

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: 07-01129

REASONS FOR DECISION

INTRODUCTION

[1] The HCV Personal Representative has appealed a final decision of the Administrator dated December 22, 2010, in which the application for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied under subsection 2.01(3). She failed to satisfy the Administrator on a balance of probabilities that the deceased HCV Infected Class Member, who had used non-prescription intravenous drugs, was infected with Hepatitis C for the first time by a blood transfusion in Canada during the Class Period. The HCV Infected Class Member was born in 1972 and passed away in 2005.

FACTS

[2] On October 19, 2007, the HCV Personal Representative delivered an application for compensation under the *Settlement Agreement*. The required forms were not fully completed, and the Administrator subsequently advised the HCV Personal Representative of deficiencies to be corrected.

Documents delivered on October 19, 2007

[3] In the General Information Form, the HCV Personal Representative did not complete portions of the form, including “Section G – Other Risk Factors”.¹

[4] The Treating Physician Form was completed by a family physician; he had treated the HCV Infected Class Member for 21 years (“the family physician”).² In the part “Section F – HCV Disease Verification”, he checked the box to indicate non-prescription intravenous drug use as a risk factor for the Hepatitis C virus. In response to question 2, he indicated that the Claimant had received a blood transfusion during the Class Period. In response to question 3 concerning whether there was anything in the medical history or clinical presentation of the HCV Infected Class Member to indicate the use of non-prescription intravenous drugs at any time, he checked the box “Yes” and wrote the following:

[The HCV Infected Class Member] described sharing needles with friends taking IV methamphetamine, and noted that none of these people had acquired Hepatitis C.³ [Emphasis Added]

[5] In the Statutory Declaration Form (“first Statutory Declaration Form”), the HCV Personal Representative declared that the HCV Infected Class Member had never used non-prescription intravenous drugs at any time, but wrote the following:⁴

¹ See page 5 of the Claim File. (All page numbers in the footnotes refer to the Claim File). See also paragraph 13 where HCV Personal Representative indicated in response to “Section G – Other Risk Factors” in the second General Information Form that the HCV Infected Class Member had no risk factors for the Hepatitis C virus.

² See pages 7 to 13. A further Treating Physician Form was delivered to correct deficiencies noted by the Administrator and is reproduced at pages 82 to 86. However, the information concerning non-prescription intravenous drug use by the HCV Infected Class Member was not changed in any manner.

³ See page 12. The treating physician made no reference in the Treating Physician Form to the timeframe of the non-prescription intravenous drug use by the HCV Infected Class Member. However, other evidence in the file indicated that the use occurred in the period from 1968 to 1973.

⁴ See page 15.

He did when young however he proved it was the Blood transfusion he received as he did not share. I will show this in the following pages. [Emphasis Added]

[6] In the Blood Transfusion History Form, the HCV Personal Representative noted the numbers of several units of blood transfused to the HCV Infected Class Member for the treatment of a gunshot wound.⁵

[7] The HCV Personal Representative delivered several documents with the application forms, including part of a provincial plan decision, a letter from the family physician and a reporting letter from a surgeon to the family physician.

[8] In a decision dated April 11, 2000, the provincial plan Review Committee (“Review Committee”) concluded that the HCV Infected Class Member had contracted Hepatitis C as a result of blood transfusions and granted him an entitlement to a benefit. The decision stated, in part, as follows:⁶

On the physician’s form, there is an indication of IV drug use in 1973, accompanied by a notation that the people with whom the applicant shared drugs, but not needles, are negative for Hepatitis C. The interview notes indicate that [the HCV Infected Class Member] said he tried non-prescription injection drugs in 1968, and in his reasons for review, [the HCV Infected Class Member] says he always used his own needles. There is no basis in the material before me to reject this statement. It is clear from the material before me that the risk of contamination from IV drug use is from sharing of needles and paraphernalia, not from the use of non-prescription drugs itself. In the material before me, I have no evidence that [the HCV Infected Class Member] shared anything. There are no other risk factors identified in the material before me.

