**CLAIM # XXXX**

**Province of Infection:** ***(Province)***
**Province of Residence:** ***(Province)***

**IN THE MATTER OF A REFERENCE**
**TO REVIEW THE DECISION OF THE ADMINISTRATOR**

**BEFORE:** Tatiana Wacyk

**SUBMISSIONS:** ***(****Claimant)*, FBO The Estate of *(Primary Claimant)*;
John Callaghan, Fund Counsel for the Administrator

## Decision

**Background:**

1. The Estate of the Deceased (the "Estate") submitted an application, dated July 2010, for compensation under the Transfused HCV Plan ("the Plan"), as set out under the terms of the 1986-1990 Hepatitis C Settlement Agreement ("the Settlement Agreement").

2. By letter dated April 21, 2017, the Administrator denied the claim on the basis the Estate failed to cure a number of deficiencies in the Claim, despite having been granted a deadline extension to do so.

3. The Estate requested that a Referee review the decision of the Administrator. I am the Referee appointed to conduct the review.

4. On agreement of the parties, their submissions in the review were made in writing, with Fund Counsel for the Administrator proceeding first.

5. However, Counsel for the Fund pointed out that as the onus is on the Estate to prove the infection of HCV and the cause of death by HCV, and as its this submission is being made without the benefit of the Estate's submission, the Administrator reserved the right to not only respond to the Estate's submissions but to adduce evidence, if necessary, to respond.

**SUBMISSION OF FUND COUNSEL FOR THE ADMINISTRATOR:**

***Deficiencies in Materials Filed***

6. In the first instance, Fund Counsel submitted that in denying the claim, the Administrator followed the Court Approved Protocol relating to Deficient Claims, Claimants that Cannot be Located and Duplicate Claims.

7. That Protocol requires the Administrator to make all reasonable efforts to assist claimants in resolving deficiencies. Where the Administrator concludes it has done so, and those deficiencies remain uncured, the Administrator must warn the claimant, in this instance the Estate, that through the issuance of a "Notice of Pending Deficiency Denial Letter" that the claim will be denied if the deficiencies are not cured.

8. The Notice must also include a listing of the deficiencies at issue and provide a deadline of 90 days, as well as advise of the ability to request an extension of this 90-day deadline.

9. Despite requesting and receiving an extension to cure all the deficiencies, Fund Counsel submitted the Estate failed to do so. In those circumstances, the Protocol requires the Claim be denied, as it was in this instance. Fund Counsel submitted that despite additional materials being obtained during the course of this Review, deficiencies remain, and there remains a lack of necessary proof for the Claim to succeed.

***Section 3.05 of the Transfused HCV Plan***

10. As the Deceased's death occurred prior to the resolution of the class action, the claim is to be determined by applying the provisions of the Transfused HCV Plan in section 3.05.

11. Fund Counsel submitted that the records produced on this Review do not meet several of the criteria in section 3.05. As such, even had the records been produced earlier, the claim would have been dismissed.

## Timeliness

12. In the first instance, Fund Counsel points out the Settlement Agreement and approved Transfused HCV Plan i.e., section 3.05 of the Transfused Plan titled "Claim by HCV Personal Representative of HCV Infected Person", require that a claim be made on behalf of a deceased either within 3 years of the person's death or 2 years after the Approval Date.

13. In this instance, the Deceased's death occurred on (*date)*, 1990.

14. The final approval of the Settlement Agreement occurred on January 22, 2000 (the "Approval Date").

15. The application was filed in 2010.

16. Counsel points out this is well beyond the stipulated period of two years after the Approval Date, which is the later date.

**Proof that Death Caused by Infection with HCV**

17. Fund Counsel points out that section 3.05(1)(a) specifically requires "proof that the death of the HCV Infected Person was caused by his or her infection with HCV".

18. However, Fund Counsel points out that in this instance, the Deceased had no diagnosis, either pre or post death, of HCV. Specifically, there is no medical opinion or other evidence that she died of HCV.

