D E C I S I O N

Claim No. 2728

Province of Infection – New Brunswick

1. The Claimant applied for compensation as a Primarily-Infected Person pursuant to the Transfused HCV Plan.

2. By letter dated March 19, 2001 and confirmed by letter dated November 23, 2001, the Administrator denied the claim on the basis that the Claimant had not provided sufficient proof that he was infected for the first time with HCV by a blood transfusion received in Canada during the Class Period.

3. The Claimant requested that the Administrator's denial of his claim be reviewed by an arbitrator.

4. The Administrator's letter of March 19, 2001, stated, in part, as follows:

> "We are writing to advise you that your claim for compensation under the 1986-1990 Hepatitis C Settlement Agreement will be rejected unless you can provide further evidence that you were infected for the

first time with HCV by a blood transfusion received in Canada during the Class Period.

Criteria for Class Membership

The Settlement Agreement provides compensation under the Transfused HCV Plan for Class Members first infected by a blood transfusion received in Canada between January 1, 1986 and July 1, 1990. There is a court-approved investigation procedure, which requires the Administrator to request a traceback of all the blood or blood products previously used by a claimant through which the Administrator determines whether the claimant is eligible for class memberships. The investigation procedure requires the Administrator to request a traceback of all blood and blood products previously used by the claimant.

All donor searches are complete and your traceback results have been carefully reviewed. According to the results, the HCV virus was not present in any of the blood or blood products you received between January 1, 1986 and July 1, 1990.

Since all donor searches are complete and as all of the donors or units of blood received in the Class Period were determined to be negative for the HCV virus and as we know of no other information that would impact on the evaluation of your claim, we have reached a decision that your claim will be rejected unless you can prove that you were infected, for the first time, with HCV by a blood transfusion received in Canada during the Class Period notwithstanding the results of the Traceback Procedure."

5. The Administrator's letter of November 23, 2001 confirmed the Administrator's decision to deny the claim and set out the following reasons for the denial:

> "The Settlement Agreement provides compensation under the Transfused HCV Plan for class members first infected by a blood transfusion in Canada between January 1, 1986 and July 1, 1990.
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> 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:
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> 1) You did not provide any further evidence to the Administrator; **OR**
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> 2) The further evidence that was submitted failed to overturn the preliminary determination that your claim did not meet class membership criteria.
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> The Administrator carefully reviewed all of the evidence that you provided to support your claim. A committee of three (3) senior evaluators reviewed your claim and concluded as follows:
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> The results of your Traceback confirmed that all of the donors of the blood transfused to you, during the class period, have tested negative for the HCV antibody. In light of this information, your claim was denied. The information you submitted was reviewed and did not favourably influence the previous results of your traceback. Therefore, based on Article. 3.04 of The 86-90 Hepatitis C Settlement Agreement, Transfused Plan, your claim is denied."

6. In the Request for Review filed by the Claimant, he outlined the following reasons for wanting to have the Administrator's decision reviewed:

> "The hospital records pertaining to my blood transfusion are not complete as the hospital is no longer in business. The current records available show that there is a possibility that I was given more blood than the 1 unit the traceback was done to. Therefore since there was no other way I contracted HCV I wish to appeal."

7. The basic facts of the case are not in dispute. On October 10, 1988, the Claimant presented at the Hotel-Dieu St. Joseph, a division of the Campbellton Regional Hospital, with a severe laceration to his right forearm. He underwent emergency surgery to excise and suture the wound. He was cross-matched for six units of blood in preparation for the surgery and the hospital records indicate that at least one of those units – namely, unit #044754 – was transfused to the Claimant.

8. In 1993, the Claimant was diagnosed as suffering from HCV infection. After receiving the Claimant's application for compensation under the Transfused HCV Plan, the Administrator requested a traceback of all blood and blood products transfused to the Claimant at the Hotel-Dieu St. Joseph. The traceback result received from the Canadian Blood Services indicated that the Claimant had received only one unit of blood in connection with his surgery on April 10, 1988, that unit being #044754, and that the HCV status of the donor of the unit in question was negative.

9. The Claimant does not take issue with the traceback result insofar as it relates to unit #044754. However, his contention throughout has been that he received more than one unit of blood on April 10, 1988 and that the hospital records are deficient in this respect.

10. A conference call was convened on August 23, 2005. The Claimant and his spouse participated in the call along with Fund Counsel and the Appeal Coordinator.

11. During the conference call, the Claimant's spouse stated that she had met with the director of the Campbellton Regional Hospital (now known as the Restigouche Health Authority) and that the records which were shown to her were fragmentary at best. She said she had personally observed that the Claimant was still receiving blood on the floor after he returned from the operating room and that there was considerable discussion at the time about the Claimant having lost so much blood.