I have before me material from medical literature on which the program office may have relied, a list of which was to be provided to the applicant. The program office’s letter mentions medical opinion that the risk from IV drug use is 10 to 50 times greater than that from the blood supply. However, the source for that opinion is not in the material before me. There is an indication to the contrary in the material, in a piece appended to the twenty-sixth article on the list provided to the applicant, which is “Information for the General Public” from the Hepatitis C Foundation. The appendix is entitled “Hepatitis C – Background Information” and is authored by Dr. Paul R. Gully of the Bureau of Communicable Disease

⁵ See page 18.

⁶ See pages 39 to 41.

Epidemiology of the Laboratory Centre for Disease Control, and indicates that blood transfusion ranks ahead of needle sharing in order of risk by route of transmission in Canada. Similarly, the twenty-fourth article on the same list, "Prevention and control of Hepatitis C, Guidelines and Recommendations", Health Canada:

Canada Communicable Disease Report: 1995 21S2: I-18, indicates that prior to blood screening, transfusion in Canada was the most likely route of transmission.

b. Is the stage of the HCV consistent with the chronology of the administration of blood products as the source of the Applicant's HCV infection?

There is little evidence about the stage of HCV before me. The diagnosis was made in 1997, and the transfusions were received in 1974. Therefore, there is no inconsistency in terms of chronology of diagnosis and exposure through the blood supply.

c. The number of units of blood or blood product received by the Applicant

[The HCV Infected Class Member] received six units of blood in 1974 when treated for a gunshot wound. The traceback indicated there were no records for any of those units. One is left with the possibility of six or more donors, and the lack of information as to their HCV status.

The evidence for the proposition that the transfusion was the source of [the HCV Infected Class Member] HCV includes the opinion of the applicant's physician that the applicant probably contracted his Hepatitis C from tainted blood received in blood transfusions administered in 1974; the timing of the transfusions sufficiently before the diagnosis, and the absence of sharing of needles. There are also the medical articles suggesting that, in Canada in the period in which the applicant was transfused, prior to screening, the risk of transmission of HCV by transfusion ranked ahead of needle sharing in IV drug use. The evidence against is the possibility that the HCV was contacted through the occasions of IV drug use of which I have evidence, weighed with the doctor's and the [the HCV Infected Class Member] evidence that there was no sharing, together with the undocumented medical opinion that the risk of transmission through IV drug use was ten to fifty times greater than through the blood supply.

In the face of the opinion of the applicant's doctor that the HCV was likely contracted through the blood supply, and the evidence that there was no needle sharing, I find that it is more likely than not that the [the HCV Infected Class Member] contacted [sic] HCV through the blood supply.

The Review Committee finds that the applicant contracted Hepatitis C as a result of his transfusions in Ontario in the entitlement period.

DECISION

I have considered the Review Record and applied the principles and policies [sic] set out to the Policy Pursuant to Section 3.1 of the OHCAP External Review

Procedures. The decision of the Program Adjudicator is reversed and entitlement to the benefit is granted. [Emphasis Added]

[9] In a letter dated August 12, 1998, the family physician wrote as follows:⁷

RE: [Name deleted – HCV Infected Class Member]

The above has documented Hepatitis C, probably contracted from tainted blood received in blood transfusions administered in 1974. [Emphasis Added]

[10] In a letter dated October 5, 2004, a surgeon reported to the family physician concerning his examination of the HCV Infected Class Member and stated that the Hepatitis C was “likely” due to blood transfusions in 1974. However, he made no reference in the letter to non-prescription intravenous drug use by the HCV Infected Class Member. The letter stated, in part, as follows:⁸

Thank you for asking me to see this 62-year-old man with regards to his hepatoma and consideration of transplantation. I recall discussing him at rounds this morning with the benefit of your notes as well as the images on the computer system.

This man is Hepatitis-C positive cirrhosis likely related to blood transfusions received around the time of a laparotomy for a shot gun blast to the right upper quadrant in 1974. He has had an appendectomy at the age of 17 or 18 and a cholecystectomy in the early 1980s.

His other risk factors for Hepatitis-C is [sic] his sexual orientation.

He has in general felt well without any symptoms of decompensation of his liver disease but surveillance has identified two new vascularized lesions in the right upper quadrant. You have investigated him for consideration of transplantation. [Emphasis Added]

[11] In a letter dated November 19, 2007, the Administrator advised the HCV Personal Representative of various deficiencies in the application.

⁷ See page 66.