19. Rather, Fund Counsel submits the evidence is overwhelming that the Deceased suffered several sickle cell crises in hospital, and ultimately died of complications due to sickle cell disease.

## Alternative Proof to Diagnosis of Hepatitis C

18. Fund Counsel points out that in the absence of a Hepatitis C diagnosis, Section 3.05(3) provides for the following alternative proof that a deceased had been infected with HCV:

> (a) a liver biopsy consistent with HCV in the absence of any other cause of chronic hepatitis;
>
> (b) an episode of jaundice within three months of a Blood transfusion in the absence of any other cause; or
>
> (c) a diagnosis of cirrhosis in the absence of any other cause.

19. Fund Counsel points out that provision is also clear the onus is on the Estate to prove the requirements, as it also states:

> For greater certainty, nothing in this Section will relieve any claimant from the requirement to prove that the death of the Primarily-Infected Person was caused by his or her infection with HCV…

20. Fund Counsel indicates the Estate received several notices in the years following the filing of the application in 2010, as to deficiencies, including the failure to establish the Deceased had been infected by HCV.

21. Further, Fund Counsel points out that since the filing of this review in 2017, there have also been ample adjournments to allow for the Estate to locate and file more evidence. However, while more medical records have been adduced on this review, none discloses either a liver biopsy (section 3.05(3)(a)) or a diagnosis of cirrhosis (section 3.05(3)(c)).

## ***Jaundice***

22. In the absence of any evidence in support of either a liver biopsy or a diagnosis of cirrhosis, Fund Counsel's submissions focussed on section 3.05(3)(b), which allows weight to be given to "an episode of jaundice within three months of a Blood transfusion *in the absence of any other cause".* [emphasis added]

23. Fund Counsel points out the record discloses there were transfusions during (and before) the Class Period i.e., January 1, 1986 - July 1, 1990, and concedes there are notations of occasions of jaundice in the Deceased's medical file. However, Fund Counsel further points out that jaundice is a symptom of sickle cell disease, and the Deceased suffered from jaundice prior to the class period, when she was in sickle cell crisis, and in the absence of transfusions.

24. Fund Counsel further submits that even in circumstances where there is a temporal connection of jaundice being recorded within 3 months of a transfusion, it is clear that the sickle cell begets jaundice, and it has not been established the Deceased suffered jaundice in "the absence of any other cause".

25. As such, Fund Counsel maintains evidence of HVC, by jaundice "in the absence of any other cause", has not been established.

26. Further, Fund Counsel pointed out that even if it were proven the Deceased had HCV and died from HCV (and neither has been proven on the record to date), there would need to be additional proof to establish class membership i.e., that a class donor of units was positive. For example, there would need to be a traceback of the transfused units, which has not occurred.

27. Counsel for the Fund indicated the protocol for this settlement has been that Canadian Blood Service only does a traceback where the claimant is diagnosed with HCV and has identified blood units. As no traceback has been performed, the HCV status of the donors of the units provided are not known. Counsel for the Fund points out that a traceback might well identify a positive pre-class unit donor or that the in- class donors of units were negative; in either case, the Deceased would not be admitted to the class.

28. Accordingly, even in the event of a favourable decision for the Estate in this Reference, this would not result in admission to the Class, as more steps in the application process would need to be undertaken.

**The Deceased and Sickle Cell Disease**

29. The Deceased was born (*date)*, 1963 in *(City)*, *(Country)*. She moved to Canada, grew up in (City), and later lived in (City) and (City).

30. Fund Counsel points out the Deceased suffered from sickle cell anemia and eventually died on *(date)*, 1990, at Toronto General Hospital, after one of many sickle cell anemia attacks. Fund Counsel further points out her medical records demonstrate the Deceased had several sickle cell crises through the 1980s and preceding her death in (*month)* 1990.

31. Sickle cell disease (SCD) is an inherited blood disorder. SCD involves flaws to the hemoglobin which, in turn, interfere with oxygen to the tissue. John Hopkins Hospital reports that SCD's impacts include: anemia; sickle crisis which results in pain in the chest, arms and legs; acute chest syndrome; pooling in the spleen; stroke, and "jaundice, or yellowing of the eye".

