

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: 07-05143

REASONS FOR DECISION

INTRODUCTION

[1] The Claimant has appealed a decision of the Administrator dated May 1, 2009, in which her claim for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied on the basis that she did not provide further evidence of first infection with Hepatitis C by a blood transfusion in Canada during the Class Period.

FACTS

[2] On October 3, 2007, the Claimant delivered a claim for compensation under the *Settlement Agreement*. In the “Form 1 – General Information Form”, she stated that she was a Primarily-Infected Person who was infected with the Hepatitis C virus through a blood transfusion received in Canada during the Class Period. In the part of Form 1 entitled “Section E – Blood Transfusion Information”, she checked all of the boxes in response to question 3 “When did the HCV Infected Class Member receive Blood transfusions in Canada?”, indicating that she had received blood in the following three time periods: prior to January 1, 1986; between the period of January 1, 1986 and July 1, 1990; and between the period of July 2, 1990 and September 28, 1998. In “Section F – Related Compensation Programs”, she indicated that she had received compensation under the *Canadian Red Cross Settlement* in the amount of \$10,150.00. In “Section G –

Other Risk Factors”, she checked the box to indicate non-prescription intravenous drug use as a risk factor and wrote “MDA 1968”. She also checked the box for tattoos and wrote “1 1970 gone now”.

[3] The “Form 2 - Treating Physician Form” was completed by a family physician who indicated, among other things, that the Claimant was at Disease Level 6. He noted in “Section E – Patient History” that he had treated the Claimant in 1992 and from 1997 for 10 years. In response to question 1 in “Section F – Disease Verification”, he checked the box to indicate that she had no risk factors for HCV. For question 2, he checked the box to indicate that she had received blood during the Class Period and noted “1992”. In response to question 3, he stated that there was nothing in her medical history or clinical presentation to indicate that she had used non-prescription intravenous drugs at any time.

[4] In the “Form 3 – Statutory Declaration Form”, the Claimant checked the box “True” in response to the first declaration in “Section D – Declarations” that “[...] to the best of my knowledge, information and belief, the HCV Infected Class Member has never at any time used non-prescription intravenous drugs”. She added the handwritten note “one time was enough”.

[5] In the “Form 5 – Blood Transfusion History Form”, the Claimant stated “Kindly refer to 86-90 HCV records [...]”.

[6] In support of her claim, the Claimant delivered, among other things, hospital, medical and laboratory records that she had previously submitted in support of her applications for compensation under a provincial plan and the *1986-1990 Hepatitis C*

Settlement Agreement. She also delivered forms, letters and various other documents from those two previous applications.

i) Hospital and Medical Records

[7] The hospital and medical records delivered by the Claimant demonstrate that she was hospitalized on six occasions: October 16, 1986 for a D&C; September 27, 1988 for a laparoscopy; May 17, 1989 for problems related to her pregnancy; August 28, 1989 for a Caesarean section and tubal sterilization; September 28, 1990 for a D&C; and September 18, 1992 for a hysterectomy, with a related laparotomy on September 21, 1992. Only the last two hospitalizations, in September 1990 and September 1992, fall within the Class Period of the *Settlement Agreement*. The same “attending physician/surgeon” (“surgeon”) attended the Claimant during all of her hospital admissions, save and except for her Caesarean section in 1989. He prepared all of the Patient Clinical Reports, except for those relating to the Caesarean section. The Patient Clinical Reports included Operative Reports and on some occasions Discharge Summaries. The surgeon was obviously very familiar with the Claimant and her medical history and problems.

[8] In the first hospital admission detailed in the records, the Claimant had D&C surgery on October 17, 1986 (outside of the Class Period). The surgeon described the surgical procedure in the Operative Report and concluded by stating:

There were no unusual findings and no complications. The [Claimant] left the O.R. in good condition.

The other hospital records concerning the admission were a Preoperative Assessment and an Anaesthesia Record. There was nothing in any of the records to demonstrate that the Claimant received a blood transfusion during this hospital admission.

[9] In the second hospital admission, the Claimant had laparoscopy surgery on September 27, 1988 (outside of the Class Period). The surgeon described the surgical procedure in the Operative Report and stated, among other things, that there were “no complications” and “[the Claimant] was removed from the OR in good condition”. The other hospital records were a Preoperative Assessment and an Anaesthesia Record. There was nothing in any of the records to demonstrate that the Claimant received a blood transfusion during this hospital admission.

[10] In the third hospital admission, the Claimant was admitted on May 17, 1989 (outside of the Class Period) for problems related to her pregnancy. There were only two records relating to this hospital admission: a hospital Blood Bank requisition and a Discharge Summary. The Blood Bank requisition dated May 17, 1989 indicated that blood from the Claimant was to be tested for “type and antibody detection test (serum held for crossmatch)”. In the Discharge Summary, the surgeon indicated that the Claimant was discharged from the hospital on May 28, 1989. He explained the problems that led to her admission, some of her medical history, the tests that she had while in the hospital and the treatment that she received for her headaches. He noted that she had improved gradually. There was nothing in the Discharge Summary to demonstrate that the Claimant received a blood transfusion during this hospital admission.

[11] In the fourth hospital admission, the Claimant had a Caesarean section and tubal sterilization on August 29, 1989 (outside of the Class Period). A hospital Blood Bank requisition, numbered BB27364 and dated August 29, 1989, indicated that blood was drawn from the Claimant with a crossmatch required for two units of blood “A.S.A.P.” The surgery was performed by a different surgeon than the one who dealt with the

Claimant on all of her other hospital admissions. The Operative Record described the surgical procedure and stated as follows:

Blood loss was estimated at about 400 – 500 ccs. Transfusion was not necessary.