⁸ See page 74

Documents delivered on December 19, 2007

[12] On December 19, 2007, the HCV Personal Representative delivered documents, including the completed pages of various forms.

[13] In a further General Information Form (“second General Information Form”), the HCV Personal Representative responded to “Section G – Other Risk Factors” by checking the box “None” to indicate that the HCV Infected Class Member had no risk factors for the Hepatitis C virus.⁹ She did not check the box for non-prescription intravenous drug use.

[14] In a letter dated February 13, 2008, the Administrator advised the HCV Personal Representative of further deficiencies in the application.

Documents delivered on March 12, 2008

[15] On March 12, 2008, the HCV Personal Representative delivered a further Statutory Declaration Form (“second Statutory Declaration Form”) in which she declared that the HCV Infected Class Member had used non-prescription intravenous drugs.¹⁰ She also wrote as follows:

I was not privy to my brother’s life in the timeframe you say, busy raising my 3 babies at that time. But I sent you all the dr’s forms and I read them and so this is why I answer both ways.

PRELIMINARY DECISION OF ADMINISTRATOR

[16] In a decision dated June 30, 2008, the Administrator advised the HCV Personal Representative that the application for compensation would be rejected due to the use of non-prescription intravenous drugs by the HCV Infected Class Member, unless further

⁹ See page 80.

¹⁰ See pages 138 to 139.

evidence was provided to establish eligibility on the balance of probabilities. The Administrator included a Further Evidence of First Infection Form for the Claimant to return within thirty days and a “How to Proceed” document.

[17] In letter dated July 14, 2008 to the Administrator, the HCV Personal Representative stated as follows:¹¹

You have in your possession a transfusion summary and trace back [number deleted] for the deceased, my brother [the HCV Infected Class Member], from the Canadian Blood Services stating 7 units were transfused in February 1974. As a direct result of these transfusions, my brother received some money based upon the investigation of tainted blood when he was alive. [The family physician] has stated he was my brother’s doctor for some 21 years. It should be clear to you from all the evidence that you already have that, [the HCV Infected Class Member], my brother, was infected in the 1974 transfusion. I don’t live close to where my brother lived. When he was alive, I would see him when he was on his holidays from work. I don’t know how these many years later if what you are asking for is available or necessary, however, I will pursue this matter for my deceased brother in whatever means are available to me. My brother was not an addict. It has been proven that he was sick from the tainted blood received. Given all the evidence, the balance of probabilities should rule in my brother’s favour. I promised my brother when he was deathly ill that I would pursue his claim for him. If you would please reply to this brief letter in writing it would be appreciated.

[18] The HCV Personal Representative did not provide any further evidence of first infection within the timeframe specified by the Administrator.

TRACEBACK

[19] By letter dated February 11, 2008, the Canadian Blood Services provided the final report on the Traceback to the Administrator, together with a Transfusion Summary that stated as follows:¹²

Seven units were transfused in February 1974. Due to the fact that CBS has no Donor records for 1974 a full Traceback cannot be completed.

¹¹ See page 148.

¹² See page 150 and pages 335 to 337.

DECISION OF ADMINISTRATOR DENYING APPLICATION

[20] In a decision dated September 2, 2008, the Administrator denied the application for compensation for the following reasons:

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.

The Administrator has 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.

FIRST REQUEST FOR REVIEW

[21] On September 17, 2008, the HCV Personal Representative delivered a Request for Review ("first Request for Review").¹³ In an accompanying letter dated September 11, 2008, she requested a period of one year to prepare the appeal, expressed the view that

¹³ See pages 151 to 152.

the application was unjustly denied and included an excerpt from the provincial plan decision that was previously filed.¹⁴

[22] The Fund Counsel provided assistance to the HCV Personal Representative throughout the appeal process and granted extensions of time when required.

SUPPLEMENTARY EVIDENCE

[23] On September 29, 2009, the spouse of the HCV Personal Representative sent supplementary evidence to the Fund Counsel consisting of hospital records and three letters concerning the question of non-prescription intravenous drug use by the HCV Infected Class Member. One of the letters was written by the spouse of the HCV Personal Representative and the other two were from friends of the HCV Infected Class Member.

