

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: 07-07320

REASONS FOR DECISION

INTRODUCTION

[1] The Claimant has appealed a decision of the Administrator dated December 11, 2009, 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 Hepatitis C for the first time by a blood transfusion in Canada during the Class Period.

FACTS

[2] On March 18, 2008, counsel for the Claimant delivered an application for compensation under the *Settlement Agreement* that consisted of approximately 350 pages of documents. Reference will be made only to documents that may have relevance to the issue raised on appeal.

Documents delivered on March 18, 2008

[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.¹ In “Section G – Other Risk Factors”, he checked the boxes to indicate prison incarceration, non-prescription intravenous drug use and tattoos as other

¹ See pages 2 to 6.

risk factors for Hepatitis C; for the non-prescription intravenous drug use, he wrote “Intravenous cocaine use during 1980’s”; for the tattoos, he wrote “mid 1970’s 1 tattoo, 1980’s 3 tattoos”. In Schedule “A” to the form, he provided details concerning his incarceration in federal and other penal institutions from May 1970 to August 1971 and July 1975 to August 1981.² The Claimant has received compensation under another plan in the amount of \$25,000.00.

[4] The Treating Physician Form was completed by a family physician (“family physician”); he had treated the Claimant for six years.³ He indicated, among other things, that the Claimant was at Disease Level 6. In response to question 1 in the “Section F – HCV Disease Verification” part of the form, he checked the boxes to indicate prison incarceration, non-prescription intravenous drug use and tattoos as risk factors for the Hepatitis C virus. In question 2, he checked the box to indicate that the Claimant had received a blood transfusion during the Class Period. In response to question 3 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 family physician wrote “few episodes of i.v. cocaine use in 1986”.

[5] In the Statutory Declaration Form, the Claimant declared that he had used non-prescription intravenous drugs.⁴

[6] In the unsigned Blood Transfusion History Form, the Claimant stated that he had received six units of blood in November 1975 for blood loss from a stabbing.⁵

² See page 33.

³ See pages 7 to 13.

⁴ See page 15.

⁵ See page 18. The form was signed by the Claimant on June 2, 2008 (at page 51).

[7] Counsel delivered documents in support of the application for compensation including laboratory reports and hospital chart records.

[8] A laboratory report dated May 10, 2002 confirmed, among other things, that the Claimant had tested positive for the antibody to the Hepatitis B surface antigen and Hepatitis C.⁶

[9] In a G.I. Office Consultation dictated on July 8, 2005, a physician wrote, among other things, as follows:⁷

[The Claimant] is 61 and had blood transfusions in 1975. He also used intravenous drugs a few times.

[10] In a Consultation / Clinical Note Clinique dictated on April 9, 2007, a physician stated, in part, as follows:⁸

[The Claimant] is a 63 year old man who was noted to have low platelets recently. He has been noted to have hepatitis C back in 1975, following a blood transfusion.⁹ He was told during a look back program in the 1990's to have his antibody checked and this was positive. [...]

In terms of risk factors for viral hepatitis, the only one is the blood transfusion in 1975. Otherwise, he denied sharing needles. He has not had any acupuncture or any tattoos that were sterily [sic] applied. No IV drug use or cocaine snorting. His alcohol use was heavy as a youth, but he has been completely abstinent for the last three years. No occupational exposures. No family history of liver disease, colorectal polyps or cancer.

⁶ See page 36. See also laboratory report at page 83 indicating that the Claimant tested positive for Hepatitis C on May 1, 1998.

⁷ See page 38.

⁸ See page 43.

⁹ There is no evidence to support the statement that the Claimant was "Noted to have Hepatitis C back in 1975 following a blood transfusion". Indeed, the next statement in the Consultation indicates that the Claimant was tested for Hepatitis C in the 1990's after receiving notification in a look back program.

[11] In a letter to the family physician dated May 29, 2007, a specialist at the hospital stated, among other things, that the Claimant had “[...] a past history of hepatitis C related to blood transfusions in the 1970’s”.¹⁰

[12] In letters dated May 29 and June 31, 2008, the Administrator advised counsel of certain deficiencies in the application for compensation.

TRACEBACK

[13] By letter dated July 10, 2008, the Canadian Blood Services forwarded the final Traceback report to the Administrator. The accompanying Transfusion Summary stated as follows:¹¹

Hospital: [name deleted]
Timeframe: 1975

Comments:

The hospital records indicate that 3 blood units were transfused in 1975. Due to the fact that Canadian Blood Services does not have donor records for this time period, we are unable to perform a traceback.

The case is closed. [Emphasis added]

PRELIMINARY DECISION OF THE ADMINISTRATOR

[14] In a decision dated August 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 eligibility on the balance of probabilities. 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:

¹⁰ See page 40.

¹¹ See page 57.

- 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. [...]

