: at Hospital “A” in July 1970, January 1973 and January 1994, and Hospital “B” in February 1994.

i) Documents delivered on October 29, 2007

[3] In the General Information Form, the HCV Personal Representative stated that the HCV Infected Class Member, her deceased husband, was a Primarily-Infected Person who was infected with the Hepatitis C virus through blood transfusions received in Canada prior to January 1, 1986. The HCV Infected Class Member had no risk factors for Hepatitis C.

[4] The Treating Physician Form was completed by the HCV Personal Representative and made reference to a deceased physician.¹

[5] The unsigned Blood Transfusion History Form indicated that the HCV Infected Class Member was transfused with five units of blood in July 1970 at Hospital “A” for blood loss after surgery.²

[6] At the time of the delivery of the application, the HCV Personal Representative provided supporting documents, including some records from admissions of the HCV Infected Class Member to Hospital “A” in 1970 and Hospital “B” in February 1994, two death certificates and a few documents concerning an application for a benefit under a provincial plan.

Records from Hospital “A” – 1970 Admission

[7] The records from Hospital “A” concerning the 1970 admission consisted of blood transfusion records confirming that the HCV Infected Class Member was transfused with a total of five bottles of blood on August 1, 1970.³

¹ A Treating Physician Form was delivered on August 3, 2010 and is described in paragraph 45.

² The signed Blood Transfusion Form was delivered on January 15, 2008.

³ See pages 53 to 54. See also paragraphs 19 to 35 summarizing other records relating to this hospitalization.

Records from Hospital "A" – January 1994 Admission

[8] The records from Hospital "A" concerning the January 1994 admission included an Emergency Report, an Inpatient Registration Form, Physician's Orders and Requisitions, and a Discharge Summary.

[9] The Emergency Report dated January 3, 1994 indicated, among other things, that the HCV Infected Class Member was admitted to the hospital for problems related to abdominal distention. The "History & Examination" part of the form contained notes written by the examining physician in the Emergency Room, including the following:⁴

PMH [past medical history] NIDDM [diabetes] x [illegible] x GBS – Hepatitis
after – 4 days → P [previous] ETOH [illegible]

[10] The Inpatient Registration Form indicated, among other things, that the HCV Infected Class Member was admitted to the hospital on January 3, 1994 and stated as follows:⁵

Most responsible diagnosis: (the one most significant condition responsible for the greatest length of stay: Hepatoma of liver

Other primary diagnosis(es): (Significant conditions which influence length of stay/treatment): Cirrhosis [with] ascites

[11] The Physician's Orders and Requisitions contained various orders, including the following:⁶

Jan 6/94 Send Hepatitis A B + C serology⁷ [Emphasis Added]

⁴ See page 52.

⁵ See page 47.

⁶ See page 57.

⁷ The laboratory report concerning the results of the hepatitis testing was not in the Claim File.

[12] The Discharge Summary dictated by Dr. "P" on January 10, 1994 indicated that the HCV Infected Class Member was hospitalized from January 1 to 10, 1994 and stated, in part, as follows:⁸

This 55 year old man, with a previous history of ethanol ingestion, was seen one year ago at the Toronto General Hospital, by the hepatologist and was told that he had a shadow in his liver. [The HCV Infected Class Member] noticed two weeks ago that his abdomen began to grow in girth. He developed a swelling of his legs and came into the Emergency Room where he was admitted by Dr. [name deleted]. [The HCV Infected Class Member] has been otherwise well.

On examination, he had peripheral wasting with central edema. His BP was 150/80. He had no spider nevi. His abdominal examination showed massive ascites with retrograde flow. [...]

[...]

His chest x-ray was unremarkable. Ultrasound suggested a mass in the left lobe of the liver. This was confirmed by the CAT scan which showed cirrhosis associated with splenomegaly and ascites. There is an inhomogeneous 5 cm mass in the left lobe, compatible with a hepatoma.

A biopsy was performed, confirming the diagnosis of primary hepatocellular carcinoma.

[...]

FINAL DIAGNOSIS: 1. Hepatoma of the liver.

2. Cirrhosis of the liver with portal hypertension and ascites.

[Emphasis Added]

Death Certificates

[13] A Medical Certificate of Death dated February 23, 1994 indicated that the HCV Infected Class Member died on February 21, 1994 at Hospital "B".⁹ The immediate cause of death was a massive upper gastrointestinal hemorrhage and antecedent causes were cirrhosis of the liver and hepatoma. A provincial Statement of Death dated February 23,

⁸ See page 41.