32. The Mayo clinic refers to organ damage as one outcome of advanced SCD (see: https://www.hopkinsmedicine.org/health/conditions-and-diseases/sickle-cell-disease and also https://www.mayoclinic.org/diseases-conditions/sickle-cell-anemia/symptoms-causes/syc-20355876). Further, SCD can cause progressive injury to the liver with significant fibrosis, often cirrhosis, and decreased liver function (see https://pubmed.ncbi.nlm.nih.gov/3516788/).

33. Fund Counsel points out that while SCD patients often require multiple transfusions, unlike hemophiliacs, they are not subject to a separate plan in the Settlement Agreement by which to prove class eligibility. As such, SCD claimants who died prior to the class approval in 2000 must follow the Transfused Plan as set out in section 3.05.

34. The Transfused Plan specifically requires not only evidence of a transfusion but evidence of a diagnosis of HCV. In order for a person who died prior to the Approval Date to be eligible as a class member, the Transfused Plan requires that the person die from HCV. As mentioned above, section 3.05(3) sets out what must be proven, including as it relates to establishing the claimant had HCV. As set out in section 3.05(3) (a)-(c), there are three ways to establish a deceased claimant had HCV in the absence of a test.

35. Fund Counsel reiterates the Deceased's file does not contain evidence of a liver biopsy (section 3.05(3)(a)) or diagnosis of cirrhosis (section 3.05(3)(c)) and, even had it done so, the issue of "absence any other cause" remains.

36. However, Fund Counsel points out the file does disclose transfusions and episodes of jaundice which are addressed below.

## Transfusions and Jaundice

37. The medical file in the record dates back to the early 1980s.

38. Fund Counsel points out the medical file contains references to the deceased experiencing jaundice in 1983 and 1984. (see for example Review Record pp. 124, 128/9, 175 and 1635) [also page 88]

Specifically, in 1983, the Deceased attended Toronto General Hospital as she was suffering from sickle cell crisis. Fund Counsel points out notes in the file reference her jaundice symptoms i.e. "Occ. Jaundice when in pain" (pp. 128/9). In that instance, the Final Summary also notes she had "mildly jaundiced scelera". (Scelera is the white outer layer of the eyeball).

39. Fund Counsel also points out the medical file contains no evidence or any mention of a transfusion in 1983. [The intake interview, dated March 30, 1983, (page 165) indicates the Deceased answered "NO" to the question "Have You Ever Had a Blood Transfusion?"]

40. A further attendance in 1984 for sickle cell crisis noted the "Head and neck examination showed scleral icterus [ie. jaundice in the eyes]" (p. 175 and note at p. 182). Fund Counsel submits that on these occasions the observed symptoms are consistent with the literature referred to above, including the presence of jaundice and pain. For example, the History Sheet notes that "Pain is sharp, unremitting, worse with (not clear) [appears to be "movement"] and pressure. Pain in chest is worse with inspiration. Pain located primarily over sternum". (see p. 184)

41. Fund Counsel submits the above observations demonstrate the Deceased's jaundice is consistent with SCD, particularly when a patient is in sickle cell crisis.

42. There is evidence the Deceased receiving blood transfusions in 1986 and 1990 (i.e., during the class period). Specifically, in 1986 the records show a blood transfusion on July 27, 1986 (pp. 236 and 254).

43. There were observations of scleral icterus in a subsequent *(City)* General Hospital attendance from October 18-22, 1986 (p. 272-73). The Final Summary notes indicate she attended the hospital with sickle cell crisis at that time. Her liver function was said to be fine. The note specifically says that "the impression at that time was that she was in sickle cell crisis with vaso-occlusive chest pain and some vaso-occlusive back and thigh pain. She had no indication that she had an infection process at that time." Her Liver tests were said to be normal. She was to follow up with the sickle cell clinic.