Hospital records

[24] By letter dated July 7, 2009, the hospital released records of the HCV Infected Class Member to the HCV Personal Representative.¹⁵ However, a box was checked on the form indicating that the hospital no longer had records from the 1960's and 1970's since more than 10 years had elapsed since the discharge of the patient. Despite the indication on the form concerning the destruction of records due to the lapse of time, over 100 pages of hospital records from 1973 and 1974 were released concerning the HCV Infected Class Member.

[25] There were two records containing evidence relevant to the question of drug use by the HCV Infected Class Member.

¹⁴ See page 153.

¹⁵ See page 165.

[26] An Out-Patient Department History Sheet contained a note dated January 3, 1974 written by a physician that included sections concerning Past History and Drugs. That part of the note stated as follows:¹⁶

P.H. [Past History]

Kidney infection

Appendectomy

Knife wound in chest Jan 73

Syphilis

Drugs

Tetracycline

Was on speed – clean 1½ years

[Emphasis Added]

[27] An Out-Patient Department History Sheet contained a note dated March 15, 1974 that stated, in part, as follows:¹⁷

Gunshot wound 10th Feb 74 – multiple pellets in abd → surgery [name of surgeon deleted]

Discharged 24 Feb 74

Not back to work

To clinic 20 March 74

On no drugs

[Notes deleted concerning unrelated matters]

Claims to have no problem with drugs [Emphasis Added]

Letters concerning the question of non-prescription intravenous drug use

[28] In a letter dated September 24, 2009 (“first letter”), the spouse of the HCV Personal Representative stated as follows:¹⁸

Please find copies of 2 letters enclosed together with memo from Health Services. Some 49 years ago prior to my marriage to [the HCV Personal Representative], I had a [sic] apartment with her late brother. At that time, [the HCV Infected Class Member] didn’t even drink alcohol let alone use drugs I can

¹⁶ See page 189.

¹⁷ See page 177.

¹⁸ See page 160. The HCV Infected Class member was born in 1942. As a result, the letter indicated that they lived together 49 years, in approximately 1962, when the HCV Infected Class member was 20 years old. The evidence indicated that the earliest use of non-prescription intravenous drugs was in 1968.

provide an affidavit for that time period if you feel it would help again your advice is appreciated.

[29] In a sworn letter dated July 2, 2009 (“second letter”), a friend of the HCV Infected

Class Member stated as follows:¹⁹

[The HCV Infected Class Member] was a neighbour and good friend of mine for over 20 years prior to his death. We both resided at [name deleted]. During that time we often socialized, but I never saw [the HCV Infected Class Member] use recreational drugs (needle or otherwise) or talk about using them. The only medicines I saw him use were prescribed.

[30] In a letter dated August 18, 2009 (“third letter”), another friend of the HCV

Infected Class Member stated as follows:²⁰

I am [name deleted] and I have known for [the HCV Infected Class Member] about 30 years. We were roommates during early 70’s. I have never known [the HCV Infected Class Member] to share needles or drugs with anyone. I’ve only seen him on and off for past five years before his death. I hope this will help his familys [sic] concerns.

[31] By letter dated November 3, 2009, the Fund Counsel forwarded the

supplementary evidence to the Administrator and requested a reconsideration of the decision.²¹

[32] By letter dated November 19, 2009, the Administrator advised the Fund Counsel

that the body of evidence was not sufficiently complete and further medical records

would be required. The letter stated as follows:²²

¹⁹ See page 164. The friend stated that the HCV Infected Class Member was a good friend “for over 20 years prior to his death”. However, the HCV Infected Class Member passed away in March 2005, meaning that they were friends from approximately 1985 onward. The evidence does not indicate any intravenous drug use during that timeframe.

²⁰ See page 162. The friend stated the HCV Infected Class Member did not share needles or drugs with anyone. The letter did not address the question of whether the HCV Infected Class Member used non-prescription intravenous drugs.

²¹ See page 159.

²² See pages 166 to 167.

We acknowledge receipt of your letter dated November 3, 2009. You requested The Administrator review the supplementary evidence submitted on behalf of the claim for the Estate of [the HCV Infected Class Member] and reconsider our decision on the claim.

The evidence submitted consisted of [the HCV Infected Class Member's] Medical records from the early 1970's and letters from his friends stating they did not see him share needles.

