

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: 07-00176

REASONS FOR DECISION

INTRODUCTION

[1] The Claimant has appealed a decision of the Administrator dated June 12, 2009, as reconsidered on August 21, 2009, in which his claim for compensation under the *Pre-1986/Post-1990 Hepatitis C Settlement Agreement* (“*Settlement Agreement*”) was denied. The Claimant, who had used non-prescription intravenous drugs, failed to satisfy the Administrator on the balance of probabilities that he was infected with HCV for the first time by a blood transfusion in Canada during the Class Period.

FACTS

[2] On September 17, 2007, the Claimant delivered a claim for compensation under the *Settlement Agreement*. In the General Information Form, he stated that he was a Primarily-Infected Person who was infected with the Hepatitis C virus through a blood transfusion in Canada during the Class Period. In “Section G – Other Risk Factors”, he checked the boxes to indicate prison incarceration and non-prescription intravenous drug use as other risk factors for Hepatitis C. With respect to his incarceration, he wrote “1968-1971 – Kingston Penitentiary”; for the non-prescription intravenous drug use, he stated “1968 – tuinol[sic] – a couple of times”. The Claimant has received compensation under the *Red Cross Settlement* and a provincial plan in the amounts of \$10,450.00 and \$25,000.00 respectively.

[3] The Treating Physician Form was completed by the Claimant's family physician on September 11, 2007. He indicated, among other things, that the Claimant was at Disease Level 6 with hepatocellular cancer. In response to question 1 in the "Section F – HCV Disease Verification" part of the form, he checked the boxes to indicate prison incarceration and non-intravenous prescription drug use as risk factors for the Hepatitis C virus. In response to question 3 in that part concerning whether there was anything in the Claimant's medical history or clinical presentation to indicate that he had used non-prescription intravenous drugs at any time, the family physician wrote "Hx [history] of IV narcotic use in past" [Emphasis Added]; he did not limit his statement concerning non-prescription intravenous drug use to the period when the Claimant was incarcerated or to any particular drug. At the time he completed the form, the family physician had treated the Claimant for seven years.

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

[5] In the Blood Transfusion History Form, the Claimant stated that he had received one unit of blood in November 1968 and two units in December 1968 for a severed ear.

[6] In support of his claim, the Claimant delivered a laboratory report printed on January 19, 2000 confirming the detection of the Hepatitis C antibody in his blood, as well as various scans and other medical reports dating from 2000 to 2007. None of those records contained any information relevant to the question of non-prescription intravenous drug use. He also delivered a Request for Records Search from his previous application for compensation under a provincial plan. The Request for Records Search indicated that he was diagnosed with Hepatitis C on January 28, 2000. The part of the

form completed by the hospital Health Records Department was dated April 13, 2000 and confirmed that the Claimant was transfused with one unit of blood on November 30, 1968 and two units of blood on December 1, 1968. The Canadian Blood Services indicated in its part of the form, completed on April 26, 2000, that there were no records available for any of the units of blood transfused; the units could not be traced back and the traceback would not continue.

[7] On October 5 and November 6, 2007, the Administrator sent letters to the Claimant to advise him of certain deficiencies in the documentation delivered in support of the claim.

[8] By letter dated December 31, 2007, the Canadian Blood Services forwarded the final report for the Traceback (“Traceback”) to the Administrator, together with a Transfusion Summary that stated as follows:

Three units were transfused in 1968. Canadian Blood Services has no records to identify donors from 1968 so we are unable to complete a full Traceback.

PRELIMINARY DECISION OF THE ADMINISTRATOR

[9] In a decision dated June 30, 2008, the Administrator advised the Claimant that his claim for compensation would be rejected due to his use of non-prescription intravenous drugs, unless he provided further evidence to establish his eligibility on the balance of probabilities. It included a Further Evidence of First Infection Form for the Claimant to return within thirty days.

FURTHER EVIDENCE OF FIRST INFECTION

[10] On July 15, 2008, the Claimant indicated on the Further Evidence of First Infection Form his intention to provide further evidence that he was infected with HCV for the first time by a blood transfusion.

i) evidence delivered on September 2, 2008

[11] On September 2, 2008, the Claimant delivered further evidence of first infection to the Administrator, including an affidavit sworn by him and a decision from a provincial plan Review Committee granting him an entitlement to a benefit. He also delivered various medical, clinical, laboratory and hospital records concerning his current state of health, none of which contained any evidence relevant to the question of his non-prescription intravenous drug use.

[12] In his undated sworn affidavit, the Claimant stated as follows:

AFFIDAVIT

Paragraph 1: [name and address of Claimant]

Paragraph 2: [date of birth]

Paragraph 3: Diagnosed with HCV January 17, 2000 – Age first received blood is 29 years

Paragraph 4: Used non prescription drugs in 1969 twice in a 48 hr. period.

Paragraph 5: Needles used were new and sterile disposable diabetic syringes. Smuggled in during a visit.

Paragraph 6: The needle was sterile on both occasions.

Paragraph 7: Needles were never shared.

Paragraph 8: Never donated blood.

Paragraph 9: Yes, robbery and impaired driving and received a full pardon Oct. 23, 1990.

[13] In a decision dated January 11, 2001, the member of the provincial plan Review Committee considered, among other things, the question of the Claimant's use of non-prescription intravenous drugs as a possible risk factor for HCV. She concluded that his use of such drugs was not a risk factor in the case and found that it was "more likely than not" that he had contracted HCV through a blood transfusion. She therefore granted him an entitlement to a benefit. In the decision, she stated, in part, as follows:

a. Absence of other risk factors as a source of HCV

The Program Office identified IV drug use as a risk factor possibly exposing the Applicant to HCV. The evidence in the file is that the Nurse Investigator noted that the Applicant stated that he had administered non-prescription drugs by means of injection "a couple of times" in 1968. On the Physician Form, [his family physician] noted IV drug use as another risk factor. In his Reasons for Requesting a Review, the Applicant states:

If I had not been honest and admitted to drug use I would be eligible. Without factual proof it is not fair that I be denied only on a likelihood.

The Program Office has referred to medical expert opinion estimating that the risk of contracting hepatitis C through intravenous drug use is ten to fifty times greater than the risk of contracting the infection through a blood transfusion. I do not have that medical opinion before me. What is clear from the material before me is that the risk of contamination from IV drug use is from sharing needles and paraphernalia, not from the use of non-prescription drugs itself.

In the material before me, there is no evidence that this Applicant did or did not share needles or drug paraphernalia during the couple of times that he used IV drugs. This is a non-adversarial process. It is the sharing of needles and drug paraphernalia in IV drug use that leads to the risk of transfer of the HCV infection. Given that there is no evidence for or against this, I must regard the evidence as being equal on this point and apply the benefit of the doubt in the Applicant's favour. The Review Committee finds there is no evidence that the Applicant shared anything during the period that he admits to using IV drugs and therefore the Applicant's IV drug use is not a risk factor in this case.