⁹ See page 65.

1994 stated, among other things, that the occupation of the HCV Infected Class Member was “Sales – Automobile” and provided the name of his employer.¹⁰

Documents related to provincial plan application

[14] The documents from the provincial plan application consisted solely of a Request for Records Search and two letters from family members of the HCV Infected Class Member. The Request for Records Search has no relevance as it related to two transfusions received by the HCV Infected Class Member at Hospital “A” in January 1994, approximately two months before his death.

[15] By letter dated June 26, 2000, the HCV Personal Representative wrote to the provincial plan application on behalf of the estate of the HCV Infected Class Member.¹¹ She stated, among other things, that her daughter had made an application for a benefit under the provincial plan on the basis that the HCV Infected Class Member had received contaminated blood during surgery at Hospital “A” in the early 1970’s. The letter was signed by the HCV Personal Representative and her daughter.

[16] By letter dated April 30, 2001, the daughter of the HCV Infected Class Member wrote to an official of the provincial plan to contest the decision denying the application for a benefit and requested a review by the Review Committee. She stated, in part, as follows:¹²

I am in receipt of your letter dated April 11, 2001 regarding the decision for [the HCV Infected Class Member’s] estate and file # [deleted]. I have to contest this decision on the basis of a couple of things.

1. [The HCV Infected Class Member] was contaminated with the Hepatitis C virus in the early 70’s at [Hospital “A”]. He was under the care of Doctor [name

¹⁰ See page 44.

¹¹ See page 59.

¹² See pages 60 to 62.

dleted]. This information is clearly stated in his file, as it was named Hepatitis Non A Non B at the time. [The HCV Infected Class Member] almost died during this operation and also post op, and had to be given many blood transfusions just to keep him alive. They had lost him for a few seconds, but re-animated him at that time.

2. You are saying that it is not the Hepatitis C virus, and are blaming it for another form of Hepatitis. You stated in your document and on the telephone that on the Autopsy [sic] report, he was negative [sic] for Hep. C. I have to argue this matter, as my father did **Not** have an autopsy [sic], as this was his request before dying.

3. If it was any other hepatitis virus, my mother would have been contaminated with it, as they were married for 30 years at the time of his death. My mother does not have the Hepatitis virus in her system, and never contacted his hepatitis. This is the only form of Hepatitis that cannot be caught [sic] by kissing, sex, saliva, using the same toilet, etc. ... it is only all of the other forms of hepatitis, like Hepatitis A & B. The only way you can catch Hepatitis C is through blood, and this is why my mother is not contaminated with any form of Hepatitis, because [the HCV Infected Class Member] **Had** Hepatitis C and not the other strains of virus, as my mother is fine.

4. [The HCV Infected Class Member] died of Progressive Active Hepatitis C, and this is what we have been told by Dr. [name deleted], his specialist, then, and also now, just recently on the telephone.

5. I also have hepatitis C and am close to end stage liver failure. I am on a transplant list at [name and location of hospital deleted]. I know what Hepatitis C is, inside and out, and **I know for a fact that this is what my father had.** Where is your heart? 2 people out of a family of 4 (mother, father, sister and myself) have been given tainted blood, and nobody wants to stand up and solve this matter. I lost my father when he was only 55 years old. It could only have been Hepatitis C that could have brought down a man of 6' tall, 265 lbs.

We have been treated so unfair [sic], and it is all of the government and Red Cross's fault, and nobody wants to take the blame for it. This file has been in your hands for almost three years now. Everyone is passing the ball back and forth, and its [sic] easier to say no, that is not what he had, when we all know very well that **Hepatitis C killed my father.** He is dead now, and nothing can bring him back, but we deserve some kind of compensation for this travesty [sic].....he was contaminated through the blood system in [the province].....what can I say?

[...]

Please reconsider this decision and take it to the Plan Review Committee. [...]
[Emphasis added by author of document]

[17] The HCV Personal Representative did not deliver a copy of the decision of the adjudicator denying the application for a benefit or the decision of the Review Committee.

ii) Documents delivered on May 7, 2008

[18] On May 7, 2008, the HCV Personal Representative delivered records from the 1970 and 1973 admissions of the HCV Infected Class Member at Hospital “A” and the February 1994 admission at Hospital “B”.