The [Claimant] left the Operating Room in good condition. [Emphasis Added]

The other hospital records were a Preoperative Assessment, an Anaesthesia Record, an Operating Room Record, a Post Anaesthesia Record and a Discharge Summary indicating that the Claimant was discharged from the hospital on September 4, 1989. The Discharge Summary explained the reasons why a Caesarean section was performed, including her previous Caesarean section operation in 1974, and noted that her postoperative course was “completely uncomplicated”. A copy of the Discharge Summary was sent to the surgeon who dealt with the Claimant on all of her other hospital admissions. There was nothing in any of the records to demonstrate that the Claimant received a blood transfusion during this hospital admission; indeed, the Operative Record specifically stated that a “transfusion was not necessary”.

[12] In the fifth hospital admission, the Claimant had a D&C operation on September 28, 1990 (within the Class Period). The surgeon described the procedure in the Operative Report and made no mention of a blood transfusion; he stated that there were no complications and the Claimant left the operating room in “good condition”. The Operating Room Record contained no information relevant to the question of a blood transfusion. However, the surgeon noted that the surgery started at 1205 and finished at 1212, lasting for only seven minutes. The Post Anaesthesia Record contained a column entitled “Fluid Therapy”, with a line drawn through it, indicating that the Claimant had received no fluids during the operation. The Nurses’ Notes contained two entries that

stated “uneventful”. There was nothing in the records to demonstrate that the Claimant received a blood transfusion during this hospital admission.

[13] Approximately two years later, a Blood Bank requisition, numbered BB27558 and dated September 9, 1992, indicated that blood was drawn from the Claimant to be held for crossmatch; blood was to be required for September 18, 1992 (the date scheduled for the hysterectomy). The form noted a surgical diagnosis of “excessive vaginal bleeding”.

[14] In the sixth and final hospital admission, the Claimant had a hysterectomy on September 18, 1992, as well as a laparotomy on September 21, 1992 due to postoperative problems (both surgeries were within the Class Period). There were hospital records concerning both of the surgeries, including Blood Bank records.

[15] With respect to the hysterectomy on September 18, 1992, the surgeon described the surgery in an Operative Report of the same date and stated as follows in the concluding sentences:

No blood transfusions or unusual bleeding. 2” vaginal pack inserted. The [Claimant] was in good condition. [Emphasis Added]

On the bottom of the Operative Report copy in the Appeal File, a note was apparently written by the Claimant that stated as follows:

By 4 p.m. I was in ICU. The Doctor put me there before he went away for the weekend. Next morning I woke to being [sic] transfused.

[16] As indicated in paragraph 13, Blood Bank requisition BB27558 had required blood from the Claimant to be held for a crossmatch required on September 18, 1992. A second copy of Blood Bank requisition BB27558 contained additional information, indicating that the Claimant’s blood was crossmatched with unit numbers 553-8-483715 (“483715”) and 553-3-481723 (“481723”). Two other hospital records that were on a

page called "Labels of Blood Transfused" each referred to Blood Bank requisition BB27558: one label indicated that the Claimant was transfused with unit number 481723 on September 19, 1992; the other label was undated, but nevertheless indicated that the Claimant was transfused with unit number 483715.

[17] Two days after the hysterectomy, on September 21, 1992, the Claimant had laparotomy surgery. The surgeon stated, in part, as follows in an Operative Report of the same date:

The peritoneal cavity was entered, the peritoneal cavity was found to be full of a large amount of blood, probably 1000 c.c. It was old blood hemolyzed. There was no active bleeding at this time. The peritoneal cavity was cleansed of all the old blood and exploration was made, no bleeding sites could be found. Where the blood had come from was not visualized.

[...]

The [Claimant] will require some blood transfusions. The patient was then removed from the O.R. in good condition. [Emphasis Added]

[18] The next day, another Blood Bank requisition, numbered BB27316 and dated September 22, 1992, required a crossmatch of two units of blood for the same day. The unit numbers of blood that were crossmatched with the Claimant's blood were 553-5-479783 ("479783") and 553-6-485713 ("485713"). There were no other hospital Blood Bank records relating to those two units of blood.

[19] On September 27, 1992, the Claimant was discharged from the hospital. In the Discharge Summary, the surgeon described the surgery for the hysterectomy. He continued by explaining the postoperative problems experienced by the Claimant and the need for a laparotomy. In the summary concerning the laparotomy, the surgeon stated that "the Claimant required blood transfusions". The relevant parts of the Discharge

Summary stated, in part, as follows:

Postoperatively, the [Claimant] was afebrile and initially was doing well but was complaining of abdominal pains. [Sentence obscured by black line drawn through it]. [...] Pelvic ultrasounds on the fourth postoperative day showed a 4.5 cm cystic mass in the left adnexal area. There was also considerable fluid in both flanks. [...]

The patient was seen in consultation by [another physician], who felt the problem was intraperitoneal and probably intraperitoneal bleeding. It was decided at this time that a laparotomy should be done. Under general anaesthesia, laparotomy was done. The abdomen was opened and the [Claimant] was found to be full of old blood, hemolyzed blood and clot. This was all removed. The [Claimant] required blood transfusions. No source of bleeding was found. The peritoneal cavity was clean. The abdomen was then closed. [Emphasis Added]

ii) Documents relating to application for compensation under provincial plan

[20] On December 23, 1998, the Claimant delivered an application for compensation under a provincial plan. In the part of the form entitled “Medical Information (to be completed by physician)”, the physician who completed the form noted that he had been the Claimant’s physician for 36 years (“first family physician”). He checked the box to indicate that the Claimant had received a transfusion during the period from July 2, 1990 to September 28, 1992 and gave “blood loss during hysterectomy” as the reason for the transfusion. He also checked the box to indicate that the Claimant had risk factors for HCV infection, but provided no details in the space provided.