44. The Deceased re-attended *(City)* General Hospital on December 13-21, 1986 for sickle cell crisis. She was transfused with two units of blood at that time. (pp. 336, 350-1,361-2). While there were observations of a somewhat enlarged liver (p. 373), Fund Counsel points out there was no mention of jaundice either at that time or within 3 months of the December transfusions.

45. There is mention of scleral discolouration when she attended at the hospital in May 1987, but Fund Counsel points out this was not within 3 months of the last known transfusion. At that time, she was again diagnosed with "Sickle Cell Crisis/Disease" (see pp. 378, 385, 386, 389).

46. Similarly, the Deceased attended *(City)* General Hospital in February 1988, suffering a sickle cell crisis. The Nursing Assessment Form (p. 398) refers to "jaundice …[at] present" and that "she (presumably the Deceased) states she is always yellow when she is sick". Fund Counsel points out there is no record of a transfusion in the three months prior to February 1988.

47. The Deceased subsequently moved back to*(city)* and then to (*city)*. She returned to *(City)* some time prior to August 1990.

48. The Deceased attended at *(City)* General Hospital on August 7-8, 1990. The Nursing Assessment Form on August 7, 1990 did not note jaundice (p. 443) and there is no record of a transfusion at that time.

**October/November 1990 Hospital Attendance**

49. The Deceased's last hospital attendance at the *(City)* General Hospital was from (Date), 1990 to (date), 1990.

50. The Discharge Summary reports the Deceased unfortunately "ultimately succumbed to her multiple medical problems". The Summary indicates the first part of her stay was spent on "intensive management" for her respiratory failure. Although she initially improved, she developed numerous other medical complications including cerebral infarction (i.e., a stroke) and high-input renal insufficiency. The Summary indicates she ultimately died of what was "probably … an episode of sepsis related to bowel infarction".

51. During her final stay, the Deceased received numerous blood transfusions as follows: (month), 3, 4, 7, 8, 17 and (month)16, 1990 (see pp.1093, 1171, 1188, 1120, 1762, 1789, 1220, 1236, 1307, 1314, 1525,1570, 1610 and 1611) and fresh frozen plasma on (month) 27 (p. 1789, 2209).

52. Fund Counsel points out the Admission Note of (month), 1990, completed by Dr. *(Physician)*, before any of the above transfusions, states "she has mild jaundice evidenced in her sclera". (p. 977)

53. While Clinical Notes also completed on (date), 1990, by an unknown author, state "-no anemia/no jaundice/no [undecipherable]", Fund Counsel points out the notes also indicate the Deceased "talks with eyes closed/prefers to be left to rest".

54. Further, Fund Counsel pointed out that Dr. (Physician)'s observation, made during his physical examination of the Deceased, which was being conveyed to other doctors for treatment purposes, was consistent with other observations of jaundiced sclera within that time frame. Specifically, Clinical Notes of (date) 1990 (p. 464) refer to the Deceased's "jaundiced sclera", and an undated but "Initial Assessment of Universal Self-Care Requisites" form also notes "sclera jaundiced". (pp. 1190) Further, notes on a Consultation Form, which appear to be dated (date), 1990, refer to the Deceased's "conjunchva (sic) yellow" and "conjunchva (sic) were jaundiced".
(591/2)

55. Later reports do not mention jaundice, and a (date), 1990 radiology report of an abdominal ultrasound noted" no abnormalities are seen of the liver…" (p. 854)

56. While the Deceased did well when she first arrived, she suffered several strokes while in hospital. During the latter part of her stay at the hospital she was comatose. The EEG report of (date), 1990, described her as a "(age) year old woman with sickle cell crisis and three previous intra-cerebral hemorrhages". (p. 950). By (date), 1990, "a complete absence of any cerebral activity" was recorded, which continued to the end of the Deceased's life (pp. 953, 954)

57. Fund Counsel points out there is no indication the Deceased died of HCV. Indeed, he submits there is no evidence she suffered from HCV. Nor is there any subsequent medical opinion as to her dying of HCV. Rather, Fund Counsel submits it is highly unlikely that had she been infected with HCV in 1990, or 1986, or that any HCV infection would cause her death in such a short period of time. While the record indicates the family refused an autopsy, leaving some questions unanswered, Fund Counsel submits it is clear there is no evidence the Deceased died as a result of HCV (p. 448).