Further Records from Hospital “A” – 1970 Admission

[19] An Emergency Report dated July 28, 1970 indicated that the HCV Infected Class Member was admitted to Hospital “B” for abdominal pain.¹³

[20] Three days later, an Operative Report dated July 31, 1970 indicated that the HCV Infected Class Member had cholecystectomy surgery for gallbladder disease.¹⁴

[21] A day after the surgery, a Fluid Balance Record dated August 1, 1970 indicated that the HCV Infected Class Member received blood transfusions.¹⁵

[22] A Requisition for In-Patient Physiotherapy contained a note dated August 4, 1970 stating that the HCV Infected Class Member had an elevated temperature since the surgery.

[23] A Consultation Record dated August 4, 1970 stated, in part, as follows:¹⁶

¹³ See page 175.

¹⁴ See page 192.

¹⁵ See page 199. The blood transfusion records were delivered previously, as described in paragraph 7. There were also notations in the Physician’s Orders dated July 31 and August 1, 1970 ordering blood transfusions.

¹⁶ See page 166. A family member wrote a note near the top of the record stating “First sign of liver enzymes up because of transfusions”. There was also a note near the second last paragraph stating “Right after

Findings:

[The HCV Infected Class Member's] haemoglobin fell postoperatively and he subsequently went into shock postoperatively.

Today he is feeling fairly well but still has a considerable amount of pain. He has received approximately 5 bottles of blood and his Hb. is now being maintained at or about 12.5 gms.

Examination fails to reveal any definite abnormality but on examining his incision there was certainly a small amount of blood issuing from the drain and the smell appeared to be that of altered blood. [...]

Diagnosis:

I would suspect that [the HCV Infected Class Member] has had a postoperative hemorrhage that accounted for his shock. I am hopeful that the situation is under control at the moment but none the less the tachycardia is a little worrisome and feel that we should watch and monitor his Hb. rather carefully.

He also had Fluothane at the time of surgery and enzymes are a little elevated. We should perhaps watch his liver function but I really doubt if this had anything to do with his postoperative shock.

Will follow for the next few days. [Emphasis Added]

[24] A Nurses' Clinical Record dated August 4, 1970 contained notes indicating, among other things, that the HCV Infected Class Member was "perspiring heavily".¹⁷

[25] A Progress Report contained a note dated August 6, 1970 that stated "Probable post-op infection".¹⁸

[26] The Nurses' Clinical Record contained a note on August 16, 1970 at 1300 hours indicating that the dressing was changed and there was a large amount of bloody purulent drainage from the wound. A specimen was sent to the laboratory.¹⁹

surgery + blood". There were numerous pages of laboratory records detailing the results of blood and other tests.

¹⁷ See page 230.

¹⁸ See page 187. There was also a note written on the record by a family member that stated "1st sign of infection + hepatitis after surgery".

¹⁹ See page 279.

[27] A Bacteriology Laboratory Report dated August 16, 1970 indicated that there was a “Heavy growth of Staph Aureus” in a specimen of “wound drainage” taken from the HCV Infected Class Member.²⁰

[28] The Nurses’ Clinical Record dated August 18, 1970 contained a note at 1130 hours indicating that a physician visited and removed the dressing. There was a large amount of purulent drainage from a hole on the suture line; an “isolation technique” would be started for the HCV Infected Class Member.²¹

[29] The Physician’s Orders dated August 18, 1970 indicated that a physician ordered the antibiotic Erythromycin for the HCV Infected Class Member.²²

[30] The Nurses’ Clinical Record dated August 19, 1970 contained a note at 1130 hours indicating that there was a moderate amount of serous sanguinous drainage from a small opening in the incision line.²³ The notes at 1430 and 1730 hours indicated small amounts of drainage. There was also a similar note on August 24, 1970 at 2100 hours.²⁴

[31] The Physician’s Orders dated August 23, 1970 contained an order to continue the Erythromycin.²⁵

[32] The Physician’s Orders dated August 25, 1970 indicated that the HCV Infected Class Member could be discharged from the hospital.²⁶ The Nurses’ Clinical Record at 1200 hours on that date stated that there was a small amount of drainage when the

²⁰ See page 256.

²¹ See page 280.

²² See page 244.

²³ See page 264.

²⁴ See page 283.

²⁵ See page 243.