[21] The provincial plan Request for Records Search form contained two parts: one completed by the hospital concerning its transfusion records, and one completed by the Canadian Blood Services concerning its traceback. The hospital indicated in its part of the form that transfusion records were available and established that the Claimant was transfused on September 19, 1992 with the following two units of blood: unit numbers 483715 and 481723. It also provided the collection date of the blood. The Canadian Blood Services indicated in its part of the form, approved on February 3, 1999, that

records were available for the units of blood and that subsequent donations from the donors of the units were tested and all were found to be negative for antibodies to Hepatitis C. There was no reference by either the hospital or the Canadian Blood Services to the two units of blood, 479783 and 485713, crossmatched on September 22, 1992 and required for that day.

[22] By letter dated August 1, 1990, a specialist in internal medicine wrote to the first family physician and confirmed that he had seen the Claimant for “[...] non specific complaints of chest pain, dyspnea on exertion just general debility with any kind of activity associated with tiredness”. He provided a very brief description of her history and his physical examination of her. In referring to the results of laboratory tests, he noted, among other things, that “hepatitis A and B markers were negative”. He stated that he could not make a specific diagnosis, but added, in part, the following:

Perhaps she had some specific virus involving the liver causing a slight elevation of the SGPT and the occasional [illegible last word]. However, I can't prove it at this time. I really don't think that we should do anything specific except to watch her.

[23] A laboratory record dated January 10, 1997 stated that the Claimant had tested positive in the Hepatitis C screening test and the specimen was sent to the public health laboratories for confirmation.

[24] By letter dated June 5, 1997, the Canadian Red Cross wrote to the Claimant's lawyer to provide the results of the traceback investigation. The letter stated, in part, as follows:

A traceback investigation has been opened [...] for your firm's client, [the Claimant]. [...]

[The Claimant] received two units of blood and there are therefore two donors who were implicated in her transfusion.

Both implicated donations were collected in August of 1992 and both tested negative for hepatitis C at that time. The Canadian Red Cross Society implemented a test for hepatitis C during the spring of 1990 and had been testing for hepatitis C for over two years at the time the blood received by your firm's client was collected.

The first donor has donated eight times since August of 1992. All of these subsequent donations have tested negative for hepatitis C.

The second donor has made only one subsequent donation, but that donation was made on July 18, 1994, some two years following the August 1992 donation. It too was negative.

Given these test results, it is a virtual certainty that your client contracted hepatitis C through means other than her blood transfusion.

[25] By letter dated July 29, 1997, the Claimant's lawyer wrote to the health records department of the hospital and stated, in part, as follows:

Your records show [the Claimant] receiving 2 units of blood – #553-3-481723 and #553-8-483715. Attached is a copy of sheet showing the “labels of blood transfused”. One label showing the blood being transfused on 19/09/92 and other showing no date of transfusion.

[The Claimant] recalls that there was at least another unit of blood transfused but we are unable to confirm this from the records given to us. We have noted, however, the following:

1. The last paragraph of [the physician's] clinical report [the Operative report] dated 92/09/21 states “[the Claimant] will require some blood transfusion” – Attached is a copy of this report for your ease of reference;
2. Blood Bank form #BB27316 refers to units #553-5-479783cc and #553-6-485713cc being required for 22/9 (September 22, 1992). Attached is a copy of form #BB25316 for your ease of reference.

Please review your records and advise:

1. Was [the Claimant] given blood transfusions further to [the surgeon's Operative Report] dated 92/09/21?
2. Was [the Claimant] given any other blood transfusion(s) other than units #553-3-481723 and #553-8-483715? If she was, please provide us with full particulars.
3. What happened to units #553-5-479783cc and #553-6-485713cc? [Emphasis Added]

[26] By letter dated September 25, 1997, the hospital responded as follows:

Our hospital and blood transfusion records show that [the Claimant] only received the following 2 units of blood (#553-3-481723 and #553-8-483715). They were both given on September 19, 1992.

Units #553-5-479783 and #553-6-485713 as referred in our Blood Bank form #BB2716 [sic] were prepared in case of further requirements for transfusion by [the Claimant]. She did not require any further blood transfusions, even though [the surgeon] indicated in the last paragraph of his clinical note [Operative Report] that “[the Claimant] will require some blood transfusions”. These units were returned to our blood bank and were given to another patient. [Emphasis Added]

The first page of the letter ended at that point and the second page was not in evidence. In the letter, the hospital clerk provided no copies of any hospital record to support the statement that units 479783 and 485713 (Blood Bank requisition BB27316 dated September 22, 1992) were not transfused to the Claimant and were returned to the Blood Bank. The clerk acknowledged the surgeon's statement in the last paragraph of the Operative Report dated September 21, 1992 concerning the laparotomy that “[the Claimant] will require some blood transfusions”, but stated that the Claimant did not require any further transfusions. However, the clerk made no reference to the last paragraph of the Discharge Summary in which the surgeon stated, with reference to the laparotomy, that “the [Claimant] required blood transfusions”.

[27] By letter dated January 18, 2001, the manager of the Blood Transfusion Laboratory of the hospital wrote to the Claimant's family physician and stated as follows:

As a result of your request, the Medical Chart records for [the Claimant] have been searched.