58. Fund Counsel submits the Settlement Agreement and Transfused Plan are very descriptive as to what is required to meet eligibility of a class member, including those who die prior to the Approval Date.

59. Fund Counsel submits the Administrator correctly applied the Court approved protocol where an application was not completed. While more evidence was filed on this Review, Fund Counsel submits there is still a delinquency of required information.

60. Fund Counsel submits that, based on the information filed, the claim ought to be dismissed for at least the following reasons:

> a) The claim was properly denied in a manner consistent with the CAP relating to deficiencies;
>
> b) The claim was filed beyond the stipulated time in section 3.05. Specifically, the claim was filed in 2010, more than 3 years from the date of death and more than 2 years from the Approval Date;
>
> c) There is no proof the Deceased had HCV. The episodes of jaundice following the transfusions in 1986 and 1990 do not meet the criteria in section 3.05(3)(b) as there is another explanation, being the SCD. Jaundice is an [acce]pted symptom of SCD. The records show the Deceased suffered jaundice prior to 1986 and in the absence of any transfusion. Even in 1990, upon admission on October 1, 1990, there were observations of jaundice which is prior to the 1990 transfusions which took place after October 1, 1990. The records verify the Deceased's jaundice was associated with her sickle cell disease. As such, it has not been established that the jaundice was "in the absence of any other cause"; and,
>
> d) There is no evidence the Deceased died of HCV. Rather, she died of complications arising from SCD.

61. Fund Counsel acknowledges the Deceased's death was tragic, and undoubtedly a source of great sorrow for her parents and siblings. However, Fund Counsel submits the Administrator and the Referee are obligated to follow the terms of the Settlement Agreement and Transfused Plan.

62. Fund Counsel points out the Deceased's family spent 10 years trying to amass evidence that would meet the criteria referenced in section 3.05. Notwithstanding those efforts, Fund Counsel submits there is insufficient evidence to establish the criteria in section 3.05 and neither the Administrator nor Referee may deviate from those criteria.

63. Accordingly, Fund Counsel submits the claim was correctly dismissed in 2017, and even with the voluminous productions since 2017, the claim still must be dismissed.

## THE ESTATE:

64. Despite having agreed to file a formal Response, the only "submission" received from the Estate in response to Fund Counsel's submission were two e-mails from the Representative of the Estate.

65. In the first e-mail, dated September 20, 2021, the Estate Representative takes issue with what she characterizes as the suggestion the Estate ignored requests for additional submissions and responses over 10 years. She points out the claim was filed by the father of the Deceased, who died in 2008.

66. The Estate Representative further indicates no one knew of this claim and outstanding requests until 2016, at which point the Estate Representative had just returned to Canada after a stint overseas and was contacted by the Administrator of the Fund. Since that time, the Estate Representative indicated she had spent the last 5 years trying to piece things together, not 10 years as is suggested in this letter.

67. The Estate representative also indicated in that e-mail, that Fund Counsel's submission is incorrect in stating there was no traceback, as a CBS Traceback was completed and shared with "you" [presumably the Fund].

68. The Estate Representative points out that the hospital, at the time, did not have accurate ways of testing for Hepatitis [presumably HCV] and as such the Deceased's records prior to her death would not have any specific evidence to validate whether she could have contracted it.

69. The Estate Representative concedes that SCD did contribute to the deterioration of the Deceased's health, but submits that none of the information relied upon by the Fund can be used to unequivocally advance that HCV was not a factor. She reiterates that the test for detecting HCV were not available at the time. Nor were the Deceased's tests, or hospital reports comprehensive on matters relating to it, despite some mention of liver health.

70. The Estate Representative further submits that many other points in Fund Counsel's submission need to be clarified, considering the lack of substantive information in the reports. She submits this made it difficult for the doctors who reviewed the reports at the Toronto General Hospital to come to a clear conclusion as to whether HCV contributed to the Deceased's death.

