

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: 07-01680

**REASONS FOR DECISION**

**INTRODUCTION**

[1] The HCV Personal Representative appealed a decision of the Administrator dated September 22, 2008, in which the claim for compensation made in relation to the deceased HCV Infected Class Member under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied on the basis that he did not receive Blood during the Class Period in Canada. The Administrator reconsidered its decision in view of supplementary evidence that was filed and, in a decision dated May 21, 2009, maintained the denial of the claim. The HCV Personal Representative elected to continue with the appeal.

**FACTS**

[2] On January 23, 2008, the HCV Personal Representative delivered a claim for compensation under the *Settlement Agreement* on behalf of the deceased HCV Infected Class Member, her late husband who died on January 8, 2002. In the General Information Form, she noted, among other things, that he was a Primarily-Infected Person who was infected with the Hepatitis C virus through blood transfusions received in Canada. She indicated dialysis as a risk factor for the Hepatitis C virus, specifically hemodialysis from October 1984 to December 1985.

[3] The HCV Personal Representative delivered two Treating Physician Forms. The first one was prepared by a medical specialist in internal medicine and nephrology (“specialist in nephrology”) who had treated the deceased HCV Infected Class Member from 1985 to the date of his death, a period of approximately 17 years; the second one was prepared by a specialist in nephrology and liver transplants (“specialist in liver transplants”) who had treated him for five years. The information given in both Treating Physician Forms was essentially the same. Each specialist noted that the deceased HCV Infected Class Member was at Disease Level 6, having had a liver transplant. They also both stated that an infection with HCV had materially contributed to his Disease Level 6 medical condition and that dialysis was a risk factor for the Hepatitis C virus. They both indicated that the deceased HCV Infected Class Member had received Blood during the Class Period. In response to question 7 in the Section F – Disease Verification part, both specialists checked “Yes” to indicate that the Hepatitis C virus had materially contributed to the death of the deceased HCV Infected Class Member. In the explanation part of question 7, the specialist in nephrology wrote “See autopsy report” for an explanation; the specialist in liver transplants stated as follows:

- died from post-transplant complications
- directly from HCV

[4] The Form 5 – Blood Transfusion History Form indicated that the deceased HCV Infected Class Member had received a transfusion of Albumin in December 1985 for a renal transplant.

[5] The HCV Personal Representative delivered various other documents with the claim forms, including the Autopsy Report.

[6] The Autopsy Report and its accompanying Report of Post Mortem Examination recorded the results of the autopsy conducted on January 9, 2002, the day following the death of the deceased HCV Infected Class Member. The Anatomical Diagnosis at the beginning of the Autopsy Report stated, in part, as follows:

**ANATOMICAL DIAGNOSIS**

**FINAL REPORT**

- 1) Living-related renal transplant (1985) for post-Streptococcal glomerulonephritis, with:
  - a) transfusion-acquired Hepatitis C infection (1992) [...]
  
- 2) Orthotopic liver transplant for Hepatitis C-induced cirrhosis (September 5, 2001; [...]), with:
  - a) impaired liver function and persistent cholestasis clinically (jaundice) [...]
  - f) no evidence of recurrent Hepatitis C infection, rejection and cirrhosis [...]

[7] On April 4 and June 13, 2008, counsel for the HCV Personal Representative delivered further materials in support of the claim, including various laboratory reports and a hospital Surgical Pathology Report, as well as various documents from the application for a provincial plan benefit.

[8] One of the laboratory reports confirmed that blood collected from the deceased HCV Infected Class Member on December 23, 1998 had tested positive for the HCV Antibody and negative for the Hepatitis B antigen. The Surgical Pathology Report related to a liver biopsy completed on April 30, 1999 and confirmed that the deceased HCV Infected Class member had “[...] chronic active hepatitis progressing into hepatic cirrhosis as a result of viral hepatitis (likely other than hepatitis B).”

[9] Counsel submitted two relevant documents from the provincial plan application, as well as the Final Decision and Reasons of the Review Committee.

[10] The first provincial plan document was a letter dated December 15, 1999 from the specialist in nephrology to the deceased HCV Infected Class Member that stated, in part, as follows:

I have a verbal report that your sister, who gave you 3 donor blood transfusions as part of your DST protocol prior to your transplant and who also gave you the kidney, is hepatitis C negative. Her tests, therefore, exclude her as a potential reason for you developing hepatitis C.

I discussed the issue with [Doctor A] who looked after you before your transplant. Although there are no longer any records maintained, it is highly likely that you received blood products such as albumin and fresh frozen plasma as these were given freely in the days under consideration. It is, therefore, likely given the fact that you have had a stable relationship and no other source of infection that you received such a product and this was the reason for your hepatitis C which was only detected in 1992. [Emphasis Added]

[11] The second provincial plan document was a “Responding Submission” of the provincial plan program office dated January 24, 2000 in which the following response was made to the information contained in the letter from the specialist in nephrology:

Following [the deceased HCV Infected Class Member’s] submission, the [provincial plan] contacted the hospital where [he] received his dialysis treatments in 1984. The dialysis unit uses the hospital blood bank and records of any transfusion or use of blood products for dialysis would have been maintained by the hospital blood bank.

The hospital reported that blood had been cross-matched on December 18, 1984, but was not used.

Literature on Hepatitis C indicates that undergoing dialysis is, in itself, a risk factor. [Emphasis Added]

[12] In the Final Decision and Reasons dated August 22, 2000, the Review Committee reviewed a decision in which an adjudicator had concluded that the deceased HCV Infected Class Member was not entitled to a benefit. The adjudicator had denied the application for a benefit on the basis that the transfusions of blood received by the deceased HCV Infected Class Member from his sister were private donations and not part of the province’s blood supply.