There are no other risk factors identified in the material before me.

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

There is little evidence about the stage of HCV before me. The diagnosis was made on January 13, 2000, and the transfusion of three units of blood occurred in

1968, prior to screening of blood donors for hepatitis C. There is no inconsistency therefore in terms of chronology of diagnosis and exposure through the [provincial] blood supply.

b. The number of units of blood product received by the Applicant.

The Applicant received three units of blood on two occasions in 1968. Consequently, the risk of exposure occurred on that occasion from three potential sources. A traceback was initiated. The results were that records were unavailable on those two units of blood.

DECISION

The Review Committee has found that the Applicant's IV drug use is not a risk factor in this case. In this review, then the evidence that one of the three units of blood transfused was the source of the Applicant's HCV includes the fact that there are no other risk factors in this case and that the chronology of the transfusions are consistent with the Applicant's stage of HCV. The Review Committee regards the evidence of the inconclusive traceback as neutral, neither suggesting that the donors were or were not hepatitis C carriers.

On a balance of the probabilities therefore the Review Committee finds it more likely than not that the Applicant contracted HCV through a transfusion in the entitlement period. [Emphasis Added]

ii) evidence delivered on October 21, 2008

[14] On October 21, 2008, the Claimant delivered medical, clinical and hospital records, including Progress Notes from 1993 to September 2007 made by physicians during his annual physical examinations or other medical appointments. The Progress Notes from January 24, 1999 to May 2007 were written by the family physician; the four entries in the Progress Notes from 1993 to 1997 were made by another physician. The Progress Notes contained entries dated January 24, 1999 (prior to the Hepatitis C diagnosis) and February 15, 2000 (after the Hepatitis C diagnosis) concerning the Claimant's non-prescription intravenous drug use. The records also included letters from three specialists to the family physician in which reference was made to the possible source of the Claimant's Hepatitis C infection: letters dated April 5, 2000 and May 2, 2000 from a specialist in gastroenterology; a letter dated May 6, 2004 from a specialist in

internal medicine; and a letter dated August 16, 2007 from a specialist in hepatology.

None of the other records contained any information that was relevant for the purposes of the appeal. The Claimant also delivered a letter that he wrote on October 18, 2008.

[15] The first two pages of the Progress Notes related to the period from March 1, 1993 to a date in May 1997 and were made by another physician; they contained no relevant information. All of the other Progress Notes were made by the family physician. The first entry in the Progress Notes that was made by the family physician was dated January 24, 1999, one year prior to the date of the Claimant's diagnosis with Hepatitis C. The initial part of the entry made reference, among other things, to a long standing problem that the Claimant had with ringing in the left ear and the external ear injury suffered by him years ago. The family physician also wrote as follows:

- hx [history] of [illegible] / benzodiazepine [illegible]
→ oil → [illegible] syringe [Emphasis Added]

There was nothing in the Progress Notes on that date concerning any drug use by the Claimant during his incarceration in the Kingston Penitentiary.

[16] In the Progress Notes made by the family physician on January 28, 2000, on or shortly after the date that the Claimant was diagnosed with Hepatitis C, he noted, among other things, that the Claimant had received a blood transfusion in the 1960's. In the Progress Notes dated February 15, 2000, he wrote, in part, as follows:

+ HEP C recent diagnosis
 had blood transfusion 1967
IV drug use 1968-1970
when in Kingston Pen
 had not had HIV test
 0 Alcohol x 30 years previous hx [history] Alcohol + drug abuse

Sees gastroenterologist April 15 [sic]
[Emphasis Added]

[17] In a letter dated April 5, 2000 to the family physician, the specialist in gastroenterology stated, in part, as follows:

[The Claimant] had blood transfusion in 1967 following trauma to his head. He told me that he had 10 pints of blood. He had intravenous drug abuse history up to 1970. There was no skin tattoo. He is a heterosexual male. There was no previous diagnosis of jaundice or acute Hepatitis. [...]

Review of system was unremarkable. Family history was non-contributory. [...] He smokes a package of cigarettes a day and quit alcohol consumption since 1971. He did have a history of alcoholism. [...]

Impression: [The Claimant] has chronic active Hepatitis C associated with the elevated liver transaminase. He is otherwise asymptomatic. Likely that [the Claimant] acquired the chronic Hepatitis C infection since the late 60's. This would suggest that [the Claimant] had the chronic infection for 3 decades. [...] [Emphasis Added]

[18] One month later, the specialist in gastroenterology wrote a further letter to the family physician in which he stated, in part, as follows:

[The Claimant] certainly has significant inflammatory changes and also description of piecemeal necrosis quite compatible with chronic active hepatitis C. It was interesting that there was no fibrosis seen. If indeed [the Claimant] acquired a hepatitis C during his previous blood transfusion exposure, then he would have had chronic hepatitis for over three decades. [...]

[19] In a letter dated May 6, 2004 to the family physician, the specialist in internal medicine stated, in part, as follows:

The [Claimant] has been known to have Hepatitis C for about 30 years. This was as a result of a transfusion. [...]

Review of system reveals that he has osteoarthritis. He is a smoker [...] but he is trying to quit. He has not drunk alcohol in the last 35 years. [...]

[20] Three years later, on August 16, 2007 from the specialist in hepatology wrote to the family physician and stated, in part, as follows:

He has Hepatitis C. This was diagnosed for the first time about 6 years ago. It has never been treated. [...]

He believes he acquired the infection from a fight in 1967, but there is also a history of injection drug use in the petitionary [sic] [the penitentiary] between 1969 and 1970, and I think it is far more likely that this is where he picked up the disease. [...]

His previous medical history is otherwise unremarkable. [...] he used to be a heavy drinker many years ago, but has not had any alcohol for the last 37 years. He smokes about 20 cigarettes a day. [...] [Emphasis Added]

[21] In his letter dated October 18, 2008, the Claimant stated as follows:

I am enclosing the medical records that were available to me from my family doctor for the past 10 years. I tried two previous family doctors and they had no records. Dr. [...] and Dr. [...]. I have requested and may receive in about 6 weeks, records from the [...] Hospital regarding the hospitalization in 1968 when I received the blood transfusion. If so I will send that on as well.

I know I received the hep C from a blood transfusion I received in 1968. This was administered due to loss of blood from a cut on my head incurred during a fight. There was no other opportunity [sic] for me to have contacted [sic] this virus.

Since being diagnosed with hep C in 2000 I have told every doctor I've seen I have hep C and the first question is always "Have you ever used non prescription intravenous drugs?" I have been truthful and answered "yes". Most doctors never asked "Did you receive a blood transfusion?" None ever asked "Did you share needles with anyone"? I would have answered these questions honestly also.

I have never shared a needle with anyone. I was a heavy user of alcohol and had never used intravenous drugs. I injected myself with tuinal (could be spelled wrong) using a sterile needle while in the penitentiary alone in my cell. I wasn't affected as expected, however, I tried again the next day under the same conditions.