12. The upshot of the conference call was that a summons was issued to the Restigouche Health Authority requiring it to produce all medical and blood

bank records relating to the Claimant during the period January 1, 1986 to July 1, 1990. For convenience, the records were to be delivered care of Fund Counsel.

13. The Claimant's medical records were subsequently produced by the Restigouche Health Authority in response to the summons. A review of those records confirms the following pertinent facts:

(i) Six units of blood were cross-matched for the Claimant in preparation for his surgery on April 10, 1988.

(ii) One unit of blood, unit 044754, was signed for as having been received from the blood bank and transfused to the Claimant.

(iii) The anesthetist's record has a handwritten note on it indicating that one unit of blood was transfused to the Claimant.

14. At my request, Fund Counsel filed a written submission on behalf of the Administrator. In his submission, Fund counsel advanced the following arguments:

> "The information received [sic] medical records is consistent with the information received from the Canadian Blood Services which indicates that one unit of blood was transfused to [the Claimant], being unit 044754 (see Appeal Record page 54). A traceback of that unit of blood was performed and the donor was tested 'negative' for the HCV antibody (see Appeal Record page 49).
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> The Transfused HCV Plan provides that a claimant must establish that they were first transfused [sic] during the class period. The Transfused HCV Plan further provides that the Administrator is to conduct a trace-back. Section 3.04(1) of the Transfused HCV Plan provides that if a donor tests HCV anti-body negative then the Administrator must reject the claim. In this case, the Administrator was given the information from the Canadian Blood Services that the donor of the unit of blood to [the Claimant] was not HCV anti-body positive and therefore rejected the claim.
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> The Transfused HCV Plan does provide that a claimant 'may prove' that the primarily infected person was infected for the first time with an HCV blood transfusion received in Canada during the class period, notwithstanding the result of the traceback procedure. Section 3.04(2) makes it clear that the onus is on the claimant to prove the 'notwithstanding provision'. In this case, there was no evidence adduced by the claimant that [the Claimant] was first infected with HCV as a result of the blood transfusion in 1988."

15. A second telephone conference was held on January 5, 2006. The Claimant's spouse participated in the conference call on his behalf. The other participants were Fund Counsel and the Appeal Coordinator.

16. The Claimant's spouse questioned what had happened to the five units of blood for which no traceback had been conducted. Her concern was that one or more of these units may have been transfused to the Claimant even though the

records produced to date seem to indicate otherwise. Fund Counsel suggested that, based on his experience dealing with other hospitals, it was possible not all blood bank records had been produced in response to the summons. Consequently, it was agreed that I would make a further inquiry of the Restigouche Health Authority to determine whether it had blood bank records showing what had happened to the other five cross-matched units.

17. By letter addressed to me dated January 30, 2006, Mr. Dan Leger, RT MLT, Region Laboratory Manager of the Restigouche Health Authority, advised as follows:

> "In reference to [the Claimant], our records indicate that [the Claimant] was crossmatched for 6 units of packed red cells on April 10, 1988.
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> One of these units was transfused to [the Claimant] (044754).
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> Units 044767 and 044764 were placed back into general inventory and eventually crossmatched and transfused to two different patients.
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> Units 048771, 044763 and 044765 have no record of being further crossmatched or transfused to any other patient. These three units never had a releasing signature. This is indicative of the units becoming outdated and then disposed of.
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> Mandatory signature was (and still is) required when units were taken to the patient's room for transfusion."

18. In response to a further inquiry from me, Mr. Leger advised, by letter dated February 3, 2006 that a releasing signature is mandatory when units are taken to the "patient's place of treatment" in the hospital, not just to a "patient's room" as his January 30th letter seemed to indicate.

19. Mr. Leger's letters were sent to the Claimant and Fund Counsel on February 3, 2006 and a further conference call was held on February 10, 2006. Again, the Claimant's spouse participated on his behalf and the other participants were Fund Counsel and the Appeal Coordinator. The information contained in Mr. Leger's letters was discussed. It was pointed out to the Claimant's spouse that the medical records contained no indication that the Claimant had been transfused with more than one unit of blood.

20. The Claimant's spouse requested a further opportunity to see if she could find any corroborating evidence to establish that the Claimant had received more than one unit of blood. Her request was granted and she undertook to advise me by March 10, 2006 if her efforts were successful, failing which I would decide the claim based on the materials and representations previously submitted to me. On March 17, 2006, the Claimant's spouse advised me by telephone that she had not been able to find any additional information.