[13] In reviewing the decision of the adjudicator, the Review Committee considered several issues. With respect to the transfusion issue, the Review Committee noted that the deceased HCV Infected Class Member had received blood transfusions in November 1985 in preparation for his kidney transplant surgery; the transfused blood was donated by his sister who was the kidney donor. In analysing whether there was evidence of a transfusion, the Review Committee stated, in part, as follows:

As the [deceased HCV Infected Class Member] was transfused with blood donated privately, and did not come from blood supply in [the province], these transfusions cannot be considered in determining the [deceased HCV Infected Class Member's] eligibility.

On the other hand, this Record provides evidence that the [deceased HCV Infected Class Member] had received blood products for dialysis treatments prior to the transplant surgery in 1985. There is no hospital record for the administration of blood products. However, in this regard, the [deceased HCV Infected Class Member's] assertion is supported by other evidence.

[14] The Review Committee quoted the contents of the letter dated December 15, 1999 from the specialist in nephrology, reproduced in paragraph 10, as well as the “Responding Submission” reproduced in paragraph 11.

[15] The Review Committee weighed the evidence and determined that the statements made by the specialist in nephrology were “[...] persuasive about the [deceased HCV Infected Class Member] receiving blood products in the entitlement period”. It concluded that the deceased HCV Infected Class Member had received blood products in the province and that it was “more likely than not” that the source of his HCV infection was the administration of blood products. It therefore granted an entitlement to benefit.

[16] The Estate of the deceased HCV Infected Class Member received compensation under the provincial plan in the amount of \$25,000.00 and under the *Canadian Red Cross Settlement* in the amount of \$10,450.00.

## **DECISION OF THE ADMINISTRATOR**

[17] In a decision dated September 22, 2008, the Administrator denied the claim for compensation on the basis that “you have not provided sufficient evidence to support that you or the HCV Infected Class Member received Blood during the Class Period, as defined in the Settlement Agreement”.

## **REQUEST FOR REVIEW**

[18] On October 2, 2008, counsel for the HCV Personal Representative delivered a Request for Review, together with “Schedule A” in which he outlined his reasons for appealing. In particular, he stated that the appeal was brought on the basis that the deceased HCV Infected Class Member “[...] was infected by blood transfusions during dialysis and not from blood transfusions during surgery”.

## **SUPPLEMENTARY EVIDENCE AND SUBMISSIONS**

[19] Counsel for the HCV Personal Representative provided supplementary evidence on three occasions: November 3, 2008, January 14 and April 12, 2009.

*i) supplementary evidence provided on November 3, 2008 – provincial plan document, together with submissions*

[20] In a letter dated November 3, 2008, counsel provided five documents as supplementary evidence, together with submissions. The only document that could properly be characterized as supplementary evidence was the “Applicant’s Reply to the Responding Submission” in the provincial application, dated March 1, 2000. It contained a handwritten note from the specialist in nephrology that stated as follows:

Full hospital investigation reveals no use of blood/blood products. 1980-1982 reuse of dialysers may have been risk, as is dialysis for hep C. No other medical or personal risk factors for Hep C known.

[21] In his submissions that were included with the supplementary evidence, counsel took the position that the deceased HCV Infected Class Member had received blood products during the period of his dialysis treatments in accordance with the practice of the day, even though there were no records to confirm this.

*ii) supplementary evidence provided on January 14, 2009 – hospital records*

[22] In a letter dated January 14, 2009, counsel provided the hospital records concerning the deceased HCV Infected Class Member. There were approximately five hundred pages of hospital records.

[23] The relevant hospital records are summarized in paragraphs 23 to 37.

[24] In about 1979, the deceased HCV Infected Class Member was discovered to have proteinuria. His renal function began to deteriorate and, in 1983, he was diagnosed with chronic glomerulonephritis.<sup>1</sup>

[25] On August 29, 1983, the deceased HCV Infected Class Member was cross-matched for two units of blood in preparation for a renal biopsy that was to take place two days later.<sup>2</sup>

[26] A hospital Transfusion Record dated August 30, 1983 indicated, among other things, that two units of blood were ordered on August 30 in the name of the deceased HCV Infected Class Member. The bottom half of the form bore the title “Report” and noted, among other things, the numbers of two units of blood that were reserved until September 2, 1983. There were initials in the “Crossmatch” column. The form was signed in both the column entitled “Set up/Read by” and on the signature line. The columns on

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<sup>1</sup> See pages 675 and 677 of the Appeal File.

<sup>2</sup> See page 446 of the Appeal File.

the right side for recording the details of transfusions (“transfusion columns”) contained no entries.<sup>3</sup>

[27] In August 1984, an AV fistula (for dialysis) was created.<sup>4</sup>

[28] On October 9, 1984, he was admitted to the hospital for “end stage renal failure”; two days later he started hemodialysis. On October 11, 1984, he tested negative for the Hepatitis B antigen. In January 1985, he started hemodialysis at home.<sup>5</sup>

[29] In a letter dated July 19, 1985, the specialist in nephrology provided a report to the doctor who had referred the deceased HCV Infected Class Member for a possible renal transplant. He stated that he had met the deceased HCV Infected Class Member on that date. In outlining the background medical history, he noted, among other things, that the deceased HCV Infected Class Member “[...] has had no blood transfusions. There is no history of jaundice [...]”.<sup>6</sup> A reading of the letter as a whole indicates that the specialist in nephrology met the deceased HCV Infected Class Member for the first time on that date. However, the letter does not indicate the source from which the specialist in nephrology obtained the information that the deceased HCV Infected Class Member “[...] has had no blood transfusions”.

[30] On October 30, 1985, a hospital record contained the notation “Donor specific blood transfusions as per protocol – using packed cells please”.<sup>7</sup> An undated hospital record entitled “Donor Specific Blood Transfusions” listed the deceased HCV Infected

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<sup>3</sup> See page 444 of the Appeal File.

<sup>4</sup> See page 487 of the Appeal File.