Paragraph 3 of the Court Approved Protocol for Non-prescription Intravenous Drug use reads as follows:

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.*

Additionally Paragraph 5 reads as follows:

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

It has been determined the body of evidence is not sufficiently complete to render a decision and in order to proceed with this claim further medical records would be required. The Administrator requires all available medical records from the 1970's **up to the date that [the HCV Infected Class Member] passed away (emphasis ours).**

Based on this information we are unable to reconsider the decision on the claim; however The Administrator would be agreeable to the claimant having the opportunity to provide the required supporting evidence before the status of the claim is reconsidered.

If you have further questions regarding this matter please contact the Administrator.

Medical records

[33] By letter dated February 22, 2010, the Fund Counsel forwarded the medical records of the HCV Infected Class Member to the Administrator. There were approximately 60 pages of medical records.

[34] There were five records containing evidence relevant to drug use by the HCV Infected Class Member. The four notes described in paragraphs 34 to 38 inclusive were handwritten by a total of three different physicians.²³

[35] In a note dated November 20, 1984, a family physician wrote, in part, as follows:²⁴

Was shot 1974 – hassle over drugs
 Requested [illegible] – referral ex drug user
 Grew silent after referral
 ? drug seeker!!!! [Emphasis Added]

[36] In a note dated February 24, 1986, a different family physician wrote, in part, as follows:²⁵

This interesting patient works as messenger at [name of employer deleted]. He has a history of I.V. drug usage 1975/76 & gunshot & stabbing [illegible]
 [Emphasis Added]

[37] In a note dated May 5, 1998, the family physician wrote, in part, as follows:²⁶

Previous lovers didn't have Hep C
IV drugs to 1972 – partner of the time doesn't have Hep C
 ? acquired in [initials of hospital deleted] [Emphasis Added]

[38] In a note dated May 25, 1998, the family physician wrote, in part, as follows:²⁷

²³ It was obvious from the distinctive differences in the handwriting that three different physicians wrote the notes.

²⁴ See page 282.

²⁵ See page 283.

²⁶ See page 309.

[First two lines of note deleted]

Friends he used to do speed with do NOT have Hepatitis C [therefore] probably contracted from transfusions in 1973-74 in [initials of hospital deleted]
[Emphasis Added]

[39] In a letter dated November 2, 2001, a specialist in pain management at a hospital wrote to a specialist in orthopaedics concerning an evaluation of the HCV Infected Class member for pain following surgery for a fracture.²⁸ He stated, in part, as follows at the bottom of the first page of the letter:

He is single. He smokes about a pack or ½ pack of cigarettes a week. He drinks 5-7 beers, 2-3 times a week. He had not used street drugs before. [Emphasis Added]

[40] In a letter dated March 3, 2010, the Administrator wrote to the HCV Personal Representative. The letter was entitled “Reconsidered Decision of the Administrator” (“reconsidered decision”) and stated as follows:²⁹

We are pleased to inform you that after reviewing the supplementary evidence and/or submissions, the Administrator accepts your claim in accordance with your Request for Review.

Please find enclosed further correspondence regarding the status of your claim.

[41] In a letter dated March 3, 2010, the Administrator provided reasons to explain the basis of the reconsidered decision.³⁰ In the letter, the Administrator stated that the claim was accepted as it met the “initial requirement” in the *Non-Prescription Intravenous Drug Use Protocol*. However, the Administrator noted that an opinion would be obtained from a medical specialist, as required by paragraph 3(b) of the *Non-Prescription*

²⁷ Ibid.

²⁸ See pages 329 to 330.

²⁹ The letter was not paginated, but precedes page 341 in the Claim File. It was confusing for the Administrator to call this letter a “reconsidered decision”. In effect, it was simply a notification to the HCV Personal Representative that an opinion would be sought from a medical specialist, following which the totality of the evidence would be assessed. In other words, it provided information concerning the next steps to be followed in the evaluation.

³⁰ See page 341.

Intravenous Drug Use Protocol, following which the totality of the evidence would be weighed. The letter stated as follows:

As stated in the previous letter the Appeal has been accepted based on the Supplementary evidence as you have complied with the initial requirement of the Court Approved Protocol (CAP) for Non-Prescription Intravenous Drug use. The Administrator will now continue to evaluate the claim under the rules of the CAP.