I never used intravenous drugs since then. I quit drinking in 1971. I quit smoking in 2007.

I feel I am being rejected for telling the truth and would have been accepted if I had lied or omitted the information about the attempt at intravenous drugs.

I can't prove the blood used in the transfusion was infected with hepC but I know there was no other way I could have been infected.

After reading some of these medical [sic] records I am surprised by the assumptions taken by some doctors regarding how I became infected

I have done all I can to defend my belief and hope you review in my favour.

iii) evidence delivered on November 7, 2008

[22] On November 7, 2008, the Claimant delivered hospital records concerning his hospitalization in November and December 1968, as well as in February 1969.

[23] An Emergency Record dated November 30, 1968 indicated that the Claimant was admitted to the hospital for multiple lacerations after being cut by a beer glass. A Consultation Sheet dictated by a physician on the same date stated that the Claimant “[...] was involved in a fight and sustained very extensive laceration of the scalp and the left ear”. He also noted that the Claimant “[...] must have lost a fair amount of blood”. The Claimant was admitted to the Intensive Care Unit; he was to be transfused and prepared for surgery for the next day.

[24] The Operative Record signed by the surgeon was undated and described the severe lacerations suffered by the Claimant and the surgery that was necessary to repair the wounds. He noted, among other things, that the operation involved the following:

Cleansing, debridment [sic] and plastic surgical repair of severe through and through lacerations of the left ear and reconstruction of the ear, repair of adjacent scalp laceration, repair of deep, penetrating laceration of left cheek, repair of large flap laceration of right posterior scalp.

In the section of the Operative Record entitled “Findings”, the surgeon stated, in part, as follows:

FINDINGS: [The Claimant] was involved in a fight and hit with a broken bottle. On admission to emergency room he was in shock [...]. [He] was treated with intensive intravenous therapy and was transfused being given two bottles of blood.

[25] The Summary Sheet indicated that he was discharged from the hospital on December 10, 1968.

[26] A little over two months later, on February 20, 1969, the Claimant was admitted to the hospital after arriving unconscious at the Emergency Room. The Emergency Record indicated that he was brought in by the police “unconscious”. The diagnosis was a possible overdose of pills. A Consultation Sheet prepared by an internist on the same date provided a summary of the investigation conducted in the Emergency Room, including positive tests for barbiturates, and noted that the Claimant had some Antabuse tablets in his pocket when he was found. The provisional diagnosis was “acute intoxication with barbiturates plus or minus alcohol”. The internist noted, among other things, that the Claimant was “very deeply unconscious and unresponsive to pain” and described the treatment given to him. Two days later, on February 22, 1969, the internist noted in the Progress Notes that the Claimant was wide awake. He also wrote:

Can't remember taking more than 2 sleeping pills at party. Was on Antabuse so wouldn't drink so given [illegible] “to make him high”. Not suicide attempt.

[27] The Summary Sheet noted that the Claimant was given the Last Rites on the date of his admission and was discharged on February 24, 1969.

OPINION FROM MEDICAL SPECIALIST OBTAINED BY ADMINISTRATOR

[28] By letter dated April 14, 2009, the Administrator requested an opinion from a medical specialist in infectious diseases (“medical specialist”) as to whether the HCV infection of the Claimant and his disease history were more consistent with infection at the time of the receipt of blood or at the time of the non-prescription intravenous drug use. The Administrator provided the medical specialist with a copy of the Claimant’s file, which included his affidavit and all of the other evidence.

[29] In a letter dated May 12, 2009, the medical specialist provided his opinion to the Administrator indicating that the probabilities were “[...] equal and it would be impossible 40 years after the fact to weigh two potential risk episodes in a short period of time as one being more predominant than the other”. In other words, the medical specialist stated that it was equally probable that the source of the Claimant’s HCV infection was either his blood transfusion in 1968 or his non-prescription intravenous drug use. He stated as follows in his letter:

I have had the opportunity of reviewing the file on the above named claimant. Briefly, after an altercation where he was hit over the head with a beer bottle he had major cuts to his face and partial laceration to his ear he underwent several blood transfusions in 1968.

It is unclear to me how many units of blood he did receive but clearly there is documentation of the transfusion. Around that time other risk factors include incarceration from 1968 to 1971. Apparently he injected several times an unknown drug. I interpret that he also likely injected a couple of times when he was in prison. Despite having elevated liver function tests in the late 1990s around 2000 he had hepatitis C testing which was positive and hepatitis B antigen was negative. I do not have core antibody testing, so it is not known if he ever had exposure to hepatitis B. Interestingly he had a liver biopsy in 2000 that showed no fibrosis but grade 3 inflammation and yet seven years later he has a hepatocellular carcinoma with some esophageal varices. He also has some rectal localizing carcinomas being adenomas. In reviewing in his chart I was wondering if perhaps the rectal cancer could have spread to the liver but it looks like those lesions were only local cancers and not invasive. The question therefore is on the balance of probabilities was he more likely to get it from the estimated three units of blood that the [sic] received in 1968 vs. a couple of times that he used needles from a source that may not be totally reliable. I would say on the balance of probabilities that the probabilities are equal and it would be impossible 40 years after the fact to weigh two potential risk episodes in a short period of time as one being more predominant than the other. [Emphasis Added]

ADMINISTRATOR’S MEMORANDUM

[30] In an undated memorandum, the Administrator summarized the facts that it considered in assessing the claim for compensation, stated its conclusion and provided a

text for the “rejection letter”. The memorandum stated as follows:

[The medical specialist’s] report received and claim reviewed under the Non-prescription intravenous drug use Protocol

Pertinent facts:

- Pg 38-39 – Transfused in 1968 (age 29 years old) – TB inconclusive Unable to trace donors as no records available for that time frame.
- Pg 4 – Form 1 claimant wrote about IVDU “1968-tuinals a couple of times”
- Pg 41 – Affidavit – IVDU in 1969 – Twice in a 48 hour period. Stated he never shared needles.
- Pg 173 – ICU consultation sheet from the Admission when claimant was transfused. Involved in a fight and sustained multiple lacerations to scalp, face and ear. Also noted that he had multiple bruises in the hands and lower extremities.
- **Pg 98 – Consultation from [the specialist in hepatology] wrote that he believed it was more likely the [Claimant] picked up his Hep C from his history of Injection drug use**
- Pg 158/9 – [The specialist in gastroenterology] confirmed the claimant likely acquired his infection in the late 1960’s based on his disease progression.
- Claimant is at disease level 6

Conclusion of Administrator’s review: The complete claim has been reviewed including the affidavit prepared by the claimant regarding his IV drug use. [The Claimant] was transfused in 1968 and used IV drugs while in prison in 1969. He is at Disease level 6. Because the non-prescription IV drug use and the transfusions being so close in time and the Medical Expert was unable to opine when he was first infected with Hepatitis C.

