

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: 07-02378

REASONS FOR DECISION

INTRODUCTION

[1] The Claimant has appealed a decision of the Administrator dated May 26, 2010, in which the application for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was rejected on the basis that she did not provide further evidence of first infection with Hepatitis C by a blood transfusion in Canada during the Class Period.

FACTS

[2] On December 21, 2007, the Claimant delivered an application for compensation under the terms of the *Settlement Agreement*.

[3] In the General Information Form, the Claimant stated that she was a Primarily-Infected Person who was infected with the Hepatitis C virus through a blood transfusion received during the Class Period. She had no risk factors for Hepatitis C and has received compensation under the *Red Cross Settlement* in the amount of approximately \$10,300.00.

[4] The Treating Physician Form was not delivered.

[5] In the Blood Transfusion History Form, the Claimant stated that she had received two units of blood in February 1985 for facial and nasal lacerations sustained in a motor vehicle accident.

[6] In support of the application, the Claimant delivered a laboratory report and hospital records.

[7] A laboratory report printed on August 3, 2007 confirmed a positive HCV RNA (PCR) test for the Claimant in blood tested on November 10, 2006.

[8] The hospital records consisted of a Summary Sheet, an Operation Report, a Crossmatched Blood form and Nurses' Notes.

[9] A Summary Sheet indicated that the Claimant was hospitalized for 10 days, from February 9 to 19, 1985, for extensive nasal lacerations following a motor vehicle accident. She had surgery for the repair of facial and nasal lacerations.

[10] An Operation Report dated February 9, 1985 indicated that the Claimant was bleeding "freely" and stated, in part, as follows:

Under general anaesthesia, [the Claimant] was prepared and draped. She was seen to be bleeding freely from extensive lacerations of the nose. There were multiple long lacerations based superiorly so that the whole nose was laid completely open. The alar cartilages, the lateral cartilages and the septal cartilage were all either transacted or fractured. The nasal bones appeared to be more or less intact although there some small fractures involving the bone. The bleeders deep inside the nose up toward the turbinates were cauterized to control the bleeding then one or two smaller vessels were also cauterized and when the bleeding had been more or less controlled, closure was begun [...]. This entire process involved approximately an hour and a half of suturing [...].

[11] A Crossmatched Blood form confirmed that two units of blood were crossmatched and administered to the Claimant on February 11, 1985. The unit numbers were A55135 and A42424.

[12] The Nurses' Notes dated February 11, 1985 contained entries beginning at 1530 hours indicating that units A42424 and A55135 were transfused to the Claimant.

TRACEBACK

[13] By letter dated May 7, 2008, the Canadian Blood Services forwarded the Traceback final report to the Administrator. The Traceback included a Report of Transfusion-Related Infection and a Transfusion Summary. The Report of Transfusion-Related Infection recorded the unit numbers of the blood and provided no other information. The Transfusion Summary dated May 6, 2008 stated as follows:

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

Unit Number	Product Name	Transfusion Date	HCV Status of Donor if known
A (0) 042424	Red Blood Cells	1985-02-11	Negative
A (7) 055135	Red Blood Cells	1985-02-11	Negative

2 units were transfused in February 1985

2 Donors were HCV Negative on subsequent testing [Emphasis Added]

PRELIMINARY DECISION OF THE ADMINISTRATOR

[14] In a preliminary decision dated July 10, 2008, the Administrator advised the Claimant that the application for compensation would be rejected unless she provided further evidence that she "[...] was infected for the first time with HCV by Blood received

in Canada during the Class Period.” The Administrator gave the following reasons in support of its decision:

We are writing to advise you that your claim for compensation under the Pre-1986/Post-1990 Hepatitis C Settlement Agreement will be rejected unless you can provide further evidence that you or the HCV Infected Class Member was infected for the first time with HCV by Blood received in Canada during the Class Period.

Criteria for Class Membership

The Settlement Agreement provides compensation for Class Members first infected by Blood received in Canada on or before December 31, 1985, or between July 2, 1990, and September 28, 1998. There is a court approved protocol, which requires the Administrator to investigate the status of the donors of the blood or blood products received by a claimant during the Class Period.