71. The Estate's Representative further indicates that considering the number of transfusions the Deceased received up to her death, and that the Traceback revealed at least 10% non-respondents who could not be verified for HCV by the Canadian Blood Services, and the lack of hospital testing at the time for Hepatitis C, she believes the conclusion drawn by the Fund in its Submission is "forced".

[There was no record of a Traceback in the Deceased's File. Rather, the Estate Representative's reference to the "Traceback" revealing "at least 10% non-respondents who could not be verified for HCV by the Canadian Blood Services" appears to be a reference to a note on the Canadian Blood Services report which identified units of blood that could not be confirmed as having been transfused. (page 3227)]

72. The Estate's Representative concluded with the indication she would review Fund Counsel's Submission again and respond. She also indicated she had noted the October 21, 2021 deadline for her submissions. [Actually October 20, 2021].

73. In response to this e-mail, I request that the Estate Representative include all her response submissions in one document, to ensure nothing is missed.

74. In her second e-mail, dated October 19, 2021, the Estate's Representative indicated she was providing to Counsel for the Fund, a copy of what she described as "the Canadian Blood Services tracking report". The Estate's Representative indicated she had previously provided this to Counsel for the Fund, but that it appeared to be excluded from the Deceased's file. The Estate's Representative

maintained that in addition to providing evidence of the multiple transfusions received by the Deceased, the report provided trace back details.

75. [Counsel for the Fund responded that the document was not a "trace back" but only a list of transfusions. Further, Counsel for the Fund indicated the document had been included at page 3225 of the Appeal Record.]

76. The document was not sent to me, but the Representative for the Estate did not challenge Fund Counsel's characterisation of the document.

77. Indeed, nothing has been heard from the Representative of the Estate since the October 19, 2021 e-mail, forwarding the document to Fund Counsel. This is despite my e-mail request, dated October 25, 2021, asking the Representative for the Estate that she give this matter her immediate attention, as her complete response to Fund Counsel's submission, which had been due on October 20, 2021, was already overdue. Nor did the Estate Representative respond when I followed up with an e-mail on October 29, 2021.

78. Finally, on November 8, 2021, I advised the Estate Representative that if I did not hear from her by the end of the day, November 15, 2021, I would proceed to make my decision on the basis of the material and submissions before me at that time.

79. The Representative of the Estate did not respond.

80. Accordingly, my decision is set out below

**ANALYSIS:**

81. The applicable provisions of the Transfused Plan provide as follows:

> **3.05 Claim by HCV Personal Representative of HCV Infected Person**
>
> **(1)** A person claiming to be the HCV Personal Representative of a HCV Infected Person who has died **must deliver** to the Administrator, **within three years after the death of such HCV Infected Person or within two years after the Approval Date, whichever event is the last to occur, an application form** prescribed by the Administrator **together with:**
>
> (a) **proof that the death of the HCV Infected Person was caused by his or her infection with HCV;**
>
> (b) unless the required proof has already been previously delivered to the Administrator:
>
> (i) if the deceased was a Primarily-Infected Person, the proof required by Sections 3.01 and 3.03; or
>
> …

(3) Notwithstanding the provisions of Section 3.01(1)(b), if a deceased Primarily-Infected Person was not tested for the HCV antibody or HCV the HCV Personal Representative of such deceased Primarily-Infected Person may deliver, instead of the evidence referred to in Section 3.01(1)(b), evidence of any one of the following:

**(a) a liver biopsy consistent with HCV in the absence of any other cause of chronic hepatitis;**

**(b) an episode of jaundice within three months of a Blood transfusion in the absence of any other cause; or**

**(c) a diagnosis of cirrhosis in the absence of any other cause.**

For greater certainty, **nothing in this Section will relieve any claimant from the requirement to prove that the death of the Primarily-Infected Person was caused by his or her infection with HCV.**

[emphasis added]

## Timeliness

82. As indicated earlier, this Application was filed in 2010.

83. Further, as Fund Counsel points out, section 3.05(1) of the Transfused Plan, set out above, requires a claim be made on behalf of a deceased either within 3 years of the person's death or 2 years after the Approval Date - whichever event is the last to occur.