21. The relevant portions of s. 3.04 of the Transfused HCV Plan read as follows:

> "**3.04 Traceback Procedure**
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> (1) Notwithstanding any other provision of this Agreement, if the results of a Traceback Procedure demonstrate that one of the donors or units of Blood received by a HCV-Infected Person...before 1 January 1986 is or was HCV antibody positive or that none of the donors or units of Blood received by a Primarily-Infected Person...during the Class Period is or was HCV antibody positive, subject to the provisions of Section 3.04(2), the Administrator must reject the Claim of such HCV Infected Person....
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> (2) A claimant may prove that the relevant Primarily-Infected Person...was infected, for the first time, with HCV by a Blood transfusion received 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 Referee, Arbitrator or Court."

22. As previously stated, the Claimant does not contest the result of the traceback procedure with respect to unit #044754. Further there is no evidence whatever which casts any doubt on the validity of the traceback result. Accordingly, I am obliged to uphold the traceback result and find that the Claimant was not infected with HCV by being transfused with unit #044754.

23. The Claimant's main argument, of course, is that he was transfused with more than one unit of blood at the time of his surgery on April 10, 1988. Unfortunately for the Claimant, he has been unable to furnish any evidence to support this argument. The medical records indicate that, although the Claimant was cross-matched for six units in preparation for surgery, only unit #044754 was actually transfused to him. There was no releasing signature for the other five units and this is consistent with the note on the anesthetist's report that the Claimant was only transfused with one unit of blood. It is known that two of the units were subsequently cross-matched and transfused to other patients. According to Mr. Leger's letter of January 30, 2006, the other three units became outdated and were disposed of.

24. Section 3.01(1)(a) stipulates that a claimant must prove the transfusion of blood by providing the Administrator with "medical, clinical, laboratory, hospital, Canadian Blood Services or Hema-Québec records demonstrating that the claimant received a Blood transfusion in Canada during the Class Period". With the exception of unit #044754, the Claimant has been unable to satisfy this requirement with respect to any other of the five units for which he was cross-matched on April 10, 1988. Putting the Claimant's argument at its strongest, therefore, all that can be said is that the hospital and blood bank records

do not permit one to determine with complete certainty how three of the cross-matched units were ultimately disposed of. However, a claimant cannot affirmatively establish his or her claim to compensation based on deficiencies in the medical records.

25. In a recent decision, Justice Winkler dealt with the situation where a claimant's medical records did not indicate the receipt of blood during the Class Period. Apart from unit 044754, which has been proven not to be the source of HCV infection, the Claimant here is essentially in the same situation. Justice Winkler stated:

> "12. Where the claimant's medical records do not indicate the receipt of blood during the class period, the claimant may still be able to establish that he or she received Blood during that time pursuant to s. 3.01(2) which provides:
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> > 3.01(2) ...if a claimant cannot comply with the provisions of Section 3.01(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 a Blood transfusion in Canada during the Class Period.
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> 13. In this case, the claimant did not have the supporting medical records demonstrating that he received a Blood transfusion and therefore was attempting to establish a transfusion on alternate evidence under s. 3.01(2). <u>However, the important thing to note about s. 3.01(2) is that the claimant bears the onus of proof on the balance of probabilities.</u> The referee determined that the claimant did

> not satisfy the onus and therefore upheld the decision of the administrator."
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> [emphasis added]

26. Later in the decision, Justice Winkler stated:

> "18. ...In this case, the underlying records do not indicate that the claimant received a Blood transfusion during any of his visits to the hospitals. It is unfortunate that some records in this case may have been produced after a denial of their existence but having now been produced, the records do not indicate that a blood transfusion was given to the claimant. Similarly, it is not enough to suggest as the claimant does, that the circumstances of the production render the integrity of the records suspect. S. 3.01(2) requires corroborating, or affirmative, evidence of a blood transfusion rather than a demonstration that some of the existing records are either incomplete or conflicting. Establishing the latter would be helpful for credibility purposes when a referee had to weigh the information, or lack thereof, contained in the records against evidence to the contrary but there must still be admissible corroborating evidence that the claimant received Blood, notwithstanding the existence of records indicating otherwise."
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> [emphasis added]

27. Justice Winkler's comments apply with equal force in the present case. The medical records do not indicate that the Claimant received any transfusions other than unit #044754. There is no corroborating evidence to prove, on the balance of probabilities, that he was transfused with any other units. Thus,

the requirements of proof under s. 3.01(1)(a) and s. 3.01(2) have not been satisfied by the Claimant with respect to any units of blood other than unit #044754.

Under these circumstances, I have no alternative but to uphold the Administrator's denial of the Claimant's request for compensation.

DATED at Halifax, Nova Scotia, this 20th day of March, 2006.

S. BRUCE OUTHOUSE, Q.C.
Arbitrator