All donor searches are complete and your traceback results have been carefully reviewed. According to the results, the HCV antibody was not present in any of the blood or blood products you received in the Class Period. We know of no other information that would impact on the evaluation of your claim; therefore, your claim must be rejected unless you can prove that you were infected for the first time with HCV by Blood received in Canada during the Class Period notwithstanding the results of the Traceback Procedure.

You must sign and return the Form (following page) within 30 days after you receive this letter. If you wish to provide further evidence, you will then have an additional six (6) months to provide this further evidence to the Administrator.

[15] On July 17, 2008, the Claimant signed the Further Evidence of First Infection Form and indicated her intention to provide further evidence.

[16] By letter dated December 18, 2008, counsel for the Claimant advised the Administrator that she had not yet received further records requested from the hospital and asked for an extension of time. The Administrator extended the time for filing further evidence to July 17, 2009. On March 16, 2009, counsel advised the Administrator that she no longer represented the Claimant.

[17] The Claimant did not deliver any further evidence of first infection.

DECISION OF THE ADMINISTRATOR

[18] In a decision dated May 26, 2010, the Administrator rejected the claim for compensation, stating as follows:

We are writing to advise you that your claim has been denied for compensation under the Pre-1986/Post-1990 Hepatitis C Settlement Agreement. The reasons for denial are set out below.

Insufficient Further Evidence of First Infection During the Class Period – Final Decision

The Settlement Agreement provides compensation for class members first infected by a Blood transfusion in Canada prior to and including December 31, 1985 and between July 2, 1990 and September 28, 1998.

You will recall that in our last letter to you, we wrote that in the absence of further evidence, your claim would be denied. One of two circumstances applies to your case and may be summarized as follows:

- 1) You did not provide any further evidence to the Administrator; OR
- 2) The further evidence that was submitted failed to overturn the preliminary determination that your claim did not meet class membership criteria.

Your claim was recently reviewed as part of an audit of inactive claims. The final results of the Traceback confirmed the donors of the blood transfused you [sic] during the class period, have tested negative for the HCV antibody. In light of this information, the claim was denied. Your Legal Representative indicated, in response to our first letter that you were intending to provide further evidence. In your case, as noted previously, no further evidence was submitted and the time to submit such evidence has expired. Based on this the claim is now rejected.

REQUEST FOR REVIEW

[19] On June 21, 2010, the Claimant delivered a Request for Review and specified the reasons for appealing as follows:

To the best of my knowledge, is that the only time I received blood is at [name deleted] Hospital following M.V.A. Feb 11/85. I have had more surgery, at [name deleted] General Hospital 1987-88 and more with Dr. [name deleted], Plastic Reconstructive Surgery. He is now retired. I have no documentation.

[20] The Claimant included documents with the Request for Review consisting of a Physician Form for Primarily-Infected Claimants from the *Red Cross Settlement* application, the Crossmatched Blood record described in paragraph 11, notes from a medical chart in 2000 and 2001, and a letter dated February 11, 2009 from her counsel that stated, in part, as follows:

You advised our office that you also had surgeries in [name deleted] from about 1980 to 1984. We requested these records and no blood was replaced during these surgeries. You also advised us that you had a breech birth in 1958 at [name deleted] General Hospital. It resulted in you having to return to the hospital due to continuous bleeding. We contacted this hospital but unfortunately their records do not go back to 1958 as the records were destroyed. The settlement allows us to use other means of proof. [...]

SUPPLEMENTARY EVIDENCE AND SUBMISSIONS ON APPEAL

[21] By letter dated June 25, 2010, the Fund Counsel provided advice to the Claimant.

[22] On July 13, 2010, the Claimant delivered a letter to the Fund Counsel that stated as follows:¹

After my accident, we did not notice any episode of jaundice. In fact my face had all kinds of colours from the surgeries [sic] that if I had any episode of jaundice we did not notice it. At the time I was very preoccupied, if I would have a nose at all.

[23] By letter dated November 4, 2010, the Fund Counsel provided advice to the Claimant concerning her options with respect to the appeal. On November 16, 2010, the Claimant responded that her submissions were complete and wrote the following letter:

Thank you for letting me know, but unfortunately I do not know where to find more information, or how did I contact hepatitis C.