84. In this instance, the Deceased's death occurred on (date), 1990. The Approval Date of the Settlement Agreement was January 22, 2000. Accordingly, the latest the claim could be filed in order to be compliant with section 3.05(1) of the Transfused Plan was 2002, i.e., within two years of the Approval Date, which is the later date.

85. As pointed out by Fund Counsel, the filing date of 2010 is well beyond 2002.

86. Accordingly, this Claim is untimely, and stands to be dismissed on that basis alone.

### Proof that Death Caused by Infection with HCV

87. Section 3.05(1)(a) specifically requires "proof that the death of the HCV Infected Person was caused by his or her infection with HCV".

88. As pointed out by Fund Counsel, in this instance, the Deceased had no diagnosis, either pre or post death, of HCV. Nor is there any medical opinion or other evidence that she died of HCV. Rather, the medical evidence indicates the Deceased died of complications due to SCD.

## Alternative Proof to Diagnosis of Hepatitis C

89. As the Deceased was not tested for the HCV antibody or HCV, in the absence of a HCV diagnosis, as noted above, section 3.05(3) provides three alternative methods of demonstrating the Deceased had been infected with HCV. They are:

90. (a) a liver biopsy consistent with HCV in the absence of any other cause of chronic hepatitis;

> (b) an episode of jaundice within three months of a Blood transfusion in the absence of any other cause; or
>
> (c) a diagnosis of cirrhosis in the absence of any other cause.

91. These three alternative methods of proof are dealt with below.

***Liver Biopsy or Diagnosis of Cirrhosis***

92. As pointed out by Fund Counsel, there was no evidence of a liver biopsy, as referenced in section 3.05(3)(a) or a diagnosis of cirrhosis as referenced in section 3.05(3)(c).

***Jaundice***

93. In the absence of any evidence in support of either a liver biopsy or a diagnosis of cirrhosis, the remaining method of proof of HCV infection is set out in section 3.05(3)(b), which allows weight to be given to "an episode of jaundice *within three months* of a Blood transfusio*n in the absence of any other cause".* [emphasis added]

94. However, while the Deceased's medical file did reference occasions of jaundice, as Fund Counsel pointed out, jaundice is a symptom of SCD. Further, the Deceased suffered from jaundice prior to the class period, when she was in sickle cell crisis, and in the absence of transfusions.

95. Further, as Fund Counsel submits, even in circumstances where there was a temporal connection with jaundice recorded within 3 months of a transfusion, this does not satisfy the requirement to demonstrate jaundice "in the absence of any other cause", as it is clear SCD, from which the Deceased suffered, also causes, and had previously caused the Deceased to experience jaundice.

96. Indeed, the Deceased's *(City)* General Hospital "Chart…", (date) 6, 1990, states: "Hepatitis History: never contracted". (p 456)

**Onus**

97. The Estate Representative submits that none of the information relied upon by the Fund can be used to unequivocally advance that HCV was not a factor in the Deceased's death.

98. This suggests there exists a presumption that HCV was a factor, which must be unequivocally demonstrated not to be the case. However, this is not the test.

99. Rather, as pointed out by Fund Counsel, the Transfused Plan is clear the onus is on the Estate to prove the requirements have been met.

100. In this instance, for all the reasons set out above, even if the Estate could overcome the timeliness issue, I find the evidence supporting this claim to be insufficient. Rather, I find, as submitted by Fund Counsel, that the evidence is overwhelming that the Deceased died of complications due to SCD.

**DETERMINATION:**

101. For all the reasons above, I find the Estate is not entitled to compensation pursuant to the Hepatitis C 1986-1990 Class Action Settlement, as it has failed to demonstrate the Deceased was infected with HCV or that her Death was caused by an infection with HCV.

102. Accordingly, the decision of the Administrator to deny the Claim is upheld.

DATED AT TORONTO, THIS 26TH DAY OF NOVEMBER, 2021.

"Tatiana Wacyk"
Referee