Attached are the transfusion records you requested for her admission to [the hospital] in 1992. There is no record of her receiving any transfusions during her previous admissions in 1977, 1978, 1979, 1982, 1984, 1986, 1988, 1989, 1990, or 1991.

Unit No.	Group	Product	Date Bled	Date Transfused
483715-8	A	Packed Cells	24-Aug-92	21-Sep-92
481723-3	A	Packed Cells	26-Aug-92	21-Sep-92

The “transfusion records” referred to in the letter from the manager of the Blood Transfusion Laboratory was a one page document on hospital letterhead dated January 18, 2001 that contained the table of information reproduced above.

iii) Claim for compensation under 1986-1990 Hepatitis C Settlement Agreement

[28] On August 29, 2000, the Claimant delivered a claim for compensation under the *1986-1990 Hepatitis C Settlement Agreement*. In the claim, she stated, among other things, that she had received “six or more” blood transfusions during her lifetime, at least “two or three” of which were during the period between January 1, 1986 and July 1, 1990. The Treating Physician Form, dated August 15, 2000, was completed by a specialist in gastroenterology and internal medicine (“specialist in gastroenterology”) who had treated the Claimant since 1997. He indicated, among other things, that the Claimant was at Disease Level 5 at that time. In the “Section F – Disease Verification” part of the form, he noted as risk factors, in response to question 1, that the Claimant had received blood transfusions outside of the period from January 1, 1986 to July 1, 1990; he did not check the box to indicate that she had used non-prescription intravenous drugs. In response to question 3, he checked the box “No” to answer that there was nothing in her medical history to indicate that she “[...] was infected with Hepatitis Non-A, Non-B or the Hepatitis C virus prior to January 1, 1986”. In the response to question 6 concerning the use of non-prescription intravenous drugs, he wrote: “1972 – 3 instances of IV drug use – clean syringe”. The specialist in gastroenterology was therefore aware of the Claimant’s limited drug use in 1972 that took place approximately 28 years before he

completed the form. He nevertheless stated that there was nothing in her medical history to indicate that she was infected with Hepatitis C before January 1, 1986.

[29] The claim for compensation under the *1986-1990 Hepatitis C Settlement Agreement* was denied by the Administrator. The Claimant appealed to a Referee on the basis that she had a “clear recollection” of having a blood transfusion when her second daughter was born on August 29, 1989.

[30] In a decision dated June 1, 2000, a Referee concluded that the Claimant was not eligible for compensation and upheld the decision of the Administrator. In the decision, the Referee stated that she was not satisfied, on the basis of the evidence, that the Claimant had received a blood transfusion in 1989. In paragraph 15 of the decision, after she had already decided to uphold the decision to deny the claim, the Referee noted that there were “[...] other risk factors that may account for [the Claimant’s] illness”. In a footnote to that statement, the Referee stated as follows: “The Claimant admitted, and her physician confirmed, that she had used non-prescription intravenous drugs in 1972”. The comments made by the Referee concerning drug use as a risk factor were not material to her analysis and disposition of the application. Furthermore, she made no reference to the Treating Physician Form in which the specialist in gastroenterology stated, in response to question 3 in “Section E – Patient History”, that there was nothing in the Claimant’s medical history to indicate that she was infected with Hepatitis non-A, non-B or the Hepatitis C virus prior to January 1, 1986.

[31] The Claimant opposed confirmation of the Referee’s decision by Fund Counsel and delivered additional submissions in writing in support of her position. In her

submissions, she stated, in part, as follows:

I took the \$25,000 compensation package provided by the Provincial Government because I truly believed that I had contracted Hepatitis C in 1992 through a vaginal hysterectomy. A blood vessel broke in my stomach necessitating blood transfusions.

I did use intravenous needles for drugs twice in 1972 and [the specialist in gastroenterology] determined that it was this drug use incident which gave me Hepatitis C; [the next part of the sentence appears at the bottom of the page and the photocopy is illegible].

As history and blood tests have shown, my daughter, born in 1974 [...] does not have any indication of hepatitis C. I therefore did not have the disease in 1974 at her birth.

[32] In Reasons for Decision dated November 27, 2001, Winkler J. (as he then was) confirmed the decision of the Referee.

iv) Traceback Reports

[33] There were two Traceback reports from the Canadian Blood Services: a final Traceback report forwarded by letter dated January 16 [sic], 2008 (“first Traceback”), and a revised final Traceback report forwarded by letter dated February 5, 2008 (“second Traceback”).

[34] The first Traceback included a Traceback Notice dated November 29, 2007 and a Transfusion Summary dated January 18, 2008 (“first Traceback Notice” and “first Transfusion Summary”). The first Traceback Notice contained a Hospital Response dated January 10, 2008 to the request for a search of the hospital transfusion records. The hospital analyst checked the box “Transfused (Records attached)” and noted that the timeframe of the search of the Blood Bank records was 1992. She also noted that the Chart Record was searched for 1992. The record that was attached to the Hospital Response was a one page document on hospital letterhead dated January 10, 2008 that

contained the following transfusion information:

Unit No.	Group	Product	Date Bled	Date Transfused
483715-8	A	Packed Cells	24-Aug-92	19-Sep-92
481723-3	A	Packed Cells	26-Aug-92	19-Sep-92

The information concerning the date on which the units were transfused conflicted with the transfusion date of September 21, 1992 given in the otherwise identical hospital record reproduced in paragraph 27.

[35] The first Transfusion Summary stated as follows:

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

Unit Number	Product Name	Transfusion Date	HCV Status of Donor If known
A 483715-8	Packed Cells	1992-09-19	Negative
A 481723-3	Packed Cells	1992-09-19	Negative

Two blood units were transfused in September 1992. On subsequent testing both Donors tested negative for Hepatitis C.