As noted in paragraph 3(b) of the CAP (enclosed) the Administrator shall 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 receipt of blood or the time of the non-prescription intravenous drug use. Upon receipt of the specialist's opinion the Administrator will then weigh the totality of the evidence to determine whether on a balance of probabilities the HCV Infected Class Member meets the eligibility criteria of the Settlement Agreement.

Please be advised the Administrator reserves the right to reissue a denial upon review of the evidence if it does not meet the appropriate criteria. [Emphasis Added]

OPINION OF MEDICAL SPECIALIST

[42] In a letter dated December 1, 2010, a medical specialist in infectious diseases (“medical specialist”) reviewed the evidence in the file at the request of the Administrator and concluded that he was unable to determine whether the blood transfusions or the non-prescription intravenous drug was “more likely” the source of the Hepatitis C infection in the HCV Infected Class Member. He stated as follows in the opinion:³¹

I have reviewed the file of the [the HCV Infected Class Member] as requested. This individual was diagnosed with hepatitis C infection around 1997. In 1974 he sustained a gunshot wound to his abdomen and received 7 units of blood. Unfortunately none of these units can be traced because of lack of records. Apparently he had a history of injection drug use and a note from his family doctor pins this in the range of 1975 and 1976 and the note indicated that he was using methamphetamine, was sharing needles with friends but apparently none of his friends have hepatitis C. He underwent treatment with interferon around 1999 with no success. He underwent subsequent treatment with interferon and Ribavirin around 2002. In 2001 his liver biopsy indicated stage 3-4 fibrosis and

³¹ See pages 342 to 343.

liver function tests were elevated and unfortunately he subsequently developed significant hepatocellular carcinoma with liver failure including ascites and hepatic encephalopathy. He died in 2005.

Other aspects of his medical history include arthritis for which he was treated with gold therapy injections. A history of anxiety and multiple traumatic injuries aside from his gunshot wound which included a stab wound to the chest and workup for sexually transmitted infections and as well he had a past history of significant alcohol intake.

The issue is where did he more likely acquire his hepatitis C infection. Clearly he received 7 units of blood and this being in the early 1970's this certainly would be a potential risk of exposure. This has to be balanced against injection drug use at a time where there was little evidence in the medical lay literature of the dangers of sharing needles. He readily admits to sharing needles and the fact that he was unaware of any of his friends acquiring hepatitis C certainly is not an attestation to lack of risk.

His deterioration to hepatocellular carcinoma 20 years later would certainly be compatible to exposure at either time and was likely hastened by his alcohol intake. Either one of the units of blood or the multiple injection drug use exposure would be a risk factor. I am not able to ascertain which is a likelier risk.

If you have any questions please feel free to contact me. [Emphasis Added]

FINAL DECISION OF ADMINISTRATOR

[43] The Intravenous Drug Use Committee reviewed the evidence in the file and concluded as follows:³²

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

Pertinent facts

P 11-12 – The GP who completed the Form 2 indicated the he had known the HCV infected person for 21 years and patient advised him that he shared needles with friends taking IV methamphetamine, and noted that none of these friends have acquired hepatitis C.

P 39 – noted in OHCAP form that the HCV infected person used IV drugs in 1968 and 1973.

P 149 – CBS Traceback confirmed 7 units transfused in 1974 and unable to trace the donors.

P 178 – 1974 Hepatitis B Surface Antigen negative.

With Reference to IVDU CAP paragraphs 7g and 8d: [the medical specialist] wrote: “His deterioration to hepatocellular carcinoma 20 years later would

³² See page 344.

certainly be compatible to exposure at either time and was likely hastened by his alcohol intake. Either one of the units of blood or the multiple injection drug use exposure would be a risk factor. I am not able to ascertain which is a likelier risk.”

Conclusion of Administrator’s review: The complete claim has been reviewed including the evidence of the medical expert. The medical expert opined that “His deterioration to hepatocellular carcinoma 20 years later would certainly be compatible to exposure at either time and was likely hastened by his alcohol intake. Either one of the units of blood or the multiple injection drug use exposure would be a risk factor.” The specialist was unable to ascertain which one was a greater risk. Based on the review of all evidence on file it is concluded the claimant has not satisfied the criteria of the Court Approved protocol as she has not provided evidence that supports on a balance of probabilities the HCV Infected Person 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.