<sup>5</sup> See pages 613, 616, 617, 630, 632, 652, 675 and 677-678 of the Appeal File.

<sup>6</sup> See pages 677-678 of the Appeal File.

<sup>7</sup> See page 406 of the Appeal File.

Class Member and his sister, respectively, as the recipient and donor, and noted that the procedures were booked for November 4, 11 and 25, 1985.<sup>8</sup>

[31] On November 4, 11 and 25, 1985, the deceased HCV Infected Class Member received transfusions of blood donated by his sister in preparation for his kidney transplant operation. The hospital Transfusion Records for those three dates are all virtually identical. All three records contained the notation “Donor Specific Transfusion” in the box “Diagnosis”; all three contained the notation “Crossmatch [with] sample from [the sister of the deceased HCV Infected Member]”. In the bottom half of the forms entitled “Report”, all three forms contained entries in the columns, among other things, for the unit number and type of blood, as well as for “Set up/read by” and “Issued by”. In the transfusion columns, all three records contained entries only in the column entitled “Date”, where the date of each transfusion was noted; there were no entries in the columns “Transfused By”, “Volume” or “Result”. All three forms were signed and dated.<sup>9</sup>

[32] On December 8, 1985, the deceased HCV Infected Class Member was admitted to the hospital for a renal transplant. A hospital Transfusion Record indicated that four units of packed cells were ordered on December 8, 1985 for the “Renal transplantation unit” and were required for December 10. The bottom half of the form entitled “Report” recorded the numbers of the four units of blood and contained initials in the column “Set up/read by”. The form was signed. The transfusion columns contained no entries.<sup>10</sup>

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<sup>8</sup> See page 410 of the Appeal File.

<sup>9</sup> See pages 405, 406, 407, 408, and 409 of the Appeal File. Pages 431 and 432 are duplicates, respectively, of pages 408 and 409.

<sup>10</sup> See page 311 of the Appeal File. Page 430 is a duplicate.

Another blood transfusion form confirmed that Albumin was ordered on December 10, 1985; the transfusion part of the form contained no entries.<sup>11</sup>

[33] On December 10, 1985, the deceased HCV Infected Class Member had renal transplant surgery. The Operating Room record indicated, among other things, that “Blood Loss” was “250” and “Blood Replacement” was “nil”.<sup>12</sup> He therefore did not receive a transfusion during the surgery.

[34] A hospital Transfusion Record indicated that one unit of packed cells was ordered on December 17, 1985 for the deceased HCV Infected Class Member and was required by December 19 for a diagnosis of uremia. The bottom half of the form entitled “Report” indicated that the blood was reserved until December 21; the unit number and blood type were recorded and initials appeared in the column entitled “Set up/read by”. The transfusion columns contained no entries.<sup>13</sup>

[35] A hospital Transfusion Record indicated that two units of packed cells were ordered on December 27, 1985 at 0600 and were required on the same date for a diagnosis of “renal allograft”. The bottom half of the form entitled “Report” recorded the numbers of the two units of blood, indicated that the crossmatch was “OK” and contained initials in the column “Set up/read by”. There were no entries in the transfusion columns.<sup>14</sup>

[36] On December 27, 1985, the deceased HCV Infected Class Member was discharged from the hospital.

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<sup>11</sup> See page 310 of the Appeal File. Page 429 is a duplicate.

<sup>12</sup> See page 731 of the Appeal File.

<sup>13</sup> See page 427 of the Appeal File.

<sup>14</sup> See pages 309 and 311 of the Appeal File. Page 428 is a duplicate of page 309.

[37] In the hospital Discharge Summary dictated on December 26, 1985, the specialist in nephrology referred to the earlier donor-specific blood transfusions received by the deceased HCV Infected Class Member. He described problems that developed a few days after the surgery. There was no reference to any other blood transfusion received by the deceased HCV Infected Class Member during his hospitalization for the renal transplant surgery.

*iii) supplementary evidence provided on April 2, 2009 – affidavit of specialist in nephrology*

[38] By letter dated April 2, 2009, counsel forwarded an affidavit of the specialist in nephrology. In the affidavit, sworn on April 2, 2009, the specialist in nephrology stated as follows:

1. I am a medical doctor specializing in internal medicine and nephrology in the [province]. Attached as Exhibit “A” to this my affidavit is a true copy of my curriculum vitae.
2. I was [the deceased HCV Infected Class Member’s] physician from 1985 until his death and I assisted in the completion of his application for compensation pursuant to the class action settlement regarding the Hepatitis C claimants. I therefore have knowledge of the matters to which I have deposed. To the extent that I do not have personal knowledge of the matters to which I depose and have obtained information from others, I believe that information to be true.
3. I graduated from [university] in 1972 and received my certificate in May, 1982.
4. I have maintained my practice with a specialty in internal medicine since [1980] and in nephrology since [1983 in the province] over the course of last twenty-eight years.
5. Between 1984 and 1985, [the deceased HCV Infected Class Member] underwent dialysis treatment prior to undergoing renal surgery.
6. In 1985, [the deceased HCV Infected Class Member] underwent renal surgery and successfully received a kidney from his sister.
7. In 1992, [the deceased HCV Infected Class Member] was diagnosed with Hepatitis C.

8. It is my understanding that in 1999, [the deceased HCV Infected Class Member] applied for compensation resulting from being infected with Hepatitis C pursuant to the Ontario Hepatitis C Assistant Plan.
9. It is my further understanding that [the deceased HCV Infected Class Member's] initial application was rejected due to the fact that the recorded blood/blood products received did not originate from the Ontario blood supply. [...]
10. In response to this decision, I met with [the deceased HCV Infected Class Member] on December 7, 1999 to discuss the decision as well as his Hepatitis C in general.
11. Following this meeting with [the deceased HCV Infected Class Member], I investigated further his medical condition and consulted with [Doctor A] the attending physician following his transplant surgery.
12. On December 15, 1999, I wrote to [the deceased HCV Infected Class Member] and provided my opinion as follows:

“I have a verbal report that your sister, who gave you 3 donor blood transfusions as part of your DST protocol prior to your transplant and who also gave you the kidney, is Hepatitis C negative. Her tests, therefore, exclude her as a potential reason for you developing hepatitis C.