All of this information has been taken into account including the evidence of the medical expert and the claimant has not satisfied the criteria of the Court Approved Protocol as he has not provided evidence that supports on a balance of probabilities he was first infected with HCV by a Blood transfusion received in Canada during the class period. Based on this the Administrator must reject the claim.

Text for rejection letter

In your original application you advised the Administrator that you had used non-prescription intravenous drugs. You submitted an affidavit and medical records in compliance with the Court Approved Protocol. As directed by the courts, the Administrator has reviewed the entire claim including the opinion of the medical specialist. You were transfused in 1968 when being treated for severe lacerations on your scalp, face and ear. The use of Non-prescription intravenous drug took place in 1968 or 1969 while you were in prison. There is a letter on file from [the specialist in gastroenterology] confirming that you were likely infected in the late 60’s. Based on evidence that confirms the dates of IV drug use and Transfusions are in the same time frame, the medical expert is unable to determine when you were first infected with Hepatitis C. In conclusion, after review of entire file it has been determined the evidence submitted does not support on a balance of probabilities it is more likely that you were infected for

the first time with Hepatitis C by your transfusions received in 1968 and your claim must therefore be rejected. [Administrator's Emphasis]

FINAL DECISION OF ADMINISTRATOR

[31] On June 12, 2009, the Administrator denied the claim for compensation, stating as follows:

Criteria for Class Membership

The Settlement Agreement provides that if a Claimant cannot comply with the provisions of Sections 2.01(1)(c) and 2.01(3), 2.02(1)(a) and 2.02(2) or 3.01(4) because the Claimant used non-prescription intravenous drugs, the Administrator must be satisfied on the balance of probabilities that:

- 1) The HCV Infected Hemophiliac or person with Thalassemia Major was infected with HCV for the first time by the receipt of Blood;
OR
- 2) The HCV Infected Person was infected with HCV for the first time by a Blood transfusion for which an HCV antibody positive donor has been located or for which the status of the donor remains unknown;
OR
- 3) The Secondarily-Infected Person (Spouse or Parent) was infected with HCV for the first time by the alleged secondary infection.

Reasons for Decision

The Settlement Agreement requires the Administrator to determine a person's eligibility for class membership. The Court Approved Protocol ("CAP") for non-prescription intravenous drug use provides that the Administrator shall weigh the totality of evidence obtained from the additional investigations required by the provisions of the CAP and determine whether, on a balance of probabilities, the HCV Infected Class Member meets the eligibility criteria.

In your original application you advised the Administrator that you had used non-prescription intravenous drugs. You submitted an affidavit and medical records in compliance with the Court Approved Protocol. As directed by the courts, the Administrator has reviewed the entire claim including the opinion of the medical specialist. You were transfused in 1968 when being treated for severe lacerations on your scalp, face and ear. The use of Non-prescription intravenous drug took place in 1968 or 1969 while you were in prison. There is a letter on file from [the specialist in gastroenterology] confirming that you were likely infected in the late 60's. Based on evidence that confirms the dates of IV drug use and Transfusions are in the same time frame, the medical expert is unable to determine when you were first infected with Hepatitis C. In conclusion, after review of entire file it has been determined the evidence submitted does not support on a balance of probabilities that you were infected for the first time with Hepatitis C by your transfusions received in 1968 and your claim must therefore be rejected.

The Administrator carefully reviewed all the material that you provided to support your claim. A Committee reviewed your claim and concluded that you do not meet the criteria for Class membership as noted above. [Emphasis Added]

REQUEST FOR REVIEW

[32] On June 25, 2009, the Claimant delivered a Request for Review and specified his reasons for appealing as follows:

I have never shared any needles or drug paraphernalia. The only attempt I made to use non-prescription drugs was with sterile needles that were never shared. Therefor [sic] could not have been affected [sic] with the disease by this method.

SUPPLEMENTARY EVIDENCE AND SUBMISSIONS BY THE CLAIMANT

[33] By letter dated July 21, 2009, the Claimant delivered as supplementary evidence several documents that were already in evidence at the time the Administrator made its decision to deny the claim for compensation; he delivered no other supplementary evidence. He also delivered submissions in relation to two documents: the opinion prepared for the Administrator by the medical specialist, and the undated memorandum concerning the assessment of the claim conducted by the Administrator's before the final decision was made.

[34] The Claimant responded to the opinion of the medical specialist, reproduced in paragraph 27, by stating as follows:

Re: [Letter of medical specialist] dated May 12, 2009

In his letter, paragraph 2, [the medical specialist] states "it is unclear how many units of blood" I received yet the records sent in from [the] Hospital clearly states 3 units of blood were transfused in 1968. Canadian Blood Services has no records to identify donors from 1968 so were unable to complete the traceback.

I did not know incarceration was a risk factor or you could contract Hep C from being in prison.

[The medical specialist] also makes reference to my incarceration from 1968 to 1971 and states "apparently he injected several times an unknown drug. This is a false statement. There is nowhere in any information sent in where it states "injected several times" or "unknown drug". This information is misleading. My

letter sent in with my medical records dated October 18, 2008 states the drug I injected was tuinal.

[The medical specialist] also states “I interpret that he also likely injected a couple of times when he was in prison” this is partially true as I provided a sworn affidavit you received Sept. 2, 2008 admitting to this however, I also swore to using sterile needles in this same affidavit.

[The medical specialist] seems to be questioning the procedure and evaluation of my Doctors when he states “in reviewing his chart I was wondering if the rectal cancer could have spread to the liver but it looks like those lesions were only local cancers and non invasive.” This information is misleading. I have never been diagnosed with rectal cancer only told some polyps were removed during a colonoscopy.

Now [the medical specialist] comes to “the balance of probabilities” and states “he used needles from a source that may not be totally reliable.” This statement negates my sworn affidavit which clearly states I did not share needles.

His final statement is the probabilities are equal.

What he neglected to report is the risk of contamination from IV drug use is from sharing needles and paraphernalia. My sworn affidavit clearly indicates I did not share. [Emphasis Added]

[35] The Claimant responded to the memorandum concerning the assessment of the claim conducted by the Administrator, reproduced in paragraph 30, by stating as follows:

In reference to text for rejection letter

Pertinent facts:

Page 4 – Should read 1969 not 1968 – tuinals a couple of times (my error)

Page 41 – should read Page 37 – iv drug use took place in 1969 only “twice in a 48 hour period”. Stated he never shared needles. (These two facts are about the same incident.)

Page 98 is a Letter from [another physician] to [the family physician] not the Consultation from [specialist in hepatology] should read.

Page 93/94 – Consultation from [specialist in hepatology] wrote that “he believed it was more likely [the Claimant] picked up his Hep C from a history of injection drug use.” This statement is his own assumption. Fact is this is only true when sharing of needles or other drug paraphernalia takes place [specialist in hepatology] only asked me if I used non prescription intravenous drugs and I answered “yes, when I was in the penitentiary back in 1968 or 69”. There was no further discussion as to how often or if I shared needles, etc. I have submitted a sworn affidavit that negates his assumption.