²⁶ See page 242.

dressing was changed; at 1315 hours the HCV Infected Class Member was discharged from the hospital.²⁷

[33] The Medication Record confirmed that the HCV Infected Class Member took Erythromycin from August 18 to and including August 25, 1970 at the hospital.²⁸

[34] A Medical Summary indicated that the HCV Infected Class Member was hospitalized from July 28 to August 25, 1970 and stated, in part, as follows:²⁹

On August 31 [sic]³⁰, 1970, under general anaesthesia, his gallbladder was removed, the cholangiogram at that time being regarded as negative. He tolerated the surgery well but postoperatively, had developed evidence of blood loss with shock and dropping haemoglobin in spite of multiple transfusions. Finally, it seemed that this hemorrhage had stopped and he was not subjected to further laparoscopy but had a slow convalescence with ultimately his wound discharging with more old blood than infectious material.

He was discharged home, feeling much improved with a relatively normal haemoglobin and tolerating full diet well but still appearing somewhat pale and cachetic. [Emphasis Added]

[35] A Summary Sheet confirmed the dates of hospitalization and the type of surgical procedure. It noted in the “Infection Report” that the Claimant had developed a Staph infection in the hospital.³¹ The “Complications” were described as follows:

Postop hemorrhage
Haemtoma with [illegible] infection

Records from Hospital “A” – 1973 Admission

[36] A Summary Sheet from Hospital “A” indicated that the HCV Infected Class Member was admitted on January 1, 1973 for the repair of an abdominal hernia and discharged on January 7, 1973.³²

²⁷ See page 284.

²⁸ See pages 285 to 291.

²⁹ See page 176.

³⁰ The surgery took place on July 31, 1970.

³¹ See page 174.

[37] A History record dated January 1, 1972 stated, in part, as follows:³³

2 yrs ago cholecystectomy in [Hospital "A"]

[The Claimant] healed completely and four months thereafter felt weak wall with bulging [illegible]. Hepatitis after OP.

No known diabetes

No known hypertension

No known heart trouble

No known chest pain

[The Claimant] drinks alcohol occasionally ([illegible] in excess)

[Emphasis Added]

Records from Hospital "B" – February 1994 Admission

[38] By letter dated January 18, 1994, the surgeon who was the Head of the Division of General Surgery at Hospital "B" ("surgeon") wrote a reporting letter to Dr. "P", the physician who had dictated the Discharge Summary at Hospital "A", reproduced in paragraph 12. In the letter, the surgeon reported on the results of an examination that he had conducted on the HCV Infected Class Member at the request of Dr. "P". He stated as follows:³⁴

Thank you for referring [the HCV Infected Class Member] to see me with regards to his hepatoma. This unfortunate 55-year old man with a history of excessive alcohol intake was recently diagnosed to have a hepatoma, biopsy proven. You referred him to see me for consideration of resection.

He is basically asymptomatic.

Physical examination today reveals minimal jaundice. Abdominal examination reveals massive ascites and an old right paramedian cholecystectomy scar. There is also pedal oedema present.

Thank you for sending bis x-rays along which I reviewed today and his CT scan reveals massive ascites, massive splenomegaly, and a small shrunkin liver with a 4 cm hepatoma in the left lateral segment.

In summary, [the HCV Infected class Member] has a hepatoma in a background of cirrhosis. Given his very poor hepatic function which is evident by his

³² See page 146.

³³ See page 148.

³⁴ See page 135.

jaundice, ascited and splenomegaly, I do not believe that he would tolerate even a limited excision of his hepatoma. I have told him this and informed [sic] him that chemotherapy plus or minus radiation would be the only viable option for him.

I have also given him a prescription of aldactone 50 mg t.i.d. to help receive some of his ascites.

Thank you for the opportunity to evaluate [the HCV Infected Class Member] [...].
[Emphasis Added]

[39] Approximately a month later, the HCV Infected Class Member was admitted to Hospital “B” on an emergency basis. An Emergency Report dated February 20, 1994 consisted of six pages of notes and assessments.³⁵ In the “History and Physical” section, an emergency physician stated in part, as follows:³⁶

Carcinoma of liver found January 1994. Currently 10 days post chemotherapy –
Dr. [name deleted]
Today onset of nausea and vomited coffee grounds
[...] [Emphasis Added]

[40] In the “History Findings and/or Treatment”, another physician wrote three pages of notes that stated, in part, as follows:³⁷

Admission Note
55 [male] – hepatoma – very poor historian
[...]
HPI – during day described 2 episodes dark black emsis (1 cup each)
[no] previous history Upper/Lower GI bleed
[no] Hx [history] ulcer/esophageal varices/anticoagulant therapy
– Dx [diagnosis] – hepatoma Jan 94 – biopsy
– history excessive alcohol intake (denies) – Note of [the surgeon] confirms this
[...]