I discussed the issue with [Doctor A] who looked after you before your transplant. Although there are no longer any records maintained, it is highly likely that you received blood products such as albumin and fresh frozen plasma as these were freely given on the days under consideration. It is, therefore, likely given the fact that you have had a stable relationship and no other source of infection, that you received such a product and this was the reason for your Hepatitis C which was only detected in 1992. ...

I have discussed with [sic] your infectious disease specialist, [Doctor B] who is in agreement. [Exhibit “B”]
13. I confirm that my medical opinion provided in the December 15, 1999 letter where I stated that it is highly likely that the [deceased HCV Infected Class Member] received blood products during the dialysis treatment has not changed and that it is still my medical opinion.
14. On or about March 1, 2000, I completed the “Form E – Applicants Reply to Respondent’s submissions” on behalf of the [deceased HCV Infected Class Member]. I wrote as follows:

“Full hospital investigation reveals no use of blood / blood products 1980 to 1982, reuse of dialyzers – may have been risk, as is dialysis for Hep C. No other medical personal risk factors for Hep C known.” [Exhibit “C”]
15. I have been advised and verily believe that on August 22, 2000, the Ontario Hepatitis C Assistant Plan Review Committee overturned its rejection and awarded compensation to the [deceased HCV Infected Class Member]. [Exhibit “D”]

16. I have reviewed the analysis of the section entitled “Transfusion” on page 4 of the Reasons. I confirm that I agree with the restatement of my letter and the information I provided to the [deceased HCV Infected Class Member] and the Review Committee.
17. In particular, I agree that it is highly likely that the [deceased HCV Infected Class Member] received blood products such as Albumin and fresh plasma during his dialysis treatment as these were freely given in the days under consideration.
18. On December 26, 2007, I completed the “Form 2 – Treating Physician Form” [in the] application for compensation pursuant to the Class Action. [Exhibit “E”]
19. Based upon my care and treatment of the [deceased HCV Infected Class Member] and my knowledge and familiarity with his medical history, I confirmed the following provision under Section D as follows:  
  
“It is my opinion that the HCV Infected Class Member’s infection with HCV material contributed to his or her Disease Level 6 medical condition.”
20. I confirm that prior to his death, the [deceased HCV Infected Class Member] had obtained the Disease Level 6 medical condition as stipulated in the Class Action document forms.
21. Based upon the [deceased HCV Infected Class Member] being my patient for 17 years and my familiarity with his medical records and files, and in my conversations with [Doctor A] and [Doctor B] in or around 1999, it is my opinion, that it is highly likely that [the deceased HCV Infected Class Member] received blood products during the dialysis treatments’ prior to his renal transplant in 1985. This opinion is made with the knowledge that the blood transfusions and the kidney transplant he received during the renal surgery was provided from his sister who tested Hepatitis C negative. Also, this is based upon my understanding that the [deceased HCV Infected Class Member] was involved in a caring and stable marriage and had no other risk factors where he could have contacted Hepatitis C. [...] [Emphasis Added]

[39] The curriculum vitae of the specialist in nephrology was Exhibit “A” to the affidavit and confirmed that he has held a position as Staff Nephrologist at the hospital from 1982 to the present and that he was the Director of Renal Transplantation at the hospital for a ten year period from 1982 to 1992. Over the past twenty-seven years, he has also held senior academic positions at a leading university, has participated in leadership roles in two medical, charitable organizations and has performed extensive service on

numerous national, provincial, hospital and university committees. His research activities and funding are impressive, and he has published extensively, both in peer-reviewed journals and otherwise.

[40] The remaining Exhibits “B” to “E” of the affidavit of the specialist were previously filed in evidence by counsel and are summarized or reproduced in the following paragraphs: Exhibit “B” – paragraph 10; Exhibit “C” – paragraph 25; Exhibit “D” – paragraphs 12 to 17; and Exhibit E – paragraph 3.

[41] By letter dated April 7, 2009, the Fund Counsel forwarded the supplementary evidence to the Administrator under Rule 13 of the *Rules for Appeals* and requested a reconsideration of the decision.

#### **TRACEBACK REPORT**

[42] By letter dated April 28, 2009, the Administrator advised counsel and the Fund Counsel, among other things, that the final report for the Traceback was inadvertently omitted from the Appeal File and provided copies of the report.

[43] By letter dated September 9, 2009, the Canadian Blood Services forwarded the final report for the Traceback to the Administrator. It consisted of two documents: a Hospital Transfusion Record Confirmation Form and a Transfusion Summary, together with certain hospital records and a letter dated January 12, 1995 from a specialist in gastroenterology to the specialist in nephrology.

[44] The Hospital Transfusion Record Confirmation Form was completed on August 29, 2008 by a hospital employee who noted that both the hospital Blood Bank records and the Health Records for the deceased HCV Infected Class Member were

searched from 1983 to 2001. In the part entitled “Results of Search”, the employee checked “Patient record available – patient was not transfused” and added the handwritten note “with blood from Red Cross Directed donations only”.

[45] The Transfusion Summary was dated September 2, 2008 and stated as follows:

Comments:

The [deceased HCV Infected Class Member] received blood for transfusion on 3 occasions (Nov 4 1985, Nov 11 1985 and Nov 25 1985) prior to a kidney transplant procedure in Dec 1985. All 3 blood donations and the transplanted kidney were from the individual’s sister. The blood units were collected somewhere in Montreal and shipped via Red Cross to [the hospital] for the transfusions.