FURTHER EVIDENCE OF FIRST INFECTION

[15] On September 12, 2008, the Claimant signed the form indicating his intention to provide further evidence of first infection.¹²

Evidence delivered on February 24, 2009

[16] By letter dated February 20, 2009, counsel delivered further evidence of first infection to the Administrator.¹³ The evidence included an affidavit from the Claimant and some medical, laboratory and hospital records

[17] The affidavit of the Claimant was sworn on February 20, 2009 and stated as follows:¹⁴

¹² See page 60.

¹³ See page 68.

¹⁴ See pages 69 to 71.

1. I am a resident of the Province of [name deleted] and currently reside at [address deleted].
2. I was born on [date of birth deleted].
3. I tested positive for Hepatitis C on July 17, 1997. I received one blood transfusion during the class period. At the time of the first transfusion I was 32 years old. I received this transfusion while in custody at the [name deleted] Hospital on November 26, 1975.
4. I began using non-prescription intravenous drugs in the late 1980s. I used non-prescription intravenous drugs from approximately 1987 to 1989. When I first began using non-prescription intravenous drugs I would use the drugs 5 to 6 times a month, normally around paydays. I started using non-prescription intravenous drugs less frequently in 1988 and stopped using them all together in 1989.
5. When I was using non-prescription intravenous drugs I would obtain needles from various local pharmacies. I always used new needles when using non-prescription intravenous drugs. In order to purchase these needles from a pharmacy I would tell the pharmacy that I was diabetic. At the time I was using non-prescription intravenous drugs I was told that telling a pharmacy you were diabetic was the easiest way to purchase new needles.
6. I always used sterile needles when I was using non-prescription intravenous drugs. I always used a new needle each time I used non-prescription intravenous drugs and then I disposed of the used needle by breaking it in half and placing it in a can or bottle in the garbage. I disposed of my needles in this way every time I used non-prescription intravenous drugs and I never reused my old needles.
7. I have never shared a needle with any other drug user while I was using non-prescription intravenous drugs.
8. I have donated blood twice, once in approximately 1962 at the [name deleted] Reformatory and again in 1970 at the [name deleted] Correctional Camp. These donations are both prior to my blood transfusion on November 26, 1975.
9. I have been convicted of criminal offences under the *Criminal Code of Canada*. I have committed several counts of theft as well as break and enter [see Exhibit A] and I have served time in the Canadian Penal system [see Exhibit B].
10. This affidavit is made in support of my application for coverage under the Pre-1986/Post-1990 Hepatitis C Class Action Settlement Fund, and for no improper purpose. [Emphasis Added]

[18] Exhibit “A” to the affidavit consisted of two documents: first, a “Penitentiary Placement Report” from 1980 that recorded, among other things, the “current offences of the Claimant”; and second, a record of criminal convictions printed on December 3, 1980 detailing convictions from 1960 to November 1980.¹⁵

[19] A Blood Transfusion Record confirmed that, on November 26, 1975, the Claimant was transfused with units of blood numbered 07136, 07140 and 421.¹⁶

[20] An “Office Visits” chart record dated December 18, 1997 contained a note written by a former family physician of the Claimant (“former family physician”) indicating that, in the past, the Claimant “drank + took drugs”.¹⁷

[21] An “Office Visits” chart record dated October 26, 1999 contained a note written by the former family physician indicating that the Claimant had been “in trouble with the law but it call came to nothing”.¹⁸

[22] An “Office Visits” chart record dated January 8, 2001 contained a note written by the former family physician indicating that the Claimant “has been in jail the past year”.¹⁹

[23] In a consultation request dated January 11, 2001, the former family physician wrote, among other things, that the Claimant had “spent all of 2000 in jail”.

[24] An “Office Visits” chart record dated November 30, 2001 contained a note written by the former family physician indicating that the Claimant was “back out of jail”.²⁰

¹⁵ See pages 73 to 76.

¹⁶ See page 85.

¹⁷ See page 87.

¹⁸ See page 90.

¹⁹ Ibid.

²⁰ See page 91.

[25] There was nothing in the evidence to indicate the nature of the offences for which the Claimant was incarcerated in 2001. In particular, there was no reference in the affidavit of the Claimant to any convictions or incarceration during this period.

[26] On March 26, 2001, the former family physician completed a Physician Form in the context of an application made by the Claimant for compensation under another plan. In the space for Hepatitis C risk factors, she wrote as follows:²¹

Has used IV drugs in the past. No shared needles. Avoided all drugs while in jail.

Evidence delivered on March 31, 2009

[27] By letter dated March 27, 2009, counsel delivered the health care records of the Claimant from Correctional Services Canada as further evidence of first infection.²² The records spanned the period from 1970 to 1981.²³ There was no evidence in the records relating to non-prescription intravenous drug use by the Claimant. There were several references in the records in the years after the 1975 transfusions indicating that the Claimant was generally in good health.²⁴

[28] There were no medical records delivered by the Claimant for the period from approximately 1982 to 1997. This timeframe included the period from 1987 to 1989 when the Claimant admitted the use of non-prescription intravenous drugs.