[44] In a decision dated December 22, 2010, the Administrator stated that the entire file was reviewed, including the opinion of the medical specialist. The application for compensation was denied on the basis that the medical evidence did not establish, on a balance of probabilities, the infection of the HCV Infected Class Member for the first time with Hepatitis C by a blood transfusion.³³ The decision stated as follows:

In your original application the Treating Physician advised that the HCV Infected Person had used Non-prescription intravenous drugs in the past. The Administrator has reviewed the entire claim including the opinion of the medical specialist as directed by the Courts. The medical records revealed that the IV drug use and the Blood transfusions took place within the same time frame. The medical expert stated “His deterioration to hepatocellular carcinoma 20 years later would certainly be compatible to exposure at either time and was likely hastened by his alcohol intake. Either one of the units of blood or the multiple injection drug use exposure would be a risk factor.” Therefore it is concluded that you have not satisfied the criteria of the Court Approved protocol as you have not provided evidence that supports on a balance of probabilities the HCV infected person 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.

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]

³³ See pages 345 to 346. There was also a note from the spouse of the HCV Personal Representative, at page 349, indicating that time would be required to consult with medical and legal specialists.

SECOND REQUEST FOR REVIEW

[45] On January 27, 2011, the HCV Personal Representative delivered a Request for Review (“second Request for Review”) and specified the reasons for appealing as follows:³⁴

The [HCV Infected Class Member’s] doctor for many years stated that the [HCV Infected Class Member’s] HCV infection was as a result of tainted blood. The previous [name of province deleted] class stated that the [HCV Infected Class Member’s] Hep C was most likely caused by tainted blood he received. His friends stated in writing the [HCV Infected Class Member] never used or shared intravenous needles.

[46] In an e-mail dated December 15, 2011 to the Fund Counsel, the spouse of the HCV Personal Representative made the following submissions:

in [sic] reply to your statement nov.22/11 the family of the deceased [HCV Infected Class Member] has no choice but to stay with documentation already supplied there have been many requests for more and more information and documents made by the administrator. we [sic] feel with the information already supplied the claim should have been approved long ago. [The HCV Infected Class Member’s] doctor along with the [name of province deleted] class and letters from employers and long time friends of the deceased all agreed that [the HCV Infected Class Member’s] passing was directly related to tainted blood received in the 70’s please forward our concerns to the administrator the appeals officer and if there is a government agency that follows In on these cases please forward our concerns to them as well. thank [sic] you for any assistance you can provide.

ANALYSIS

[47] Subsection 2.01(3) of the *Settlement Agreement* places the onus on a claimant by requiring the delivery of evidence to establish on a balance of probabilities an infection for the first time with Hepatitis C by the receipt of blood. 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

³⁴ See pages 347 to 348.

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.

[48] The evidence establishes that the HCV Infected Class Member used non-prescription intravenous drugs, including at least methamphetamine (speed), during the timeframe of approximately 1968 to 1976. For example, at least four different physicians (one at the hospital and three family physicians) made notes in their medical records of statements made by the HCV Infected Class Member concerning his non-prescription intravenous drug use.³⁵ These notes were recorded by the physicians in medical records contemporaneously with the making of the statements by the HCV Infected Class Member and are therefore entitled to great weight. In addition, the family physician who had treated the HCV Infected Class Member for 21 years stated that the HCV Infected Class Member had “... described sharing needles with friends taking IV methamphetamine, and noted that none of these people had acquired Hepatitis C”.³⁶

[49] The evidence also included an opinion from a medical specialist in infectious diseases. In the opinion, he summarized evidence concerning the non-prescription intravenous drug use and also noted that the HCV Infected Class Member had shared needles with friends, none of whom were apparently infected with Hepatitis C. He stated that, during the relevant timeframe, there was little evidence in the medical literature of the dangers caused by sharing needles. In other words, in the 1970’s, the dangers of sharing needles were not widely known. In any event, he concluded that “[e]ither one of the units of blood transfusions in 1974 or the multiple injection drug use exposure would be a risk”. In the circumstances, he could not determine which of the two risks was

³⁵ See paragraphs 26, 35, 36 and 37.

³⁶ See paragraph 4.

“likelier”. In other words, neither risk factor was “more likely” the cause of the Hepatitis C infection.