Conclusion of Administrator’s review:

I cannot meet the criteria of the Court Approved Protocol by providing evidence that supports I was first infected with Hep C by a blood transfusion without a traceback being available to me, as the court cannot provide evidence I was not

infected by a blood transfusion. But I did not become infected from drug use or shared drug paraphernalia.

The benefit of doubt means that conclusive proof is not required to establish a fact. I have submitted a sworn affidavit that negates all the possibilities of infection by the use of intravenous non prescription drugs. Thus the balance of probabilities should be that it is more likely I was first infected with Hep C by the blood transfusions. My sworn affidavit has become meaningless and not considered. There is no proof positive in any of the doctor's reports, only a 50/50 possibility or an opinion of likelyhood [sic]. None of these doctors ever questioned the circumstance of the non prescribed drug use by me and base their assumption on personal opinion or medical research. Which in my case is grossly unfair.

[36] By letter dated August 4, 2009, the Fund Counsel forwarded the documents delivered by the Claimant as supplementary evidence and his submissions to the Administrator, requesting a reconsideration of the decision.

RECONSIDERATION OF DECISION BY ADMINISTRATOR

[37] By letter dated August 21, 2009, the Administrator advised the Claimant that it had reviewed the claim in view of the supplementary material and had decided to maintain its decision to deny the claim. The Administrator provided the Claimant with the following summary of its review:

Introduction

1. [The Claimant] claim was rejected because the evidence provided did not support on a Balance of Probabilities that he was infected with HCV for the first time by the Blood transfusion received in the Class Period. [The Claimant] submitted a Request for Review asking for review of the rejection of his claim. As per the Rules of Appeal, Fund Counsel has forwarded the Claimant's Supplementary Submissions and Evidence on August 4, 2009 to the Administrator, requesting the Administrator reconsider the Decision on the claim.
2. Paragraph 14 of the Rules for Appeals states the Administrator *shall reconsider its decision taking into account the supplementary evidence and/or submissions of the claimant*. The document package from [the Claimant] consisted of documents from claim file that have been previously considered and the claimant's written submissions dated July 21, 2009.

Summary of Written Submissions

3. [The Claimant] submitted a copy of the Decision of the Review Committee for his claim under the [provincial plan]. This Decision was included in the Initial Claim application however the claimant has called attention to paragraphs that refer to the Adjudicator applying the Benefit of the Doubt when reviewing the claim.
4. [The Claimant] also indicated in his written submissions that he cannot meet the Criteria of the Court Approved Protocol “by supplying evidence that supports I was first infected with Hep C by a Blood transfusion without a Traceback being available to me, as the court cannot provide evidence I was not infected by a Blood transfusion.”
5. [The Claimant] has also pointed out several areas of [the specialist’s] opinion letter that he does not agree with regarding his assessment of the claim.

Analysis

6. [The Claimant] submitted his [provincial plan] decision based on *Benefits of the Doubt*. The Pre 1986/Post 1990 Settlement Agreement and the Court Approved Protocol (CAP) both clearly state a claimant must provide evidence to support on a *Balance of Probabilities* the claimant was **first infected** with HCV by the Blood transfusion. The Administrator recognizes that it may be frustrating for claimant’s [sic] to be approved in one Plan and then not meet the criteria of this plan however the Administrator is bound by the Rules of the Pre1986/post 1990 Settlement Agreement.
7. [The Claimant] also expressed his frustration with the fact that he is unable to obtain the results of a Traceback to prove he was first infected by the Blood transfusion. He then stated the court cannot prove he was not infected by the blood transfusion. The Settlement Agreement Article 2.01 (3) clearly puts the onus of proof onto the Primary Infected claimant to provide evidence they were first infected by their class period blood transfusions.
8. As noted in paragraph 5 above [the Claimant] has commented on the contents of [the medical specialist’s] report. The Court Approved Protocol for Non-prescription intravenous drug use states the Administrator must obtain the opinion of a medical specialist experienced in treating and diagnosing HCV as to whether the HCV infection and the disease history of the HCV Infected Class Member is more consistent with infection at the time of the receipt of Blood or with infection at the time of the non-prescription intravenous drug use as indicated by the totality of the medical evidence. It must be noted the dates of non-prescription intravenous drug use were in the same time period as the Class period transfusions and therefore [the medical specialist] could not determine this. Although [the medical specialist] provided his opinion that on the balance of probabilities the probabilities were equal as to how the claimant was first infected with HCV, the Administrator relies only upon his opinion regarding the HCV Disease history based on the medical evidence provided.

Conclusion

The Administrator has an obligation to assess each claim and determine whether the required proof for compensation exists. The Pre1986/Post1990 Hepatitis C Settlement Agreement Article 2.01 (3) states *Notwithstanding the provisions of Section 2.01(1)(c), if a claimant cannot comply with the provisions of Section 2.01(1)(c) because the claimant used non-prescription intravenous drugs, then he or she must deliver to the Administrator other evidence establishing on a balance of probabilities that he or she was infected for the first time with HCV by Blood in Canada during the Class Period.* Review of the Supplementary submissions and evidence of the claimant as summarized above does not change the decisions of the Administrator. The claimant had several risk factors for contracting his hepatitis C including use of non-prescription intravenous drugs while in prison, being involved in a fight in the late 1960's in which he told his specialist that is where he believed he may gotten his Hepatitis C and the blood transfusions. The Administrator has weighed all of this evidence and it does not support on a Balance of Probabilities that the claimant was infected **for the first time** with HCV by his class period transfusions and the claim remains rejected. [Administrator's Emphasis]

WRITTEN SUBMISSIONS OF THE CLAIMANT ON APPEAL

[38] On August 30, 2009, the Claimant provided the following written submissions on appeal in response to the reconsidered decision of the Administrator:

In response to the "Conclusion" – [the specialist in hepatology], my specialist, asked me where I contacted the Hep C virus and I told him from blood transfusions. He asked why I was administered blood transfusions and I answered due to a loss of blood from a cut to my head. He asked how I got the cut to my head and I answered from a fight. When he transcribed his report, I have no idea why he said I thought I may have gotten Hep C from a fight.

I know I contacted Hep C from the transfusions and have told every doctor that. I was also asked about intravenous drugs and was honest and admitted to trying intravenous drugs twice while in prison and I also sent in a sworn affidavit that I never shared needles or drug paraphrenalia with anyone.

I did not contact Hep C from intravenous drugs and I do not have a "history" of drug use.

Therefore the balance of probabilities is negated by my sworn affidavit.

[39] On September 13, 2009, the Claimant provided the following additional written submissions in response to the reconsidered decision of the Administrator:

In response to the Administrators Appeal Decision dated August 21, 2009

Paragraph 7 Analysis

The settlement agreement Article 2.01 (3) clearly puts the onus of proof onto the Primary Infected Claimant to provide evidence they were first infected by their class period blood transfusions.