Two other blood units were crossmatched only on 1992-09-22. [Emphasis Added]

[36] The second Traceback included a Traceback Notice dated January 29, 2008 and a Transfusion Summary dated February 5, 2008 (“second Traceback Notice” and “second Transfusion Summary”). The second Traceback Notice contained a Hospital Response dated January 31, 2008 that made reference to the 1992 records “sent previously”. After checking the box “Blood Bank records: Timeframe of search”, the analyst wrote “1989 – not transfused”. Two 1989 records were included with the Hospital Response: a copy of Blood Bank requisition BB27364 dated August 29, 1989 (“first copy”), identical to the copy described in paragraph 11; and a second copy of the same Blood Bank requisition

(“second copy”), not included in the earlier hospital records, that contained additional information in a part of the form that was blank in the first copy. The parts of the form in the second copy that were not reproduced in the first copy were beside the part entitled “Donor”; in the second copy, there was a part entitled “Issued By”, where the word “cancelled” was stamped on the same line as each unit number of blood to indicate that it was not transfused to the Claimant.

[37] The second Transfusion Summary was identical to the first Transfusion Summary, save and except that it added the following sentence:

Two other units were crossmatched in August 1989 but were later cancelled.

[38] Although the first Transfusion Summary referred to two units of blood that were crossmatched on September 22, 1992, it did not state that the units were cancelled. In contrast, the second Transfusion Summary specifically stated that the units of blood crossmatched in August 1989 were cancelled. Furthermore, with respect to the two units of blood crossmatched on August 29, 1989, Blood Bank requisition BB27364 specifically bore stamps indicating that each unit was cancelled. In contrast, there was nothing recorded on Blood Bank requisition BB27316 dated September 22, 1992 to indicate that the two units of blood crossmatched for the Claimant on that date were cancelled.

PRELIMINARY DECISION OF THE ADMINISTRATOR

[39] In a preliminary decision dated August 5, 2008, the Administrator advised the Claimant that her claim would be rejected unless she provided further evidence that she “[...] was infected for the first time with HCV by Blood received in Canada during the

Class Period” and gave the following generic reasons in support of its decision:

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

Criteria for Class Membership

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

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

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

FURTHER EVIDENCE OF FIRST INFECTION

[40] On September 22, 2008, the Claimant signed the Further Evidence of First Infection Form and wrote a note stating, in part, as follows:

I do not understand the letter sent in Feb. Corrected it said in 89 blood was returned [the second Transfusion Summary, described in paragraph 37]. The second letter was corrected and did not say blood was returned for one and I had family there all the time [the first Transfusion Summary reproduced in paragraph 35]. I have 5 people that saw [illegible]. Why would two letters be sent out by the Blood Bank? [...]

She delivered no further evidence of first infection.

FINAL DECISION OF ADMINISTRATOR

[41] In a decision dated May 1, 2009, the Administrator denied the claim for

compensation, stating as follows:

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

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

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

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

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

The result of the Traceback confirmed the donors of the two units of blood transfused to you during the class period have tested negative for the HCV antibody. You submitted correspondence asking about 2 other units of Blood that you thought were transfused to you. Canadian Blood Services contacted the Hospital and the Hospital clarified the other Blood units were crossmatched for you however they were not transfused. In light of this information, the claim was denied. You indicated, in response to our first letter that you were intending to provide further evidence. In your case, as noted previously, no further evidence was received and the time to submit such evidence has expired. Based on this the claim is now rejected.

As you may already know, every claim for compensation is reviewed and approved based on our review of documentation confirming a series of different but related proven facts. As soon as a claim submission fails to meet one of several approval criteria as set out in the Settlement Agreement, the claim must be denied. It is important to note that in some cases, the subsequent claim evaluation steps were not completed after determining the need to deny the claim. Should you opt to appeal our decision to deny your claim and should you succeed on appeal, any and all pending evaluation steps will have to be completed. [Emphasis Added]

REQUEST FOR REVIEW

[42] On May 15, 2009, the Claimant delivered a Request for Review and specified her

reasons for appealing, in part, as follows:

I am appealing this decision because I'm not talking about 86-90 yes I did receive blood when my daughter was born. 1992 I received 4 to 5 units. I remember 4 days later it was in my abdomen [sic] later that day they suctioned the blood out of my stomach. [...]

[43] The Claimant delivered a further Blood Transfusion History Form in which she referred to some of her hospitalizations, as well as a copy of the hospital transfusion record, reproduced in paragraph 27, indicating a transfusion date of September 21, 1992.

ISSUE

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

ANALYSIS

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

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

[15] In order to determine whether the Claimant is eligible for compensation as a Primarily-Infected Class Member, the provisions in sections 2.01 and 5.04 of the *Settlement Agreement*, as well as various sections in the *Traceback Protocol for Primarily-Infected Persons* (“*Traceback Protocol*”), must be interpreted and applied to the facts. The provisions “[...] must be interpreted in a textual, contextual and purposive way” [See *Pelletier v. Canada*, [2008] 3 F.C.R. 40 (F.C.A.) at paragraph 47].

[16] Under the terms of the judicially approved *Settlement Agreement*, a person claiming to be a Primarily-Infected Class Member, such as the Claimant, must satisfy the eligibility requirements in section 2.01 in order to make a

successful claim for compensation. Section 2.01 states, in part, as follows:

2.01 Eligibility – Primarily-Infected Class Member

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

- a) medical, clinical, laboratory, hospital, The Canadian Red Cross Society, Canadian Blood Services or Hema-Quebec records demonstrating that the claimant received Blood in Canada during the Class Period; [...]