[50] I have carefully reviewed all of the submissions made by the HCV Personal Representative in various documents and wish to specifically address three of the arguments that she has raised: first, the Review Committee found that the infection was “more likely than not” caused by a blood transfusion; second, the family physician and another physician stated that the infection was “directly related” to the blood transfusions in 1974; and three, the letters from her spouse and two friends also demonstrated that the Hepatitis C infection was caused by a blood transfusion, as the HCV Infected Class Member was not a drug user and, in any event, never shared needles.

[51] With respect to the first submission, it is important to emphasize that there were no medical or hospital records in evidence before the Review Committee and no expert evidence from a medical specialist in infectious diseases. Furthermore, the sole evidence before the Review Committee concerning the use of non-prescription injection drug use by the HCV Infected Class Member indicated that he had “tried it in 1968”, and there was also an “indication of IV drug use in 1973”. In other words, the evidence before the Review Committee concerning the use of non-prescription intravenous drugs by the HCV Infected Class Member was minimal in contrast to the evidence in the present matter that established an extended timeframe of intravenous drug use over the course of an eight year period from approximately 1968 to 1976. Finally, the Review Committee accepted a statement made by the HCV Infected Class Member in the reasons on review that he had not shared needles and also noted a statement made in the physician’s form that needles were not shared. In contrast, the family physician specifically stated in the present case

that the HCV Infected Class Member had shared needles while using methamphetamine intravenously. In the circumstances, the decision of the Review Committee is of no assistance in determining whether the Hepatitis C infection of the HCV Infected Class Member was caused by the blood transfusions in 1974 or his non-prescription intravenous drug use between 1968 and 1976.

[52] In the second submission, the HCV Personal Representative referred to statements made by the family physician and another physician concerning the source of the Hepatitis C infection. In that regard, the family physician stated that that the Hepatitis C infection was “probably contracted from tainted blood received in blood transfusions administered in 1974”.³⁷ Similarly, a surgeon stated in a letter to the family physician that the Hepatitis C was “likely” due to blood transfusions in 1974.³⁸ The evidence from the family physician and the surgeon does not establish that the HCV Infected Class Member “more likely” contracted Hepatitis C from the blood transfusions than from intravenous drug use. However, even if they had said that a blood transfusion was the more likely source of the Hepatitis C infection, I would have accorded significantly greater weight to the opinion expressed by the medical specialist who reviewed all of evidence and gave detailed reasons to support his opinion that the blood transfusions and the “multiple injection drug use exposure” were both risk factors and the question of the “likelier risk” could not be ascertained.

[53] Finally, I accept that the three letters concerning the HCV Infected Class Member were written by persons acting in good faith. However, the first and second letters related to time periods when the HCV Infected Class Member was not using non-prescription

³⁷ See paragraphs 9 and 38.

³⁸ See paragraph 10.

intravenous drugs. In the circumstances, the evidence in those letters is entitled to little, if any, weight. With respect to the third letter, I simply note that the evidence from the family physician and other evidence in the hospital and medical records contradicts the statements made in the letter.

[54] I have carefully reviewed all of the evidence in the context of the eligibility requirements in subsection 2.01(3) of the *Settlement Agreement* and the applicable provisions of the *Non-Prescription Intravenous Drug Protocol*. In order to meet the burden of proof in subsection 2.01(3) of the *Settlement Agreement*, the HCV Personal Representative must establish that the Hepatitis C infection of the HCV Infected Class Member was “more likely” caused by the blood transfusions in 1974. The evidence in the file, when considered in its totality, does not establish that he “more likely” contracted Hepatitis C from the blood transfusions in 1974. As a result, the Administrator did not err in concluding that, on the totality of the evidence, the HCV Personal Representative has failed to establish on a balance of probabilities the infection of the HCV Infected Class Member for the first time with Hepatitis C by his blood transfusions in 1974, as required by subsection 2.01(3) of the *Settlement Agreement* and the provisions of the *Non-Prescription Intravenous Drug Protocol*. Indeed, I would have reached the same conclusion on the basis of the evidence. The appeal therefore must be dismissed.

[55] 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.³⁹

[56] The appeal is dismissed.

"D. McGillis"

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

DATED December 21, 2011

TO: HCV Personal Representative
Fund Counsel
Administrator

³⁹ 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).