³⁵ See pages 104 to 109.

³⁶ See page 104.

³⁷ See pages 107 to 109.

alcohol – denies any past/present excessive consumption

[...]

Impression – 55 [male] – unresected hepatoma
chronic cirrhosis (liver disease)

2 episodes N+V → emesis (“coffee grounds”)

denies any previous episodes/or alcohol abuse

[...]

[Emphasis Added]

[41] A History and Physical Examination dated February 21, 1994 indicated, among other things, that the HCV Infected Class Member suffered a “massive upper GI bleed” and passed away. He had requested that no autopsy be conducted.³⁸

[42] A Discharge Summary dictated by a physician on March 18, 1994 confirmed the details of the admission and death of the HCV Infected Class Member and noted that no autopsy was carried out. The Discharge Summary stated, in part, as follows:³⁹

HISTORY OF PRESENT ILLNESS

[The HCV Infected Class Member] was a 55 year old gentleman known to the [name deleted] Cancer centre with a diagnosis of hepatoma. He received chemotherapy approximately two weeks prior to this admission. He came to the emergency Room with increasing fatigue and weakness and having vomited several episodes of coffee ground material. There had been no previous history of GI bleeding. There is also a history of non-insulin dependent diabetes mellitus for approximately two years. He was on Diabeta. He was also receiving [names of medications deleted] for pain. He had denied history of excessive alcohol abuse despite some question to this effect. [Emphasis Added]

Letter from lawyer dated December 21, 2008

[43] By letter dated December 21, 2008, counsel for the HCV Personal Representative stated as follows:⁴⁰

Please be advised that we are the solicitors for [the HCV Personal Representative], and this is to advise you that we have made every attempt to

³⁸ See page 111.

³⁹ See page 101.

⁴⁰ See page 298.

obtain the medical records of the attending doctor, [name deleted], of the HCV Infected Class Member at the time of him contracting Hepatitis C.

[The attending doctor] is deceased and we have been unable to obtain any records. If there is any assistance that you can provide so that this matter can proceed please contact the undersigned.

iii) Documents delivered on August 3, 2010

[44] On August 3, 2010, the HCV Personal Representative delivered documentation including a completed Treating Physician Form and two character references entitled “Acknowledgement”.

Treating Physician Form

[45] The Treating Physician Form was completed by a specialist in gastroenterology who stated that he had never seen the HCV Infected Class Member; he provided the opinion at the request of the daughter of the HCV Infected Class Member and on the basis of the medical records provided by family members. In the part “Section C – HCV Antibody test and/or PCR Test”, he checked the box to indicate “a diagnosis of cirrhosis in the absence of any other cause”. He indicated that the HCV Infected Class Member had attained Disease Level 6 and HCV had materially contributed to the medical condition. In “Section F – HCV Disease Verification”, he wrote in response to question 1 that there were no risk factors on the basis of information provided by the daughter. In response to question 7, he indicated that the infection with the Hepatitis C virus had materially contributed to the death of the HCV Infected Class Member and noted the medical conditions supporting his opinion. In a note in “Section G – Disability Information”, he stated that he had gathered information from medical records provided by the family of the HCV Infected Class Member.

Acknowledgements

[46] On August 3, 2010, the HCV Personal Representative delivered two character reference documents, each entitled “Acknowledgement”. In an accompanying letter dated July 29, 2010, she stated, among other things, that she was “sending sworn affidavits from [the HCV Infected Class Member’s] work colleagues”. The “Acknowledgement” documents were undated and unsworn.

[47] The two Acknowledgements contained identical wording and stated as follows:

ACKNOWLEDGEMENT**in the matter of [the HCV Infected Class Member’s] character**

I, the undersigned, state and acknowledge as follows:

1. I knew the deceased [HCV Infected Class Member] for over 10 years and at no time did I witness [the HCV Infected Class Member] inebriated nor have I ever considered him to be an alcoholic.
2. This acknowledgement is to confirm that at no time have I ever considered [the HCV Infected Class Member] an alcoholic and for no other or improper purpose.