Hospital was unable to find record of any other transfusions to this individual.

In the traceback file there is a copy of a letter from a gastroenterology referral to the [deceased HCV Infected Class Member’s] physician which was provided along with the [hospital] documents. The letter confirms that no other transfusion was required by the [deceased HCV Infected Class Member].

[46] The hospital records that were included with and referred to in the Transfusion Summary were the document entitled “Donor Specific Blood Transfusions” and the transfusion records for November 4, 11 and 25, 1985, summarized respectively in paragraphs 30 and 31.

[47] The Transfusion Summary also included a letter dated January 12, 1995 from a specialist in gastroenterology to the specialist in nephrology that stated, in part, as follows:

In November 1994, he was identified as being hepatitis C positive and I gather his hepatitis B surface antigen status was negative. [...]

I understand that he did have three blood transfusions from his sister prior to the renal transplant but he has not required any further blood transfusion in the management of his renal disease. There is no history of intravenous drug use and he has had one sexual partner. [...]

He has been documented as having hepatitis C antibody. I understand that his wife is hepatitis C antibody negative. His only risk factor has been a blood transfusion from his sister prior to transplantation, but as far as he is aware she has had no history of liver problems. [Emphasis Added]

## **SUBMISSIONS OF COUNSEL TO ADMINISTRATOR**

[48] By letter dated May 1, 2009, counsel wrote to the Administrator to indicate that he did not dispute the statement in the letter dated January 12, 1995 of the specialist in gastroenterology concerning the blood transfusions, reproduced in the preceding paragraph. Rather, he submitted, among other things, that “[...] prior to the three blood transfusions, [the deceased HCV Infected Class Member] received blood products during the dialysis treatments in 1984-1985”.

## **RECONSIDERED DECISION OF ADMINISTRATOR DATED MAY 20, 2009**

[49] By letter dated May 21, 2009, the Administrator advised counsel that it had reviewed the decision and had determined that the evidence was not sufficient to meet the eligibility requirements in the *Settlement Agreement*. In its reconsidered Decision dated May 20, 2009, the Administrator stated as follows:

### **Introduction**

1. The Representative for the Estate of [the deceased HCV Infected Class Member] filed a claim for Compensation under the Pre 1986/Post 1990 Hepatitis C Settlement Plan. The claim was rejected based on No Proof of Blood in the Class Period. The Representative for the Estate [...] submitted a Request for Review asking for review of the rejection of the claim. As per the Rules of Appeal, Fund Counsel has forwarded the [HCV Personal Representative’s] supplementary evidence and submissions on April 7, 2009, to the Administrator for our review and response. For case of reference these pages have been paginated starting from page 286 through to page 815 (continued from the original appeal package). Pages 286 to 767 are copies of Hospital records from the [...] Hospital and pages 768 to 815 are affidavits and evidence submitted to the Administrator on April 7, 2009. It should be noted that some of the documents submitted were previously in the claim file and reviewed prior to the rejection of the claim.

### **Facts**

2. Page 13 – Form 1 > Other Risk Factors dialysis October 1984 to December 1985

3. Page 27 – The [deceased HCV Infected Class Member's] Form 5 was completed by [...] a member of the staff at the Blood bank of [...] Hospital [...]. She wrote the [deceased HCV Infected Class Member] received 1 unit of Albumin in December 1985 for Renal transplant. There was no indication on this form of the [deceased HCV Infected Class Member] receiving Blood as defined in the Settlement Agreement.
4. Canadian Blood Services (CBS) Final Traceback report was received September 11, 2008. CBS confirmed [the] Hospital has advised they searched their records and [the deceased HCV Infected Class Member] received 3 transfusions in November 1985 from his sister, prior to his kidney transplant.
5. [The] Hospital further confirmed they searched their Health Records and Blood Bank Records from 1983-2001 and the [deceased HCV Infected Class Member] was not transfused with Blood from the Red Cross. He received direct donations only.

#### **Summary of Supplementary Evidence**

6. Pages 286 to 767 – Medical records from [the] Hospital. Pertinent pages are as follows:
  - Pages 405 to 410 – medical records from November 1985 that summarize the visits for the 3 units of **Donor Specific** packed cells to be given to him. These units were donated by the claimant's sister in preparation for his Kidney transplant. [Administrator's Emphasis]
  - Page 427 – Crossmatch requisition- showing 1 unit of packed cells crossmatched on December 17, 1985. No signatures to confirm this unit was given.
  - Page 428 – Crossmatch requisition showing 2 units crossmatched on December 27, 1985. No signatures to confirm the units were given.
  - Page 430 – Crossmatch for 4 units of Packed cells December 8, 1985. No signatures to indicate these were given.
  - Page 431 – Transfusion record for unit number 86640 – donated by claimant's sister.
  - Page 432 – Transfusion records for unit number 87321 – donated by claimant's sister.
  - Page 444 – Crossmatch requisition for September 1983 for 2 units of packed cells. No indication these were given. Page 446 is the doctor's order for this crossmatch and the reason was that he was booked for a Kidney biopsy.
  - Page 485 – Admitted to hospital for creation of an AV- fistula. This is the port to perform renal dialysis.
  - Pages 525 – 668 – Records from Hospital dialysis. Nothing in these to support transfusion given. Notes on file indicate [the deceased HCV Infected Class Member] was doing home dialysis (p. 617).
  - Page 675 – Note from Psychologist dated December 1985 confirming Home Hemodialysis since January 1985.
  - Page 677 – Assessed by [the specialist in nephrology] July 19, 1985 in preparation for a kidney transplant. [The specialist in nephrology] wrote "He has had no blood transfusions."