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

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

3. In making its decision whether the Claim in respect of a person claimed to be a Primarily-Infected Person should be approved, the Administrator shall:

- a. obtain and assess the results of the stage or stages of the Traceback Procedure required by such of paragraphs 5 through 9 of this Protocol as are applicable to the claim in question;
[Emphasis Added]

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

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

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

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

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

5.04 Traceback Procedure

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

(a) where the Primarily Infected Person did not receive Blood prior to January 1, 1986, one of the donors or units of Blood received at any time between January 1, 1986 and July 1, 1990 inclusive, by the Primarily-Infected Person was HCV antibody positive; or

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

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

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

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

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

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

[24] Paragraph 15 of the *Traceback Protocol* requires the Administrator, after making a determination to reject the claim based on the Traceback Procedure result, to advise the claimant of the right to provide “further evidence of first infection”, failing which the claim will be rejected. The expression “further evidence of first infection” is used in paragraphs 15 to 18 of the *Traceback Protocol*; it is not specifically defined in either section 1.01 of the *Settlement Agreement* or paragraph 1 of the *Traceback Protocol*. However, paragraph 15 of the *Traceback Protocol* refers to “further evidence of first infection” as evidence establishing that the claimant “[...] was infected for the first time with HCV by a Blood transfusion received in Canada during the Class Period notwithstanding the Traceback Procedure result [...]”. Paragraph 15 also makes reference to subsection 5.04(2), the provision in the *Settlement Agreement* that permits a claimant to prove first infection, notwithstanding the results of the Traceback Procedure. Paragraph 15 of the *Traceback Protocol* provides as follows:

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

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

ii) The conflicting evidence concerning the transfusion dates of units 483715 and 481723 (Blood Bank requisition BB27558 dated September 18, 1992)

[46] As stated in paragraph 16, there were two transfusion labels for units 483715 and 481723 (Blood Bank requisition BB27558 dated September 18, 1992): one transfusion label indicated that unit 481723 was transfused to the Claimant on September 19, 1992; the other label was undated, but nevertheless indicated that she was transfused with unit number 483715. The hospital letter dated September 25, 1997 to the Claimant's previous lawyer, reproduced in paragraph 26, stated that the two units were transfused on September 19, 1992. In early 1999, the hospital stated, in its response to the traceback in the provincial plan application as described in paragraph 21, that the two units were transfused on September 19, 1992. However, in a letter dated January 18, 2001 to the Claimant's family physician, reproduced in paragraph 27, the manager of the Blood Transfusion Laboratory of the hospital included a one page document described as "transfusion records" that was a table of information stating that the Claimant was transfused with the two units on September 21, 1992. In the Hospital Response to the first Traceback Notice, the hospital provided a table of information dated January 10, 2008, reproduced in paragraph 34, indicating that the two units were transfused to the Claimant on September 19, 1992. In all other respects, the document in the Traceback Notice was identical to the table of information in the letter dated January 18, 2001 from the manager of the Blood Transfusion Laboratory to the Claimant's family physician. There was therefore a clear conflict in the information provided in the two otherwise identical hospital records.

[47] The evidence concerning the transfusion dates of units 481723 and 483715, when considered in its totality, establishes that the one page "transfusion record", included with

the hospital letter dated January 18, 2001 and reproduced in paragraph 27, erroneously stated that unit 481723 was transfused to the Claimant on September 21, 1992. In particular, the transfusion label clearly stated that the unit was transfused to the Claimant on September 19, 1992 and there was also other evidence to the same effect. However, with respect to unit 483715, the evidence cannot be reconciled. Taken at its highest, the evidence establishes that unit 483715 was transfused to the Claimant either on September 19 or 21, 1992.

iii) Did the Administrator err in requiring the Claimant to provide Further Evidence of First Infection under subsection 5.04(2) of Settlement Agreement and paragraphs 8(a) and 15 to 18 of Traceback Protocol?

[48] Section 5.04 of the *Settlement Agreement* and the related provisions of the *Traceback Protocol* require the Administrator, among other things, to reject a claim for compensation where none of the donors of blood received by a claimant is or was HCV antibody positive, unless further evidence establishes that the claimant was infected with HCV for the first time by a blood transfusion. In determining whether the Administrator erred in requiring the Claimant to provide further evidence of first infection, it is important to recall that blood was requisitioned and crossmatched for the Claimant twice during her hospitalization for the hysterectomy and the laparotomy: on September 18, 1992 in Blood Bank requisition BB27558, described in paragraph 16, and on September 22, 1992 in Blood Bank requisition BB27316, described in paragraph 18. The information in the first and second Tracebacks must be therefore examined in order to assess whether section 5.04 of the *Settlement Agreement* and the related provisions of the *Traceback Protocol* apply in both situations.

[49] The first Transfusion Summary provided information concerning the units of blood that were crossmatched for the Claimant in the two Blood Bank requisitions. First, it stated that unit numbers 483715 and 481723 (Blood Bank requisition BB27558 dated September 18, 1992) were transfused to the Claimant on September 19, 1992; the donors of the two units of blood were “negative” for the Hepatitis C virus. Second, it stated that “two other blood units were crossmatched only on 1992-09-22” (Blood Bank requisition BB27316 dated September 22, 1992); no other information was provided concerning the two crossmatched units. The second Transfusion Summary repeated the same information that was given in the first Transfusion Summary, but added additional information concerning a crossmatch from 1989.