Many records by now do not exist anymore.

¹ The Claimant also delivered a Blood Transfusion History dated July 7, 2010. However, it contained essentially the same information as the Blood Transfusion History delivered on December 21, 2007, described in paragraph 5.

The only thing I know for sure I never before was diagnose [sic] with “Hep C” than after the accident in 1985.

ISSUE

[24] The issue to be determined is whether the Administrator committed an error in rejecting the claim for compensation.

ANALYSIS

i) Sections 2.01 and 5.04 of the Settlement Agreement and the Traceback Protocol for Primarily-Infected Persons

[25] In the Reasons for Decision on the appeal in Claim File 07-03319, I analysed the provisions in sections 2.01 and 5.04 of the *Settlement Agreement*, as well as various sections in the *Traceback Protocol for Primarily-Infected Persons* (“*Traceback Protocol*”) and stated as follows:

[15] In order to determine whether the Claimant is eligible for compensation as a Primarily-Infected Class Member, the provisions in sections 2.01 and 5.04 of the *Settlement Agreement*, as well as various sections in the *Traceback Protocol for Primarily-Infected Persons* (“*Traceback Protocol*”), must be interpreted and applied to the facts. The provisions “[...] must be interpreted in a textual, contextual and purposive way” [See *Canada Trustco Mortgage Co. v. Canada*, [2005] S.C.R. 601].

[16] Under the terms of the judicially approved *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, in part, 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-Quebec records demonstrating that the claimant received Blood in Canada during the Class Period; [...]

[17] Paragraph 2.01(1)(a) of the *Settlement Agreement* requires that a claimant must have “received Blood in Canada during the Class Period” in order to be eligible for compensation under the terms of the *Settlement Agreement*.

[18] With respect to the procedure to be followed in considering a claim made under paragraph 2.01(1)(a), paragraph 3(a) of the *Traceback Protocol* requires the Administrator to obtain and assess the results of a Traceback Procedure. Paragraph 3(a) states as follows:

3. In making its decision whether the Claim in respect of a person claimed to be a Primarily-Infected Person should be approved, the Administrator shall:
 - a. obtain and assess the results of the stage or stages of the Traceback Procedure required by such of paragraphs 5 through 9 of this Protocol as are applicable to the claim in question; [...]

[19] The term “Traceback Procedure” is defined in both section 1.01 of the *Settlement Agreement* and paragraph 1(a) of the *Traceback Protocol*. For the purposes of the present appeal, it is unnecessary to refer to the definition in the *Traceback Protocol*. The definition in section 1.01 of the *Settlement Agreement* states as follows:

“Traceback Procedure” means a targeted search for and investigation of the donor and/or the units of Blood received by an HCV Infected Class Member”.

The results of a Traceback Procedure therefore provide information that is crucial in determining the central question of whether a person claiming to be a Primarily-Infected Person was infected with Hepatitis C by Blood received through the blood system in Canada during the Class Period.

[20] As part of the application form prescribed by the Administrator, a claimant must sign a “Form 4 – Authorization to Initiate Traceback Procedure and/or to Release Traceback Information”. Form 4 authorizes the Canadian Blood Services and/or Héma Québec, among other things, to initiate a Traceback Procedure for Blood or blood products received by that person in Canada.

[21] In circumstances where the results of the Traceback Procedure do not support the claim, subsections 5.04(1) and (2) apply and state as follows:

5.04 Traceback Procedure

(1) Notwithstanding any other provision of this Agreement but subject to the provisions of Sections 5.04(2) and (3), the Administrator must reject the Claim of a Primarily-Infected Person (and all Claims pertaining to such Primarily-Infected Person or Primarily-Infected Opt-out Person, including Claims of Secondarily-Infected Persons, HCV Personal Representatives, Dependants and Family Members) if the results of a Traceback Procedure demonstrate that:

- (a) where the Primarily Infected Person did not receive Blood prior to January 1, 1986, one of the donors or units of Blood received at any time between January 1, 1986 and

July 1, 1990 inclusive, by the Primarily-Infected Person was HCV antibody positive; or

(b) that none of the donors or units of Blood received by the Primarily-Infected Person during the Class Period is or was HCV antibody positive.