This is proven by my sworn affidavit that all the paraphernalia used was STERILE and never shared. Therefore I was not infected by the non-prescription intravenous drug use and was infected by the blood transfusions.

The 3 units I was given were untraceable. This means they were tainted or contaminated with the Hep C virus.

Paragraph 8

[The medical specialist's] report states in his opinion on the balance of probabilities, the probabilities are equal as to how the claimant was first infected with Hep C.

Once again the claimant's sworn affidavit changes the probabilities to the infection coming from the blood transfusions.

Administrators Conclusion states:

The claimant had several risk factors for contracting the Hep C including the use of non-prescription drugs while in prison, being involved in a fight in the late 1960's in which he told his specialist he believed he may have gotten Hep C and the blood transfusions.

I did not have several risk factors for contacting Hep C. I have been totally honest from the very beginning and stated I tried the intravenous drug twice in my cell with new sterile needles smuggled in during a visit with my wife at the time who has since passed away. The needles were still in their packaging as my sworn affidavit states, I did not share any drug paraphernalia. After this attempt I did not get the results expected and discarded all the materials. That is the only time I put a needle in my arm and the last. I am a self admitted alcoholic and a member of AA and have not had a drink of alcohol since Sept. 27, 1971.

There is some misunderstanding as to what I told my specialist as he asked me why I got the blood transfusions and I stated from a loss of blood to a cut to my head from a fight. I never stated I thought I got the Hep C from the actual fight.

The other risk factor is the blood I received in Dec. 1968. This is the time frame contaminated blood was issued by the Red Cross and/or [the provincial] Blood Supply. It is by this I was infected as my sworn affidavit negates any other possibility.

[40] On September 30, 2009, the Claimant elected to continue with the appeal.

ISSUE

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

ANALYSIS

[42] In the Reasons for Decision on the appeal in Claim File 07-07727, I analysed the provisions in section 2.01 of the *Settlement Agreement* and the applicable provisions of the *Non-Prescription Intravenous Drug Use Protocol* and stated as follows:

i) Section 2.01 of the Settlement Agreement and the Non-Prescription Intravenous Drug Use Protocol

[20] Under the terms of the *Settlement Agreement*, a person claiming to be a Primarily-Infected Class Member, such as the Claimant, must satisfy the eligibility requirements in section 2.01 in order to make a successful claim for compensation. Section 2.01 states as follows:

2.01 Eligibility – Primarily-Infected Class Member

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

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

(b) an HCV Antibody Test report, PCR Test report or similar test report pertaining to the claimant;

(c) a statutory declaration of the claimant including a declaration

(i) that he or she has never used non-prescription intravenous drugs, and

(ii) as to where the claimant first received Blood in Canada during the Class Period, and

(iii) as to the place of residence of the claimant, both when he or she first received Blood in Canada during the Class Period and at the time of delivery of the application hereunder; and

(iv) where the claimant is a Primarily-Infected Person, that to the best of his or her knowledge, information and belief, he or she was infected with HCV during the Class Period;

(2) Notwithstanding the provisions of Section 2.01(1)(a), if a claimant cannot comply with the provisions of Section 2.01(1)(a), the

claimant must deliver to the Administrator corroborating evidence independent of the personal recollection of the claimant or any person who is a Family Member of the claimant establishing on a balance of probabilities that he or she received Blood in Canada during the Class Period.

(3) Notwithstanding the provisions of Section 2.01(1)(c), if a claimant cannot comply with the provisions of Section 2.01(1)(c) because the claimant used non-prescription intravenous drugs, then he or she must deliver to the Administrator other evidence establishing on a balance of probabilities that he or she was infected for the first time with HCV by Blood in Canada during the Class Period. [Emphasis Added]

[21] In circumstances where a claimant cannot comply with paragraph 2.01(1)(c) of the *Settlement Agreement* by making a declaration that non-prescription intravenous drugs were never used, the provisions of the *Non-Prescription Intravenous Drug Use Protocol* apply to the claim. Since the Claimant admitted in his declaration that he had used non-prescription intravenous drugs, the *Non-Prescription Intravenous Drug Protocol* therefore applies to the gathering of evidence and assessment of the claim. For the purposes of the present appeal, it is necessary to reproduce only the following parts of the *Non-Prescription Intravenous Drug Use Protocol*:

NON-PRESCRIPTION INTRAVENOUS DRUG USE PROTOCOL

1. The Protocol applies where:
 - a. there is an admission that the HCV Infected Class Member used non-prescription intravenous drugs;
 - b. there is no statutory declaration as required under the Settlement Agreement, that the HCV Infected Class Member has never used non-prescription intravenous drugs; or
 - c. despite receipt of a statutory declaration, there is other evidence that the HCV Infected Class Member has used non-prescription intravenous drugs.
2. The Administrator shall conduct a Traceback under the Traceback Protocol. If the result of a Traceback investigation is such that the Traceback Protocol requires the Administrator to reject the claim, the Administrator shall reject the claim.
3. If a Traceback is not required to be conducted under the Traceback Protocol or the claim is not rejected under the Traceback Protocol, the Administrator shall:

- a. obtain such additional information and records pursuant to section 2.03 of the Settlement Agreement as the Administrator in its complete discretion considers necessary to inform its decision; and
 - b. obtain the opinion of a medical specialist experienced in treating and diagnosing HCV as to whether the HCV infection and the disease history of the HCV Infected Class Member is more consistent with infection at the time of the receipt of Blood or the secondary infection or with infection at the time of the non-prescription intravenous drug use as indicated by the totality of the medical evidence.
4. The Administrator shall weigh the totality of evidence obtained including the evidence obtained from the additional investigations required by the provisions of this Protocol and determine whether, on a balance of probabilities, the HCV Infected Class Member meets the eligibility criteria of the Settlement Agreement. The burden to prove eligibility is on the claimant. The Administrator shall assist the claimant by advising what types of evidence will be useful in meeting the burden of proof in accordance with this Protocol.
 5. In weighing the evidence in accordance with the provisions of this Protocol, the Administrator must be satisfied that the body of evidence is sufficiently complete in all of the circumstances of the particular case to permit it to make a decision. If the Administrator is not satisfied that the body of evidence is sufficiently complete in all of the circumstances of the particular case to permit it to make a decision, the Administrator shall reject the claim. [Emphasis Added]
[...]

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

[43] In his Statutory Declaration Form, the Claimant admitted that he had used non-prescription intravenous drugs. As a result, subsection 2.01(3) of the *Settlement Agreement* and the provisions of the *Non-Prescription Intravenous Drug Protocol* apply to the claim. Subsection 2.01(3) of the *Settlement Agreement* places the onus on the Claimant by requiring him to deliver evidence to establish on a balance of probabilities that he was infected for the first time with HCV by receiving blood. In circumstances such as the present, where a claim is not rejected under the provisions of the *Traceback*

Protocol, section 3(b) of the *Non-Prescription Intravenous Drug Protocol* requires the Administrator, in mandatory terms, to obtain the opinion of a medical specialist.