[48] The first Acknowledgement was signed by 11 persons.⁴¹ There was nothing in the document to indicate that the signatories had worked with the HCV Infected Class Member or the timeframe in which they knew him. However, the Provincial Death Certificate indicated that the HCV Infected Class Member had worked as a car salesman and gave the name of the dealership where he was employed. Two of the signatories had the same family name as the car dealership. I accept the statement of the HCV Personal Representative that the Acknowledgement was signed by work colleagues of the HCV Infected Class Member.

⁴¹ See pages 312 to 313.

[49] The second Acknowledgement was signed by the HCV Personal Representative and several family members.⁴²

DECISION OF THE ADMINISTRATOR

[50] In a decision dated September 16, 2010, the Administrator denied the claim for compensation for the following reasons:

Reasons for Decision

The Settlement Agreement requires the Administrator to determine a person's eligibility for class membership. As you may already know, section 2.01(1)(b) of the Settlement Agreement provides that you must deliver an HCV Antibody Test, PCR Test or similar test report to the Administrator. You have not provided proof of HCV (the Hepatitis C virus).

The Court Approved Protocol, "HCV Antibody and PCR Tests Protocol", defines which HCV test is acceptable. Note that in some cases, the Administrator must consult a microbiologist to obtain his or her expert opinion.

An acceptable HCV Antibody Test includes the following:

- a. a First Generation ELISA or EIA (1989-1990) which is confirmed or supplemented by a RIBA performed in a Canadian laboratory which reveals the presence of antibodies;
- b. a Second Generation ELISA or EIA (1991-1996) which is confirmed or supplemented by a RIBA performed in a Canadian laboratory which reveals the presence of antibodies; or
- c. a Third Generation ELISA or EIA or RIBA (1997 and after) performed in a Canadian laboratory which reveals the presence of antibodies.

Where any of these tests were performed in a laboratory outside Canada, that laboratory must be acceptable to the Administrator, in consultation with a microbiologist.

An acceptable PCR Test includes the following:

- a. a PCR Test dated January 1, 1998, or later, performed at any Canadian laboratory which indicates the presence of the virus; or
- b. a PCR Test which indicates the presence of the virus that has been performed by a laboratory acceptable to the Administrator, in consultation with a scientist with PCR expertise.

⁴² See page 314.

If the Primarily-Infected Class Member is deceased and was not tested for the HCV antibody or HCV, you may deliver, instead of the evidence referred to in Section 2.01(1)(b), evidence of any one of the following:

- (a) a liver biopsy consistent with HCV in the absence of any other cause of chronic hepatitis;
- (b) an episode of jaundice within three months of receiving Blood in the absence of any other cause;
- (c) a diagnosis of cirrhosis in the absence of any other cause; or
- (d) where the claimant is a Primarily-infected Hemophiliac, that the Primarily-Infected Hemophiliac has tested positive for HIV prior to his or her death.

It has been noted in the original application that [the HCV Infected Class Member] had been tested for Hepatitis C before he passed away. There were no test results provided to the Administrator. On August 3, 2010 The Administrator received a Treating Physician form completed by Dr. [name deleted], a Gastroenterologist. Dr. [name deleted] indicated he did not know [the HCV Infected Class Member] and that he completed the Form from Medical Records provided. The Doctor checked off a box to indicate [the HCV Infected Class Member] was not tested for Hepatitis C however he did have “cirrhosis in absence of any other cause”. Upon receipt of this opinion the Administrator reviewed the complete medical file. As stated previously there is a Doctor’s order dated January 1994 that confirms Hepatitis C testing was ordered for [the HCV Infected Class Member] however no test results have been submitted. In support of the claimant the complete file has been carefully reviewed It has been determined that the evidence of Cirrhosis was not in absence of any other cause. There are medical records on file that reference “Excessive alcohol intake” as being the cause of the advanced liver disease. Based on this the claim must be rejected as there is no Hepatitis C test and no alternative evidence to support [the HCV Infected Class Member] was infected with Hepatitis C. [Emphasis Added]

REQUEST FOR REVIEW

[51] On September 27, 2010, the HCV Personal Representative filed a Request for Review. The reasons for appealing were written by her daughter and stated as follows:⁴³

[The HCV Infected Class Member] died of liver cancer/cirrhosis, Hep C. He did not drink alcohol. We have an affidavit with everybody my father worked with for around 20 years. He never missed a day of work even if he was sick in later years. If you read each and every time a nurse or Dr. asked him if he drank the answer was always NO. It clearly states that “[the HCV Infected Class Member] denies [sic] any drinking. In 94 if anyone died of cirrhosis they all thought it was alcohol. No more. We now know today that Hep C infection causes it. Come on now. .. Stop this reduculus [sic] behaviour.