(2) A claimant may prove that the relevant Primarily-Infected Person or Primarily-Infected Opt-out Person was infected, for the first time, with HCV by receiving Blood in Canada during the Class Period, notwithstanding the results of the Traceback Procedure. For greater certainty, the costs of obtaining evidence to refute the results of a Traceback Procedure must be paid by the claimant unless otherwise ordered by a Court.

[22] Where the results of the Traceback Procedure demonstrate that none of the donors or units of Blood received during the Class Period was HCV antibody positive, paragraph 5.04(1)(b) of the *Settlement Agreement* requires the Administrator, in mandatory terms, to reject the claim. Paragraph 5.04(1)(b) must be read in conjunction with paragraph 8(a) of the *Traceback Protocol* which reiterates the obligation of the Administrator to reject a claim in such circumstances. Paragraph 8(a) of the *Traceback Protocol* states as follows:

8. After reviewing the available Traceback Procedure Information, if any, and the results of the Unit Number Search or Records Search, if such were required, the Administrator shall:

a. where all of the donors or units of the Blood received by the person claimed to be a Primarily-Infected Person during the Class Period are determined not to be HCV antibody positive, reject the Claim as provided in Section 5.04(1) of the Settlement Agreement, subject to the claimant's right to provide evidence to refute the Traceback Procedure result as provided in Section 5.04(2) of the Settlement Agreement and paragraphs 15 to 18 of this Protocol;

[23] Despite the requirement in subsection 5.04(1)(b) of the *Settlement Agreement* and paragraph 8(a) of the *Traceback Protocol* to reject the claim, subsection 5.04(2) nevertheless permits a claimant to prove that the Primarily-Infected Person was infected with HCV, for the first time, by receiving Blood in Canada during the Class Period, notwithstanding the results of the Traceback Procedure. In the same vein, paragraph 8(a) of the *Traceback Protocol* refers to the right of a claimant to provide evidence to refute the Traceback Procedure result under both subsection 5.04(2) of the *Settlement Agreement* and paragraphs 15 to 18 of the *Traceback Protocol*.

[24] Paragraph 15 of the *Traceback Protocol* requires the Administrator, after making a determination to reject the claim based on the Traceback Procedure result, to advise the claimant of the right to provide "further evidence of first infection", failing which the claim will be rejected. The expression "further evidence of first infection" is used in paragraphs 15 to 18 of the *Traceback Protocol*; it is not specifically defined in either section 1.01 of the *Settlement*

Agreement or paragraph 1 of the *Traceback Protocol*. However, paragraph 15 of the *Traceback Protocol* refers to “further evidence of first infection” as evidence establishing that the claimant “[...] was infected for the first time with HCV by a Blood transfusion received in Canada during the Class Period notwithstanding the Traceback Procedure result [...]”. Paragraph 15 also makes reference to subsection 5.04(2), the provision in the *Settlement Agreement* that permits a claimant to prove first infection, notwithstanding the results of the Traceback Procedure. Paragraph 15 of the *Traceback Protocol* provides as follows:

15. The Administrator shall, after determining in accordance with the provisions of Section 5.04(1) of the Settlement Agreement and paragraph 8(a) or 8(c)(i) above that a Claim must be rejected based upon the Traceback Procedure result, advise the claimant that, unless the claimant provides further evidence of first infection (“Further Evidence of First Infection”) which establishes to the satisfaction of the Administrator that the person claimed to be the Primarily-Infected Person was infected for the first time with HCV by a Blood transfusion received in Canada during the Class Period notwithstanding the Traceback Procedure result in accordance with Section 5.04(2) of the Settlement Agreement, his or her claim shall be rejected (a “Section 5.04 Letter”).