7. Page 769-772 – Affidavit of [the specialist in nephrology] dated April 2, 2009. [The specialist in nephrology] was [the deceased HCV Infected Class Member’s] Nephrologist since 1985.
  - Page 770 – Paragraph 12 of [the specialist in nephrology’s] affidavit he quoted from a letter prepared for the [provincial plan review]. He wrote “Although there are no longer any records maintained; it is highly likely that you received blood products such as albumin and fresh frozen plasma as these were freely given on the days under consideration.”
  - Page 771 – Paragraph 13 -- [the specialist in nephrology] confirmed that his medical opinion had not changed stating it is highly likely that [the deceased HCV Infected Class Member] received blood products during the dialysis treatment.
  - Page 772 – Paragraph 21 -- [the specialist in nephrology] affirmed “Based upon [the deceased HCV Infected Class Member] being my patient for 17 years and my familiarity with his medical records and files, and in my conversations with [Doctor A and Doctor B] in or around 1999, it is my opinion, that it is highly likely that [the deceased HCV Infected Class Member] received blood products during the dialysis treatments prior to his renal transplant in 1985. This opinion is made with the knowledge that the blood transfusions and the kidney transplant he received during the renal surgery was provided from his sister who tested Hepatitis C negative. Also this is based upon my understanding that [the deceased HCV Infected Class Member] was involved in a caring and stable marriage and had no other risk factors where he could have contacted Hepatitis C.”

#### **Administrator’s Decision**

Where there are no hospital records or where those available do not confirm receipt of Blood, claimants must submit corroborating evidence independent of the personal recollection of the claimant or any person who is a Family Member of the claimant as per the Court Approved Protocol “Proof of Receipt of Blood Protocol”.

8. On his Form 5 [the deceased HCV Infected Class Member] indicated he believes he was transfused in 1985 in preparation for his kidney transplant.
9. [The specialist in nephrology] confirmed in a July 19, 1985 letter that up until that time [the deceased HCV Infected Class Member] was not transfused.
10. Records on file confirm that [the deceased HCV Infected Class Member] performed Home Dialysis from January 1985 to December 1985.
11. [The specialist in nephrology] has indicated he believes [the deceased HCV Infected Class Member] may have received blood products like

Albumin or Fresh Frozen Plasma while undergoing dialysis in 1984 – 1985 leading up to his kidney transplant.

12. Canadian Blood Services has submitted documents completed by Blood Bank staff at the hospitals confirming they searched the records from **1983 to 2001** and the only transfusions were the 3 units donated by his sister in November 1985. [Administrator's Emphasis in bold]

**Conclusion**

13. The Administrator has an obligation to assess each claim and determine whether the required proof for compensation exists. The Administrator has no discretion to allow compensation where the required proof does not exist. On July 19, 1985, [the specialist in nephrology] confirmed that [the deceased HCV Infected Class Member] had never received transfusions up to that time. In his 2009 Affidavit, [the specialist in nephrology] stated he believed [the deceased HCV Infected Class Member] may have received either Albumin or Fresh Frozen plasma during the course of his dialysis treatments.
14. It should be noted that Albumin is a Blood product that is specifically excluded from the Definition of Blood as per the Settlement Agreement. Fresh Frozen Plasma does fall within the definition of Blood as per the Agreement however it is a Blood product that is stored in a Hospital Blood Bank and a transfusion record would be required to access that product. As the medical records confirm [the deceased HCV Infected Class Member's] dialysis was carried out at home most of the time this would indicate the time period that we are investigating would be from July 19 to November 1985 and transfusions would only have taken place during any dialysis treatments that occurred in the hospital setting.
15. Review of the medical records submitted from [the] Hospital supports that [the deceased HCV Infected Class Member] was crossmatched in preparation for possible transfusions, there is no record to confirm he was transfused with Blood other than the 3 units donated by his sister. Additionally the Hospital Blood bank has confirmed their records are available and there is no record of [the deceased HCV Infected Class Member] receiving a transfusion of Blood during the time period in question.
16. After careful consideration of the supplementary evidence submitted, the Administrator concludes the evidence does not support that on a Balance of Probabilities [the deceased HCV Infected Class Member] received a Blood transfusion in the class period. The decision to reject this claim for compensation remains unchanged.

[50] On May 25, 2009, the HCV Personal Representative elected to continue with the appeal.

## **SUBMISSIONS BY COUNSEL ON APPEAL**

[51] By letter dated June 15, 2009, counsel provided detailed written submissions in support of the appeal. In his submissions, counsel conceded that there were no records to satisfy the requirement in paragraph 2.01(1)(a) of the *Settlement Agreement*. However, he submitted that the affidavit of the specialist in nephrology constituted independent corroborating evidence that satisfied the requirements in section 2.02 of the *Settlement Agreement* and sections 5 and 6 of the *Proof of Receipt of Blood Protocol*.

## **ISSUE**

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

## **ANALYSIS**

### *i) Applicable provisions of the Settlement Agreement and the Proof of Receipt of Blood Protocol*

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

#### *ii) Eligibility Requirements in Article Three of the Settlement Agreement*

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

[27] The eligibility requirements that must be met by an HCV Personal Representative for a claim to be approved are outlined in section 3.01 of the

*Settlement Agreement*, which states as follows:

**3.01 Eligibility – HCV Infected Class Members Who Have Died**

(1) A person claiming to be the HCV Personal Representative of an HCV Infected Class Member who has died must deliver to the Administrator, within three years after the death of such HCV Infected Class Member or within two years after the Implementation Date, whichever event is the last to occur, an application form prescribed by the Administrator together with:

(a) an original or notarial copy of the death certificate of the HCV Infected Class Member; and

(b) unless the required proof has already been previously delivered to the Administrator:

(i) if the deceased was a Primarily-Infected Class Member, the proof required by Sections 2.01 and 2.03; or

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

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

and

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

[...]

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

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

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

Antibody or PCR Test report to establish an infection with HCV, and a statutory declaration.

[...]