²¹ See page 92.

²² See page 104.

²³ See pages 105 to 354.

²⁴ See, by way of example, pages 134, 148, 168 and 183 (1978 to 1981).

OPINION OF MEDICAL SPECIALIST

[29] In a letter dated November 17, 2009, a medical specialist provided the following opinion to the Administrator:²⁵

I have reviewed the file of the above named claimant as requested. Briefly, this is a 66-year old male who was found to be hepatitis C in 1997. He subsequently was found to be genotype 1 with evidence of cirrhosis based on low platelets and the presence of mild gastric changes. In 1975 while in prison he had a knife wound to his neck and significant injuries along with a punctured lung and he was typed and crossed for what appears to be six units of blood and the report indicates that two units of blood that appeared to have been signed off but up to three units of blood may have been transfused. None of these units can be traced. His incarcerations were in 1970-71 and subsequently from 1975 to 1981. He related that he has used intravenous cocaine in the past particularly during the period from 1987 to 1989. According to the medical chart he also was a heavy alcohol drinker however in 2007 he indicated that he was only drinking 4-5 beers per day. A note from his family doctor in the late 90s, around the time that he was diagnosed with hepatitis C indicated that he did not have any evidence of advanced liver disease that would have inhibited his ability to work. His liver function tests however were elevated in that time course. Other medical problems include diabetes and hypertension. This individual has also had several tattoos in the 70s and in the 80s.

The issue is where did he more likely acquire his hepatitis C. Clearly three units of blood acquired in 1975 would be a potential risk factor in an individual with increased alcohol intake history one could expect to see significant evidence of liver damage 15 or more years after initial infection. On the other hand he had what appears to be fairly extensive injection drug use history in the late 80s. The claimant states in his affidavit that he never shared needles and always used clean needles but in most cases individuals who are using cocaine may not be meticulous with their needle choices and more importantly it was not readily known at that time that the sharing of drugs, paraphernalia and liquids to dilute and dissolve the cocaine for injection all can be involved in the transmission of blood pathogens, especially hepatitis C even if clean needles are used. Looking at 15 years after 1987 this would take the possibility of seeing significant symptoms in the early part of the new millennium. Therefore, from a symptom standpoint, the fact that he was seen to have compensated cirrhosis in 2005 does not discriminate exposure in the late 80s versus 1975. This along with the fact that he's had a number of tattoos, was incarcerated for a long period of time all are at least as likely potential sources of acquisition of hepatitis C and [sic] is the blood transfusions that he received in 1975. I am unable to differentiate these risk factors with any greater precision. [Emphasis Added]

²⁵ See pages 355 to 356.

REVIEW COMMITTEE RECOMMENDATION

[30] In a memorandum dated December 11, 2009, the Intravenous Drug Use Committee of the Administrator summarized its review of the claim file and stated as follows:²⁶

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

Pertinent facts

Pg 56/7 Transfused 3 units in 1975 – TB inconclusive CBS does not have records from 1975 and therefore cannot further investigate the donors of these units.

Pg 69/70 – IVDU took place in 1987 to 1989. States used 5 to 6 times a month at first and then less frequently.

Pg 5 – claimant stated Tattoo's – one in 1970 and three in the 1980's

Pg 33 and 73-76 – claimant has spent several years in prison system

With Reference to IVDU CAP paragraphs 7d and 8b: [the medical specialist] wrote in his report “from a symptoms standpoint, the fact that he was seen to have compensated cirrhosis in 2005 does not discriminate exposure in the late 80's vs 1975.”

Conclusion of Administrator's review: The complete claim has been reviewed including the evidence of the medical expert. There is evidence of Transfusions however there is no information of the Donors. Additional risk factors are, IVDU, tattoos and several years in Prison. In conclusion the claimant has not satisfied the criteria of the Court Approved Protocol as he has not provided evidence that supports on a balance of probabilities he was first infected with HCV by a Blood transfusion received in Canada during the class period. Based on this the Administrator must reject the claim.

Text for Rejection letter

In your original application both you and your Treating Physician advised the Administrator that you had used non-prescription intravenous drugs. You submitted an affidavit and medical records in compliance with the Court Approved Protocol. As directed by the courts, the Administrator has reviewed the entire claim including the opinion of the medical specialist. The Medical expert wrote “from a symptoms standpoint, the fact that he was seen to have compensated cirrhosis in 2005 does not discriminate exposure in the late 80's vs 1975.” Additional risk factors have also been noted of Tattoos and Prison incarceration. Based on this the evidence on file does not support that on a

²⁶ See page 357.

balance of probabilities it is more likely that you were infected for the first time with Hepatitis C by your transfusions and your claim must therefore be rejected. [Emphasis Added]

DECISION OF ADMINISTRATOR

[31] On December 11, 2009, 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.