Following receipt of the opinion, section 4 directs the Administrator to weigh the totality of the evidence and to determine, on a balance of probabilities, whether a claimant has met the eligibility requirements in the *Settlement Agreement*. Section 4 also clearly dictates that the burden of proving eligibility is on a claimant.

[44] I have carefully reviewed all of the evidence in the context of the eligibility requirements in section 2.01 of the *Settlement Agreement* and the applicable provisions of the *Non-Prescription Intravenous Drug Protocol*. In my opinion, the Administrator has not erred in concluding that, on the totality of the evidence, the Claimant has failed to establish his infection for the first time with HCV by his blood transfusions in 1968, as required by subsection 2.01(3) of the *Settlement Agreement* and the provisions of the *Non-Prescription Intravenous Drug Protocol*.

[45] A review of the claim file confirms that there was evidence concerning the Claimant's non-prescription intravenous drug use in the Progress Notes made by the family physician, letters prepared by the specialist in gastroenterology and the specialist in hepatology, the forms delivered in support of the claim and the Claimant's affidavit. The evidence demonstrates that, on January 24, 1999, the family physician made his first notes concerning the Claimant during a medical appointment; the notes were written approximately one year before the Claimant was diagnosed with Hepatitis C. In the notes, the family physician wrote, among other things, that the Claimant had a history of "[illegible] / benzodiazepine [illegible] → oil → [illegible] syringe"; there was no mention in the notes of intravenous drug use by the Claimant while incarcerated.

Approximately one year later in the entries recorded on February 15, 2000, shortly after the Claimant was diagnosed with Hepatitis C, the family physician made two separate notes: “IV drug use 1968-1970 when in Kingston Pen” and “previous hx [history] Alcohol + drug abuse”. The entries made by the family physician in the Progress Notes were clearly based on information given to him by the Claimant during the two medical appointments or examinations. Significantly, the Progress Notes for January 24, 1999 and February 15, 2000, when read together, demonstrate that the Claimant had a previous history of drug abuse that included the intravenous use of benzodiazepine oil (and possibly another drug) by syringe.¹ The Progress Notes, when read together, also demonstrate that the family physician made a clear distinction between the Claimant’s intravenous drug use while incarcerated in the Kingston Penitentiary and his previous history of intravenous drug use. At the end of the Progress Notes on February 15, 2000, the family physician noted that the Claimant had an appointment to see a gastroenterologist. Less than two months later, in his letter dated April 5, 2000, the specialist in gastroenterology stated, among other things, that the Claimant “[...] had intravenous drug abuse history up to 1970”. Seven years later, in a letter dated August 16, 2007, the Claimant’s specialist in hepatology stated, among other things, that there was “[...] a history of injection drug use in the [penitentiary] between 1969 and 1970”. In the General Information Form, the Claimant admitted that he had used non-prescription intravenous drugs by stating “‘68 – tuinol[sic] – a couple of times”. In the Treating Physician Form, the family physician made the general statement that there was “Hx [history] of IV narcotic drug use”; he did not specify the type of drug used and did not

¹ There is also evidence in the hospital records establishing that the Claimant abused drugs non-intravenously on at least one occasion. Paragraphs 26 and 27 contain a summary of the hospital records concerning his hospitalization for a drug overdose caused by taking barbiturates.

limit the non-prescription intravenous drug use to any period of time or place. In contrast, the Claimant stated, in his very brief affidavit, that he had used non-prescription intravenous drugs twice during a 48 hour period in 1969, with new, sterile needles that were disposable diabetic syringes “smuggled in during a visit” and not shared. He did not state in his affidavit that he had never used non-prescription intravenous drugs on any other occasion.

[46] I have concluded that the evidence of the family physician, when considered in its totality, demonstrates that the Claimant used non-prescription intravenous drugs at times other than during his incarceration. As a result, the Claimant did not fully disclose the extent of his non-prescription intravenous drug use in his affidavit. His credibility is therefore seriously undermined, and his affidavit is entitled to little or no weight. In the circumstances, the Claimant has not established on a balance of probabilities that he was infected for the first time with HCV by blood received in Canada during the Class Period, as required by subsection 2.01(3) of the *Settlement Agreement*. On this basis alone, the appeal must be dismissed.

[47] In the opinion prepared for the Administrator, the medical specialist did not make any specific reference to the evidence in the Progress Notes. However, as will be explained, it appears that the medical specialist appreciated the distinction drawn by the family physician between the Claimant’s non-prescription intravenous drug use in the penitentiary and his previous history of intravenous drug use. I will therefore address certain submissions made by the Claimant concerning the opinion of the medical specialist and the decisions of the Administrator.

[48] In his written submissions on appeal dated July 21, 2009 and reproduced in paragraph 34 in response to the opinion of the medical specialist, the Claimant disputed three statements made by the medical specialist in his opinion.

[49] First, the Claimant questioned the statement of the medical specialist that it was unclear to him “how many units of blood” the Claimant had received. A review of the evidence confirms that the evidence in the Transfusion Summary of the Traceback and the Request for Record Search under the provincial plan confirmed that the Claimant was transfused with three units of blood. However, in a letter dated April 5, 2000 to the family physician, the specialist in gastroenterology stated, among other things, that the Claimant told him that “[...] he had 10 pints of blood” in the blood transfusion in 1967. There was therefore some evidence to suggest that the Claimant had received more than three units of blood. It was undoubtedly for that reason that the medical specialist stated in his opinion that it was “unclear” how many units of blood the Claimant had received. In any event, at a later point in his opinion, the medical specialist made reference to the “estimated three units of blood” that the Claimant had received.

[50] Second, the Claimant disputed the factual findings made by the specialist in the following sentences:

It is unclear to me how many units of blood he did receive but clearly there is documentation of the transfusion. Around that time other risk factors include incarceration from 1968 to 1971. Apparently he injected several times an unknown drug. I interpret that he also likely injected a couple of times when he was in prison.

In particular, the Claimant made the following submissions in relation to those findings:

[The medical specialist] also makes reference to my incarceration from 1968 to 1971 and states “apparently he injected several times an unknown drug. This is a false statement. There is nowhere in any information sent in where it states “injected several times” or “unknown drug”. This information is misleading. My

letter sent in with my medical records dated October 18, 2008 states the drug I injected was tuinal.

[The medical specialist] also states “I interpret that he also likely injected a couple of times when he was in prison” this is partially true as I provided a sworn affidavit you received Sept. 2, 2008 admitting to this however, I also swore to using sterile needles in this same affidavit.