[50] As indicated previously, I have concluded that the evidence, when considered in its totality, demonstrates that the Claimant was transfused with unit 481723 on September 19, 1992 and with unit 483715 on either September 19 or 21, 1992. In any event, the Canadian Blood Services determined, as confirmed in the first and second Transfusion Summaries, that neither of the donors of those two units was HCV antibody positive. In the circumstances, by virtue of section 5.04 of the *Settlement Agreement* and paragraphs 8 and 15 of the *Traceback Protocol*, the Administrator was required to reject the claim in relation to those transfusions, unless the Claimant provided further evidence of first infection. The Administrator complied with paragraph 16 of the *Traceback Protocol* by informing the Claimant in writing of her right to provide such evidence. The Claimant did not provide any evidence to refute the results of the first and second Transfusion Summaries in the Tracebacks concerning unit numbers 483715 and 481723.

The Administrator was therefore required to reject the claim to the extent that it was based on those two transfusions.

[51] With respect to the two units of blood crossmatched on September 22, 1992, the first and second Transfusion Summaries simply stated that “two other blood units were crossmatched” on that date. There was nothing in the first and second Transfusion Summaries to indicate that the two units were transfused to the Claimant and there was therefore no evidence concerning the donors. In the circumstances, section 5.04 of the *Settlement Agreement* and the provisions of the *Traceback Protocol* did not apply to the two units of blood crossmatched on September 22, 1992. The Administrator therefore erred by requiring the Claimant to provide further evidence of first infection in relation to the two units of blood crossmatched on September 22, 1992. Instead, the Administrator was required, by virtue of paragraph 2.01(1)(a) of the *Settlement Agreement*, to determine whether the evidence in the records demonstrated that the Claimant was transfused at any time with either or both of the units of blood that were crossmatched for her on September 22, 1992. The Administrator did not analyse the evidence from that perspective and therefore did not decide the question of whether the records demonstrated the receipt of blood by the Claimant on or after September 22, 1992, within the meaning of paragraph 2.01(1)(a). The Administrator therefore further erred by failing to determine under paragraph 2.01(1)(a) of the *Settlement Agreement* whether the records demonstrated that the Claimant had received a blood transfusion at some point in time between September 22, 1992 and her discharge from the hospital on September 27, 1992.

[52] Given my complete review of the evidence in this matter and the fact that the Claimant is gravely ill at Disease Level 6, I have decided to make the decision in this matter, rather than returning it to the Administrator for disposition.¹

iv) Did the records demonstrate that the Claimant received blood between September 22, 1992 and her discharge from the hospital on September 27, 1992?

[53] In determining whether the hospital records demonstrate that the Claimant received a blood transfusion on or after September 22, 1992 and before her discharge on September 27, 1992, two aspects of the evidence must be considered: first, the statements made by the surgeon in the hospital records concerning blood transfusions; and second, the hospital records and the first and second Tracebacks concerning the blood that was crossmatched on September 22, 1992.

[54] With respect to the statements made by the surgeon, it is highly significant to note that the surgeon addressed the question of blood transfusions in three hospital records prepared in relation to the two surgeries performed on the Claimant during her hospitalization between September 18 and 27, 1992: first, in the Operative Record dated September 18, 1992 concerning the hysterectomy, he stated that there were “no blood transfusions”; second, in the Operative Report dated September 21, 1992 concerning the laparotomy, he stated that the Claimant “will require” blood transfusions; and, third, in the part of the Discharge Summary relating to the laparotomy, he stated that the Claimant “required blood transfusions”. The surgeon knew the Claimant and her history extremely well. Indeed, he attended her and prepared the Patient Clinical Reports for five out of the six hospital admissions detailed in the hospital records; in the one hospital admission

¹ See, by way of analogy, the approach taken by Rothstein J. in *Apotex v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61 at paragraph 72.

where he did not perform the surgery (the Caesarean section), the other surgeon sent him a copy of the Operative Report. The statements by the surgeon in the Operative Report dated September 21, 1992 that the Claimant “will require blood transfusions” and in the part of the Discharge Summary relating to the laparotomy that she “required blood transfusions” are compelling evidence and are entitled to significant weight, particularly in view of the obvious in-depth knowledge that he had concerning the Claimant, all of her surgeries and the postoperative problems that she developed on the occasion in question.

[55] With respect to the evidence concerning the two units of blood crossmatched on September 22, 1992, the evidence in the hospital records, particularly concerning Blood Bank requisitions BB27316 (dated September 22, 1992) and BB27364 (dated August 29, 1989), the first and second Transfusion Summaries and the letter from the hospital dated September 25, 1997 must be considered in the context of the totality of the evidence.

[56] In the Operative Report dated September 21, 1992 concerning the laparotomy, the surgeon stated that the Claimant’s peritoneal cavity was “full of a large amount of blood”; he also stated that “the Claimant will require some blood transfusions”. The next day, on September 22, 1992, Blood Bank requisition BB27316 stated that two units of blood, numbered 479783 and 485713, were crossmatched for the Claimant and were required for the same day. The part of the form beside the unit numbers was blank. There was nothing anywhere on the requisition to indicate that the two units of blood were cancelled. In contrast, the second copy of Blood Bank requisition number BB27364, dated August 29, 1989, that was included with the Hospital Response to the second Traceback Notice and referred to in the second Transfusion Summary, contained additional information that was not in the first copy of the requisition in the hospital