In your original application both you and your Treating Physician advised the Administrator that you had used non-prescription intravenous drugs. You submitted an affidavit and medical records in compliance with the Court Approved Protocol. As directed by the courts, the Administrator has reviewed the entire claim including the opinion of the medical specialist. The Medical expert wrote "from a symptoms standpoint, the fact that he was seen to have compensated cirrhosis in 2005 does not discriminate exposure in the late 80's vs 1975." Additional risk factors have also been noted of Tattoos and Prison incarceration. Based on this the evidence on file does not support that on a balance of probabilities it is more likely that you were infected for the first time with Hepatitis C by your transfusions and your claim must therefore be rejected.

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

[32] On January 14, 2010, the Claimant delivered a Request for Review and specified the reasons for appealing as follows:²⁷

The Claimant was transfused 3 units of blood in November 1975. The Claimant disputes and denies that he was infected through periodic IV drug use that occurred after the fact, and/or unprofessional tattoo application. Based on the medical evidence, it is more likely than not that the Claimant was infected as a result of the blood transfusion in November 1975.

SUPPLEMENTARY EVIDENCE ON APPEAL

[33] On November 2, 2010, the Claimant delivered a handwritten document that was purportedly a sworn affidavit dated October 27, 2010. It does not appear that the document was sworn by an authorized person. In any event, the document stated as follows:

On the 26 Nov 1975 I received a blood transfusion at the [name deleted] General Hospital in [name of city and province deleted]. I have since contracted hepatitis C from this transfusion and am noticing [sic] you of the same.

I hereby declare that I have not contributed or done anything which would have caused hepatitis C to have entered my system in any other way than by the transfusion from 3 different donors at the [name deleted] Hospital on the above mentioned date.

And I make this sworn affidavit knowing it is of the same force and effect as made under oath and by virtue of the Canada Evidence Act.

I swear I delivered this affidavit by ordinary mail on 27 Oct 2010 to an agent of Crawford & Associates.

ISSUE

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

²⁷ See page 359.

ANALYSIS

[35] 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. [Emphasis Added]
[...]

ii) Did the Administrator err in denying the application for compensation?

[36] 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 Hepatitis C 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”. 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.

[37] I have carefully reviewed all of the evidence in the context of the eligibility requirements in section 2.01 of the *Settlement Agreement* and the applicable provisions of the *Non-Prescription Intravenous Drug Protocol*. In my opinion, the Administrator has not erred in concluding that, on the totality of the evidence, the Claimant has failed to establish his infection for the first time with Hepatitis C by his blood transfusions in 1975, as required by subsection 2.01(3) of the *Settlement Agreement* and the provisions of the *Non-Prescription Intravenous Drug Protocol*. In particular, the medical specialist stated in the opinion reproduced in paragraph 29 that, “[...] from a symptoms standpoint, the fact that [the Claimant] was seen to have compensated cirrhosis in 2005 does not discriminate exposure in the late 80’s versus 1975”. In other words, the symptoms exhibited by Claimant indicate that he could have contracted Hepatitis C in 1975 from the blood transfusions or in the 1980’s from his non-prescription intravenous drug use. The medical specialist further stated that all of the risk factors, including non-prescription intravenous drug use, tattoos and lengthy prison incarceration, were “at least as likely potential sources of acquisition of hepatitis C” by the Claimant as the blood transfusions in 1975. The medical specialist was therefore unable to indicate “with any greater precision” the more likely source of the Claimant’s Hepatitis C infection. In other words, the Claimant had multiple risk factors for Hepatitis C, any one of which could have

caused the infection. The Claimant did not deliver any evidence that would contradict the opinion of the medical specialist or establish that he had “more likely” contracted Hepatitis C from the blood transfusion. In the circumstances, he has not established on a balance of probabilities that he “[...] was infected for the first time with HCV by blood in Canada during the Class Period”, as required by subsection 2.01(3) of the *Settlement Agreement*. The Administrator therefore did not commit an error in denying the application for compensation.

iii) Compensation under another program or agreement

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

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

[39] Although I fully understand that it must be confusing and upsetting when compensation is granted under the auspices of one program or agreement and yet denied under another one, the terms of the *Settlement Agreement* govern the present claim and must be applied. It is also important to recognize that the terms of the *Settlement Agreement* are the result of an agreement between the Parties which was approved by the

Courts; neither the Administrator nor the Appeals Officer has any power or discretion to alter those terms.²⁸

CONCLUSION

[40] The appeal is dismissed.

"D. McGillis"

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

DATED March 24, 2011

TO: Claimant
Fund Counsel
Administrator

²⁸ 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).