[51] A review of the relevant sentences from the opinion of the medical specialist confirms that he made reference to the incarceration of the Claimant as a risk factor for Hepatitis C, in the same way that he had mentioned the blood transfusion in 1968 in the previous sentence. He continued by making two separate factual findings concerning the Claimant’s use of non-prescription intravenous drugs: first, the Claimant had “[...] injected several times an unknown drug; and second, “[...] he also likely injected a couple of times when he was in prison”. The first factual finding (concerning the injection of unknown drugs) is supported by the evidence in the Progress Notes dated January 24, 1999 where the family physician wrote “[illegible] / benzodiazepine → oil → [illegible] syringe”. The second factual finding (concerning the injection of drugs in prison) is supported by the admissions made by the Claimant in his affidavit and the General Information Form, as well as by the Progress Notes dated February 15, 2000. In addition, in the Progress Notes dated February 15, 2000, the family physician specifically differentiated between the Claimant’s drug use during his incarceration and his previous history of drug abuse; in the Treating Physician Form, he referred only to the Claimant’s “history of IV drug use”. The factual findings made by the medical specialist concerning the Claimant’s non-prescription intravenous drug use were therefore supported by the evidence.

[52] Third, the Claimant contested the following finding of the medical specialist:

The question therefore is on the balance of probabilities was he more likely to get it from the estimated three units of blood that the [sic] received in 1968 vs. a couple of times that he used needles from a source that may not be totally reliable.

With respect to the statement by the medical specialist, the Claimant stated as follows:

Now [the medical specialist] comes to “the balance of probabilities” and states “he used needles from a source that may not be totally reliable.” This statement negates my sworn affidavit which clearly states I did not share needles.

His final statement is the probabilities are equal.

What he neglected to report is the risk of contamination from IV drug use is from sharing needles and paraphernalia. My sworn affidavit clearly indicates I did not share.

[53] As indicated previously, a review of the opinion of the medical specialist in its entirety and in the context of the evidence indicates that he properly appreciated the distinction drawn by the family physician concerning the Claimant’s non-prescription intravenous drug use in the penitentiary on two occasions and his previous history of intravenous drug use. However, the statement of the medical specialist that needles were used “a couple of times” and “[...] from a source that may not be entirely reliable” is unclear. He appears to be making one of two findings: either he determined that the affidavit evidence of the Claimant concerning the “new” and “sterile” needles used in the penitentiary was not credible, or he acknowledged that there was no evidence concerning the needles used by the Claimant on other occasions and drew an adverse inference concerning their sterility. In my opinion, either finding could be justified on the evidence.

[54] In his submissions, the Claimant relied upon the statement in his affidavit that he did not share needles. However, it is significant to note that the Claimant limited his affidavit to the two instances of injection drug use during his incarceration in the

Kingston Penitentiary; he neither admitted nor denied that he had ever injected non-prescription drugs on any previous occasion. His statement that he did not share needles was therefore limited to his injection of non-prescription drugs while in the penitentiary and has no relevance to the separate finding of the medical specialist that the Claimant apparently “injected several times an unknown drug”. In any event, the affidavit is entitled to no little or weight due to the failure of the Claimant to admit the full extent of his non-prescription intravenous drug use.

[55] In his written submissions on appeal dated July 21, 2009 and reproduced in paragraph 35 in response to the claim assessment memorandum prepared by the Administrator, the Claimant made submissions on two points.

[56] First, the Claimant made various submissions concerning the statement made by the specialist in hepatology that it was “far more likely” the Claimant had acquired Hepatitis C from his drug use in the penitentiary, rather than in the blood transfusions received after his injury in a fight in 1968. There is nothing in the letter from the specialist in hepatology or in any other evidence to indicate that he was aware of the Claimant’s other history of non-prescription intravenous drug abuse. In the circumstances, it is unnecessary for me to address the submissions made by the Claimant with respect to the statement made by the specialist in hepatology.

[57] Second, the Claimant made the following submissions concerning the “Conclusion” in the assessment memorandum:

The benefit of doubt means that conclusive proof is not required to establish a fact. I have submitted a sworn affidavit that negates all the possibilities of infection by the use of intravenous non prescription drugs. Thus the balance of probabilities should be that it is more likely I was first infected with Hep C by the blood transfusions. My sworn affidavit has become meaningless and not considered. There is no proof positive in any of the doctor’s reports, only a 50/50

possibility or an opinion of likelihood [sic]. None of these doctors ever questioned the circumstance of the non prescribed drug use by me and base their assumption on personal opinion or medical research. Which in my case is grossly unfair.

[58] The submission made by the Claimant that his sworn affidavit “negates all the possibilities of infection” by the use of non-prescription intravenous drugs is not supported by the evidence.

[59] After the Administrator released its reconsidered decision dated August 21, 2009, reproduced in paragraph 37, the Claimant made written submissions on appeal dated August 30 and September 13, 2009, reproduced respectively in paragraphs 38 and 39. In those submissions, he has made many statements that are evidentiary in nature. I have disregarded those statements as they are not sworn. He also repeated the submission made previously that his sworn affidavit negated any possibility other than his blood transfusion as a risk factor for Hepatitis C. For reasons indicated previously, the submission is not supported by the evidence.

[60] I have carefully reviewed the decision of the Administrator dated June 12, 2009 and the reconsidered decision dated August 21, 2009. For the reasons expressed previously, I have concluded that the Administrator did not err in weighing the totality of the evidence and in determining that the Claimant did not meet the eligibility criteria of the *Settlement Agreement*. In particular, the opinion from the medical specialist dated January 12, 2009, when considered together with the other evidence in the file, amply supports the conclusion reached by the Administrator. Indeed, I would have reached the same conclusion as the Administrator in this matter. I also wish to add that the medical specialist was very fair in concluding in his opinion that the “probabilities were equal” as to the source of the Claimant’s Hepatitis C infection. However, since the probabilities

were equal, the Claimant could not meet the burden of proving that it was more probable than not that he had acquired Hepatitis C from his blood transfusions in 1968. For this and the other reasons expressed previously, the Claimant has failed to establish on a balance of probabilities, in the context of the totality of the evidence, his infection for the first time with HCV by receiving blood in Canada during the Class Period, as required by subsection 2.01(3) of the *Settlement Agreement*.

iv) Compensation under another program or agreement

[61] In his claim form, the Claimant stated that he had applied for and received compensation under the *Red Cross Settlement* and a provincial plan. In the Reasons for Decision rendered in Claim File 07-00464, I commented on the perception of inequity that may arise when compensation is awarded under one plan or agreement and denied under another. In particular, I stated as follows in paragraph 41 of that decision:

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

[62] Although I fully understand that it must be confusing and upsetting when compensation is granted under the auspices of one program or agreement and yet denied under another one, the terms of the *Settlement Agreement* govern the present claim and must be applied. It is also important to recognize that the terms of the *Settlement Agreement* are the result of an agreement between the Parties which was approved by the Courts; neither the Administrator nor the Appeals Officer has any power or discretion to alter those terms.

CONCLUSION

[63] The appeal is dismissed.

"D. McGillis"

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

DATED October 13, 2009

TO: Claimant
Fund Counsel
Administrator

Received October 13.09