records delivered in support of the claim. In particular, as described in greater detail in paragraph 36, the word “cancelled” was stamped beside the two units of crossmatched blood to indicate that they were not transfused to the Claimant. For that reason, the second Transfusion Summary stated that “two units were also crossmatched in August 1989 but were later cancelled”. In contrast, the first and second Transfusion Summaries stated, among other things, that “two other blood units [in Blood Bank requisition BB27316] were crossmatched only” on September 22, 1992. However, the Hospital Response in the first Traceback Notice provided no information at all concerning the two units of blood that were crossmatched on September 22, 1992. Indeed, there was no evidence in the hospital records to indicate that the two units of blood crossmatched in Blood Bank requisition BB27316 dated September 22, 1992 were either cancelled or transfused. In particular, there was nothing on Blood Bank requisition BB27316 to indicate that the two units were cancelled (as was the case for the units in Blood Bank requisition BB27364 dated August 29, 1989), and there were no labels to indicate that blood was transfused to the Claimant (as was the case for the units in Blood Bank requisition BB27558 dated September 18, 1992). The evidence in the hospital records therefore does not demonstrate that the two units of blood crossmatched on September 22, 1992 were either cancelled or transfused. However, the evidence does indicate that, in other circumstances, the hospital prepared Blood Bank records concerning the cancellation or transfusion of units of blood referred to in other Blood Bank requisitions. The hospital records for Blood Bank requisition BB27316 concerning the cancellation or transfusion of the two units are therefore missing.

[57] There is some evidence in a hospital letter dated September 25, 1997 to the Claimant's lawyer, reproduced in paragraph 26, concerning the two units of blood crossmatched in Blood Bank requisition BB27316 dated September 22, 1992. In the hospital letter, the clerk stated that the Claimant had not required any other transfusions "[...] even though the surgeon indicated in the last paragraph of his clinical note [Operative Report] that [the Claimant] will require some blood transfusions". However, the clerk made no reference to the statement of the surgeon in the Discharge Summary that the Claimant had "required blood transfusions". The clerk further stated that the two units were returned to the Blood Bank and were given to another patient. However, there is nothing in the first and second Transfusion Summaries, or in any of the hospital Blood Bank records in evidence, to confirm the statement made by the clerk. After considering the contents of the letter in the context of the totality of the evidence, I have concluded for two reasons that the evidence in the letter is entitled to little weight: first, the clerk failed to refer to the highly relevant statement made by the surgeon in the Discharge Summary concerning blood transfusions received by the Claimant following the laparotomy; and second, the absence of any Blood Bank records in the evidence to demonstrate that the two units were either cancelled or transfused, particularly given that Blood Bank records provided such information in relation to other units of crossmatched blood.

[58] I also note that, in the final decision dated May 1, 2009, reproduced in paragraph 41, the Administrator referred to "correspondence from the Claimant" and stated that "Canadian Blood Services contacted the Hospital and the Hospital clarified the other Blood units were crossmatched for you however they were not transfused. In light

of this information, the claim was denied”. The Administrator provided no details concerning the date of the correspondence from the Claimant or the date on which the Canadian Blood Services communicated with the hospital. It is therefore unclear whether this inquiry took place before or after the preparation of the two Tracebacks by the Canadian Blood Services. In any event, as indicated previously, the hospital did not produce any Blood Bank records in its response to the first or second Traceback Notices to demonstrate that the two units of blood crossmatched on September 22, 1992 were cancelled, as it did for the two units of blood that were crossmatched on August 29, 1989.

[59] For all of these reasons, I have concluded that the statements of the surgeon in the Operative Report dated September 21, 1992 and in the part of the Discharge Report relating to the laparotomy, when considered in the context of the evidence in its totality, demonstrate that the Claimant was transfused, on or after September 22, 1992 and prior to her discharge from the hospital on September 27, 1992, with one or more of the two units of blood that were crossmatched for her in Blood Bank requisition BB27316.

[60] There are two other matters that must be addressed. First, in arriving at my decision, I have ignored and not considered any of the written notes or submissions from the Claimant concerning her receipt of blood. Second, in the Form 1 – General Information Form submitted in the claim under the *Settlement Agreement*, the Claimant stated that she had used non-prescription intravenous drugs once in 1968; her family physician stated in the Treating Physician Form that she had no risk factors for HCV. In the claim under the *1986-1990 Hepatitis C Settlement Agreement*, the specialist in gastroenterology wrote, in response to the question concerning the use of non-prescription intravenous drugs by the Claimant: “1972 – 3 instances of IV drug use –

clean syringe”. He nevertheless stated that there was nothing in her medical history to indicate that she was infected with the Hepatitis C virus before January 1, 1986. In giving these responses, the specialist in gastroenterology indicated that he was aware of her limited non-prescription drug use approximately 28 years before his completion of the form, but concluded that it was not the cause of her infection with Hepatitis C. In written submissions opposing the confirmation of the Referee’s decision by Fund Counsel, reproduced in paragraph 31, the Claimant addressed the drug use question, undoubtedly in response to a statement made by the Referee that the Claimant had “other risk factors”. The Claimant wrote, among other things, that the specialist in gastroenterology had “[...] determined that it was this drug use incident which gave me Hepatitis C”. When considered in its context and in relation to the purpose for which the Claimant dealt with the issue, it would appear that she had intended to state “it was not this drug use incident which gave me Hepatitis C”, but that she inadvertently omitted the word “not” from her sentence. In any event, regardless of what the Claimant wrote in those submissions, the specialist in gastroenterology stated in the Treating Physician Form that there was nothing in her medical history to indicate that she was infected with Hepatitis C before 1986.

CONCLUSION

[61] The appeal is allowed. Since the Claimant is at Disease Level 6, the claim is remitted to the Administrator for determination on an expedited basis.

"D. McGillis"

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

DATED September 28, 2009

Received Sept 28.09

TO: Claimant
Fund Counsel
Administrator