⁴³ See page 328.

SUPPLEMENTARY EVIDENCE AND SUBMISSIONS ON APPEAL

[52] The HCV Personal Representative delivered letters written by her and her daughter. I have carefully read both letters. The HCV Personal Representative also sent copies of various records and documents that she had delivered previously. Notes were written by a family member on the records and documents. I have read and considered the notes.

ISSUE

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

ANALYSIS

i) Article Three of the Settlement Agreement

[54] In the Reasons for Decision on the appeal in Claim File 07-07607, I analysed certain provisions in Article Three of the *Settlement Agreement* concerning the eligibility requirements and payment of compensation for a deceased HCV Infected Class Member and stated, in part, as follows:

ii) Eligibility Requirements in Article Three of the Settlement Agreement

[26] Article Three of the *Settlement Agreement* contains the framework governing the compensation process for HCV Infected Class Members who have died, including the eligibility requirements in section 3.01 and the provisions for the payment of compensation in sections 3.02, 3.03 and 3.04. The expression “HCV Infected Class Member” is defined, in part, in section 1.01 as meaning “... collectively Primarily-Infected Class Members and Secondarily-Infected Persons”.

[27] The eligibility requirements that must be met by an HCV Personal Representative for a claim to be approved are outlined in section 3.01 of the *Settlement Agreement*, which states 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;⁴⁴ or

(ii) if the deceased was a Secondarily-Infected Person, the proof required by Sections 2.02 and 2.03;

(c) the original certificate of appointment of estate trustee, grant of probate or of letters of administration or notarial will (or a copy thereof certified to be a true copy by a lawyer or notary) or such other proof of the right of the claimant to act for the estate of the deceased as may be required by the Administrator;

and

(d) proof that the death of the HCV Infected Class Member was caused by his or her infection with HCV except as provided in Section 3.03(1)(ii).

(2) Notwithstanding the provisions of Section 2.01(1)(b), if a deceased Primarily-Infected Class Member was not tested for the HCV antibody or HCV, the HCV Personal Representative of such deceased Primarily-Infected Class Member may deliver, instead of the evidence referred to in Section 2.01(1)(b), evidence of any one of the following:

(a) a liver biopsy consistent with HCV in the absence of any other cause of chronic hepatitis;

⁴⁴ For the purposes of the present appeal, the relevant parts of section 2.01 state 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: [...]

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

- (b) an episode of jaundice within three months of receiving Blood in the absence of any other cause;
- (c) a diagnosis of cirrhosis in the absence of any other cause; or
- (d) where the claimant is a Primarily-Infected Hemophiliac, that the Primarily-Infected Hemophiliac has tested positive for HIV prior to his or her death.

Nothing in Section 3.01 will relieve any claimant from the requirement to prove that the death of the Primarily-Infected Class Member who died prior to January 1, 1999 was caused by his or her infection with HCV.

[28] In order to be eligible for compensation under either section 3.02 or 3.03 of the *Settlement Agreement*, subsection 3.01(1) requires an HCV Personal Representative to deliver to the Administrator all of the elements of proof described in paragraphs (a) through (d), as reproduced above.

[29] Paragraph 3.01(1)(b) incorporates by reference the requirements in subsection 2.01(1), unless the evidence specified in that provision has already been delivered to the Administrator. The evidence that must be delivered, when paragraphs 3.01(1)(b) and 2.01(1)(a) to (c) are read together, includes records demonstrating the receipt of Blood in Canada during the Class Period, an HCV Antibody or PCR Test report to establish an infection with HCV, and a statutory declaration.