*iii) Compensation Provisions under Article Three of the Settlement Agreement*

[32] The compensation payable under Article Three of the *Settlement Agreement* for the claim of an HCV Infected Class Member who has died is governed either by section 3.02 or 3.03, depending upon the date of death. In particular, section 3.02 applies where the death occurred prior to January 1, 1999, and section 3.03 applies where the death occurred on or after January 1, 1999.

[...]

[35] In addition, section 3.04 of the *Settlement Agreement* is intended to provide greater certainty in interpreting and applying certain compensation provisions under the *Settlement Agreement*, including subsections 3.02(1) and (2), and contains an additional requirement that must be met to succeed in making such a claim. Section 3.04 provides as follows:

**3.04 When Compensation Payable**

For greater certainty, compensation under Article Four, Section 3.02(1) and (2) and 3.03(1)(i) is only payable with respect to a deceased HCV Infected Class Member where the deceased HCV Infected Class Member had attained Disease Level 4 or higher prior to death. [Emphasis Added]

[...]

[54] As indicated in the preceding quote, subparagraph 3.01(1)(b)(i) of the *Settlement Agreement* incorporates by reference the eligibility requirements in subsection 2.01(1). In the Reasons for Decision on the appeal in Claim File 07-00464, I analysed the provisions in section 2.01 of the *Settlement Agreement* and the applicable sections of the *Proof of Receipt of Blood Protocol* concerning the eligibility requirements that must be met by a person claiming to be a Primarily-Infected Class Member and stated, in part, as follows:

*ii) Eligibility Requirements under Section 2.01*

[32] 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. In the circumstances of the present claim, the relevant

provisions are subsections 2.01(1) and (2) which state as follows:

**2.01 Eligibility – Primarily-Infected Class Member**

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

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; [ ... ]

(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. [Emphasis Added]

Subsections 2.01(1) and (2) require that a claimant must have “received Blood in Canada” in order to be eligible for compensation under the *Settlement Agreement*.

[33] The term “Blood” is defined in section 1.01 of the *Settlement Agreement* [...].

*iii) Did Claimant’s records demonstrate receipt of Blood under paragraph 2.01(1)(a)?*

[34] Under paragraph 2.01(1)(a) of the *Settlement Agreement*, a person claiming to be a Primarily-Infected Class Member, such as the Claimant, must deliver records from at least one of the prescribed categories to demonstrate that she received Blood in Canada during the Class Period.

[..]

*iv) Did Claimant deliver independent corroborating evidence under subsection 2.01(2) in conformity with applicable provisions of Proof of Receipt of Blood Protocol?*

[37] In circumstances such as the present where a person claiming to be a Primarily-Infected Class Member cannot deliver records under paragraph 2.01(1)(a) of the *Settlement Agreement* to confirm the receipt of Blood, subsection 2.01(2) permits a claimant to deliver independent corroborating evidence to establish on a balance of probabilities the receipt of Blood. Subsection 2.01(2) must be read in conjunction with the *Proof of Receipt of Blood Protocol* which contains provisions governing the evidence that may be delivered by a claimant. Since the Claimant did not receive notification as part of a Blood Recipient Notification Program, the applicable provisions of the *Proof of Receipt of Blood Protocol* are sections 5 and 6 which state as follows:

*No Hospital Records or Hospital Records Do Not Confirm Receipt of Blood and The Primarily-Infected Class Member Did Not Receive Notification As Part Of A Blood Recipient Notification Program*

5. Subject to paragraphs 2 and 7 and the following constraints, the Administrator may accept any evidence it deems reliable as proof on the balance of probabilities of receipt of Blood in Canada during the Class Period in satisfaction of section 2.01(2) of the Settlement Agreement:

- a. evidence of the Primarily-Infected Class Member or a Family Member of the Primarily-Infected Class Member may not be considered. The claimant must deliver to the Administrator corroborating evidence independent of the personal recollection of the Primarily-Infected Class Member or any person who is the Family Member of the Primarily-Infected Class Member; and
- b. any evidence which is in the nature of personal recollection must be in affidavit form and must provide the following particulars:
  - i. the month and year of the hospitalization(s);
  - ii. the reason for the hospitalization(s); and
  - iii. the basis of the affiant's personal recollection that the Primarily-Infected Class Member received Blood during the hospitalization(s).

6. Subject to paragraph 5, the following are examples of the type of evidence which the Administrator may consider:

- a. an affidavit of a medical practitioner or hospital employee involved in the care of the Primarily-Infected Class Member at the time of the receipt of Blood who recalls the receipt of Blood;
- b. the opinion of a medical practitioner, who practices in the specialty to which the Primarily-Infected Class Member's underlying medical condition belongs or who specializes in blood banking, that at the time the receipt of Blood took place, and given the nature of the medical treatment the Primarily-Infected Class Member underwent and/or the circumstances of the Primarily-Infected Class Member at that time, it is more likely than not that the Primarily-Infected Class Member received Blood. If such an opinion is advanced by a person who does not have personal knowledge of the Primarily-Infected Class Member's underlying medical condition, the medical treatment the Primarily-Infected Class Member underwent and the circumstances of the Primarily-Infected Class Member at the time of the receipt of Blood, there should be independent evidence of the underlying medical condition, the medical treatment and the circumstances of the Primarily-Infected Class Member at the time of the receipt of Blood other than the recollection of the Primarily-Infected Class Member or any person who is a Family Member of the Primarily-Infected Class Member;

[...]

*ii) Did the Administrator err in its reconsidered Decision dated May 20, 2009?*

[55] The decision of the Administrator dated May 20, 2009 contains an introduction and four separate parts: an outline of the facts, a summary of the supplementary evidence, the Administrator's decision and the conclusion. The analysis in support of the decision to deny the claim for compensation is contained in the latter two parts.

[56] I have carefully reviewed the reconsidered Decision in the context of the evidence adduced in this matter and have concluded that the Administrator erred in three respects: by misinterpreting the affidavit evidence of the specialist in nephrology; by failing to consider the affidavit evidence concerning the hospital practice that was in place at the relevant time; and by giving insufficient weight to the affidavit evidence.