[25] Paragraph 16 of the *Traceback Protocol* requires the Administrator to send a letter to the claimant under section 5.04 advising of the right to elect to provide Further Evidence of First Infection and the obligation to return the election form within a prescribed time period, failing which the claim will be rejected. Paragraph 17 provides, among other things, that a claimant who elects to provide Further Evidence of First Infection must submit the evidence within a period of six months, unless the time period is extended. Paragraphs 16 and 17 of the *Traceback Protocol* state as follows:

16. A Section 5.04 Letter shall advise the claimant that he or she may elect to provide Further Evidence of First Infection by returning the election form provided to the Administrator within thirty days from the date of receipt of the Section 5.04 Letter, failing which his or her claim shall be rejected.

17. If the claimant elects to provide Further Evidence of First Infection and returns the prescribed election form in the prescribed time, he or she must provide, within the following six months, his or her Further Evidence of First Infection, unless that time is extended with the consent of the Administrator or by the Court on a teleconference motion arranged at the request of the claimant.

[26] In circumstances where a claimant provides Further Evidence of First Infection, paragraph 18 of the *Traceback Protocol* requires the Administrator to accept or reject the claim “[...] based upon all of the information available and section 5.04 of the *Settlement Agreement*”. In addition, a claim will be rejected where a claimant fails to provide the Further Evidence of First Infection within

the prescribed or extended time period. Paragraph 18 of the *Traceback Protocol* states as follows:

18. The Administrator shall, following receipt and consideration of the Further Evidence of First Infection received from a claimant, accept or reject his or her Claim based upon all of the information available to the Administrator and Section 5.04 of the Settlement Agreement. If the claimant who elected to provide Further Evidence of First Infection does not provide the Further Evidence of First Infection within the six months following his or her election, or such further time as has been agreed or ordered, his or her Claim shall be rejected.

[27] In the present appeal, the related provisions in paragraph 5.04(1)(b) and subsection 5.04(2) of the *Settlement Agreement*, as well as paragraphs 3, 8(a) and 15 to 18 of the *Traceback Protocol*, must be read together. A textual reading of those provisions in their context and in conjunction with one another confirms that, where a Traceback Procedure demonstrates that none of the donors or units of Blood received by a Primarily-Infected Person during the Class Period is or was HCV antibody positive, a claimant has the opportunity to provide Further Evidence of First Infection in accordance with the requirements in the *Traceback Protocol*. The Further Evidence of First Infection must establish, to the satisfaction of the Administrator, that the person claiming to be the Primarily-Infected Person was infected for the first time with HCV by a Blood transfusion received in Canada during the Class Period; otherwise, the claim for compensation must be rejected. This interpretation is also consistent with the purpose of the *Settlement Agreement*, which is to settle all claims relating to or arising from the infection of persons with Hepatitis C through the Blood system in Canada during the Class Period, on the terms set out in the *Agreement*.

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

[26] Section 5.04 of the *Settlement Agreement* and paragraphs 15 and 18 of the *Traceback Protocol* require the Administrator, among other things, to reject a claim for compensation of a Primarily-Infected Person where none of the donors of blood received is or was HCV antibody positive, unless further evidence establishes an infection with HCV for the first time by a blood transfusion.

[27] The evidence in the Transfusion Summary, reproduced in paragraph 13, establishes that the donors of the two units of blood transfused to the Claimant on February 11, 1985 were HCV negative.

[28] In the preliminary decision dated July 10, 2008, the Administrator advised the Claimant that the application for compensation would be rejected, unless she could provide evidence that she was infected for the first time with HCV by blood received in Canada during the Class Period.

[29] Unfortunately, the Claimant was unable to provide any evidence that she was infected for the first time with the Hepatitis C virus by blood received in Canada during the Class Period. By virtue of subsection 5.04(2) of the *Settlement Agreement* and paragraphs 15 and 18 of the *Traceback Protocol*, the Administrator was required to reject the application for compensation.

iii) Compensation under another agreement

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

[41] I can appreciate the frustration and distress that this decision will cause to the Claimant, particularly given that the member of the provincial review committee found him to be eligible for a benefit under that program. It must be recognized that the framework governing eligibility for compensation under the terms of the *Settlement Agreement* is completely different from the one applied by the member of the review committee in the context of the provincial agreement.

[31] 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.²

CONCLUSION

[32] The appeal is dismissed.

"D. McGillis"

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

DATED January 4, 2011

TO: Claimant
Fund Counsel
Administrator

² 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).