[30] In circumstances where an HCV Personal Representative is unable to provide evidence of an HCV Antibody or PCR Test report, subsection 3.01(2) permits the delivery of certain other types of evidence to prove the existence of a Hepatitis C infection. In the context of the present appeal, the relevant provision is paragraph 3.01(2)(b) which allows evidence of “an episode of jaundice within three months of receiving Blood in the absence of any other cause”; in other words, such evidence may be filed instead of one of the test reports referred to in paragraph 2.01(1)(b). Where one of the permitted alternate forms of evidence is adduced, the concluding sentence in subsection 3.01(2) nevertheless repeats the mandatory requirement, initially articulated in paragraph 3.01(1)(d), to prove that the death of a Primarily-Infected Class Member who died prior to January 1, 1999 was caused by an infection with HCV.

ii) Application of Article Three Provisions in the Settlement Agreement to the Evidence

[55] As indicated in paragraphs 29 and 30 of the quotation reproduced above, subsections 3.01(1) and 2.01(1) of the *Settlement Agreement* require an HCV Personal Representative to deliver certain types of specified evidence, including an HCV antibody or PCR test report to establish that the HCV Infected Class Member was infected with the Hepatitis C virus. However, subsection 3.01(2) permits an HCV Personal Representative

to deliver alternate forms of evidence, including a diagnosis of cirrhosis in absence of any other cause, in circumstances where an HCV Infected Class Member was not tested for the HCV antibody or the Hepatitis C virus. By virtue of the express wording in subsection 3.01(2), an HCV Personal Representative is not permitted to deliver any of the alternate forms of evidence in circumstances where an HCV Infected Class Member was tested for the HCV antibody or the Hepatitis C virus.

[56] The evidence establishes that, on January 6, 1994, a physician ordered Hepatitis A, B and C tests for the HCV Infected Class Member.⁴⁵ The results of the tests are not in the Claim File. However, in a letter dated April 30, 2001 to a provincial plan official, the daughter of the HCV Infected Class Member made submissions contesting the decision to deny the application for a benefit and requested the Review Committee to reconsider the decision. A reading of paragraph 2 of the letter indicates that the provincial plan application was denied on the basis that the HCV Infected Class Member was infected with “another form of Hepatitis” and not the Hepatitis C virus. Paragraph 2 of the letter stated as follows:

2. You are saying that it is not the Hepatitis C virus, and are blaming it for another form of Hepatitis. You stated in your document and on the telephone that on the Autopsy [sic] report, he was negative [sic] for Hep. C. I have to argue this matter, as my father did **Not** have an autopsy [sic], as this was his request before dying

[57] The statements made in paragraph 2 of the letter indicate that the decision of the adjudicator to deny a benefit was based on the fact that the HCV Infected Class Member had tested negative for the Hepatitis C virus. There was some dispute about where the results of the tests were recorded, and the daughter properly noted that an autopsy was not

⁴⁵ See paragraph 11.

conducted.⁴⁶ In any event, she made submissions in paragraph 3 of the letter to support her position that the HCV Infected Class Member was infected with Hepatitis C and not Hepatitis A or B. Neither the decision of the adjudicator nor the Review Committee was delivered in evidence.

[58] In Section C of the Treating Physician Form, the specialist in gastroenterology checked the box for “a diagnosis of cirrhosis in the absence of any other cause” on the basis that the HCV Infected Class Member was not tested for the HCV antibody or the Hepatitis C virus. However, a reading of the Form as a whole establishes that the specialist in gastroenterology had never met or treated the HCV Infected Class Member and was providing his opinion solely on the basis of medical records and information provided by family members. Given the evidence establishing that the HCV Infected Class Member was tested for Hepatitis C, the evidence in the Treating Physician Form concerning “a diagnosis of cirrhosis in the absence of any other cause” has no relevance and cannot be considered in the assessment of an application for compensation under the *Settlement Agreement*.

[59] I have concluded on the basis of the evidence in its totality that the HCV Infected Class Member was tested for the Hepatitis C antibody or virus. As a result, subsection 3.01(2) of the *Settlement Agreement* does not permit the HCV Personal Representative to deliver an alternate form of evidence, such as a diagnosis of cirrhosis in the absence of any other cause, to prove that the HCV Infected Class Member was infected with Hepatitis C. The Administrator therefore did not commit an error in determining that there was no proof of an infection of Hepatitis C.

⁴⁶ See paragraphs 41 and 42.

[60] Although I fully understand the frustration and distress that this decision will cause to the HCV Personal Representative and her family, the terms of the *Settlement Agreement* are the result of an agreement between the Parties that was approved by the Courts; neither the Administrator nor the Appeals Officer has any power or discretion to alter those terms.⁴⁷

CONCLUSION

[61] The appeal is dismissed.

"D. McGillis"

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

DATED December 15, 2010

TO: HCV Personal Representative
Fund Counsel
Administrator

⁴⁷ 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).