[57] In order to demonstrate the manner in which the Administrator misinterpreted the affidavit of the specialist in nephrology, it is necessary to refer to several paragraphs in its decision. In the part of the decision entitled "Summary of Supplementary Evidence", the Administrator accurately quoted the relevant portions of various paragraphs of the affidavit in which the specialist in nephrology expressed his medical opinion. In the words of the specialist in nephrology, as quoted by the Administrator, it was "highly likely" that the deceased HCV Infected Class Member had received blood during his dialysis treatments. However, the Administrator stated in paragraphs 11 and 13 of its analysis that the specialist in nephrology "[...] has indicated he believes [the deceased HCV Infected Class Member] may have received blood products [...]" during dialysis treatments. The specialist in nephrology did not state his "belief" that the deceased HCV Infected Class Member "may have received" blood products. To the contrary, he provided his professional opinion in a sworn affidavit that it was "highly likely" that the deceased HCV

Infected Class Member had “received blood products such as Albumin and fresh plasma as these were given freely in the days under consideration”. In characterizing the statements of the specialist in nephrology concerning the receipt of blood as a “belief” that something that “may have” occurred, the Administrator misinterpreted the evidence on the principal issue to be decided.

[58] In dealing with the question of the misinterpretation of the evidence, I should also note one aspect of the evidence that the Administrator referred to in conjunction with the affidavit evidence. In describing the letter dated July 19, 1985 from the specialist in nephrology to the referring doctor, summarized in paragraph 29, the Administrator stated that the specialist “had confirmed” that the deceased HCV Infected Class Member had not received any transfusions up to that date. I will simply note that, in his two page letter, the specialist in nephrology summarized the medical history of the deceased HCV Infected Class Member following their first meeting and stated, among other things, that he “[...] has had no blood transfusions”. There was nothing in the letter to indicate the source of the information. In any event, the specialist in nephrology subsequently swore in his affidavit that it was “highly likely” that the deceased HCV Infected Class Member received blood products during his dialysis treatments due to the practice of the hospital. In the circumstances, the sworn affidavit evidence was entitled to significantly more weight than the letter.

[59] With respect to the question of the practice in the hospital, the Administrator quoted, in its “Summary of Supplementary Evidence”, one of the paragraphs in the affidavit where the specialist in nephrology stated, among other things, that the blood products “were freely given in the days under consideration” for patients undergoing

dialysis. In its analysis, the Administrator made several references to the fact that the hospital records did not demonstrate the receipt of blood by the deceased HCV Infected Class Member, other than the transfusions that he received from his sister prior to his renal transplant surgery. However, in its analysis, it did not refer to or address the evidence in the affidavit of the specialist in nephrology concerning the practice of the hospital that blood products were “given freely” during dialysis treatments in the time period in question. The affidavit evidence describing the hospital practice for patients undergoing dialysis was not only central to the case, but it came from an unimpeachable and informed source. The curriculum vitae of the specialist in nephrology, Exhibit “A” to his affidavit, confirms that he has worked as a Staff Nephrologist at the hospital from 1982 to the present and that he was also the Director of Renal Transplantation for a ten year period beginning in 1982. Given his positions at the hospital during the years in question as both a Staff Nephrologist and the Director of Renal Transplantation, his experience makes him uniquely qualified to explain the practice and procedure followed with respect to transfusions for patients who received dialysis treatments at the hospital during the time frame in question, over twenty-two years ago. Furthermore, at the time the specialist in nephrology swore his affidavit, he was well aware that there were no hospital records to demonstrate that the deceased HCV Infected Class Member had received blood, other than in the transfusions from his sister prior to his renal transplant surgery. Despite the absence of any reference in its analysis to the affidavit evidence concerning the hospital practice, the Administrator stated that a blood product such as fresh frozen plasma would be stored in a hospital Blood Bank and that “a transfusion record would be required to access that product”. There was no evidence in the file to support that statement. Even if that

statement accurately represented the generally accepted practice twenty-two years ago, it was contradicted by the sworn evidence in the affidavit of the specialist in nephrology that blood products were “freely given” to dialysis patients. In other words, twenty-two years ago, at a time when the specialist in nephrology worked as a Staff Nephrologist (as he does today) and was the Director of Renal Transplantation at the hospital, there was an additional practice in place at the hospital for patients receiving dialysis treatments. The Administrator was obliged to consider this crucial evidence in its analysis and its failure to do so constitutes an error.

[60] Finally, a review of the decision of the Administrator as a whole indicates that the Administrator failed to give sufficient weight to the affidavit evidence of the specialist in nephrology.

## **CONCLUSION**

[61] The opinion of the specialist in nephrology, as expressed in his sworn affidavit, stated that it was “highly likely” that the deceased HCV Infected Class Member received blood during the course of his dialysis treatments. The usage of the expression “highly likely” by the specialist in nephrology means that “it is more likely than not”, within the meaning of paragraph 6(b) of the *Proof of Receipt of Blood Protocol*, that the deceased HCV Infected Class Member received Blood. In the circumstances, I am satisfied that, when the independent corroborating evidence in the affidavit is considered in the context of the totality of the evidence, the HCV Personal Representative has established on a balance of probabilities, as required by subparagraph 3.01(1)(b)(ii) and subsection 2.01(2) of the *Settlement Agreement*, that the deceased HCV Infected Class Member received Blood in Canada during the Class Period. I also note that there is evidence in the file to

prove that the death of the deceased HCV Infected Class Member was caused by his infection with HCV, as required by paragraph 3.01(1)(d).

[62] The appeal is allowed.

"D. McGillis"

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

DATED July 29, 2009

TO: Counsel for the HCV Personal Representative  
Fund Counsel  
Administrator