Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2024 CHRT 133
Date: December 10, 2024
File No.: T2425/8419

Between:

Christopher Karas

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Health Canada

Respondent

Decision

Member: Gary Stein

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I. OVERVIEW AND DECISION

[1] Christopher Karas, the Complainant, contests the blood donation “deferral” policy (the “Policy”) that prevents men who have sex with men (MSM) from donating blood for a period of time after they last had sex with a man. Mr. Karas says the Policy discriminates against him based on his sexual orientation as a gay man. Health Canada, the Respondent, argues that this complaint should be dismissed because it doesn’t provide a service as defined in the *Canadian Human Rights Act,* RSC 1985 c H-6 (the “Act”).

[2] For the reasons provided below, I agree with Health Canada and dismiss this complaint. Health Canada fulfils a regulatory role that is defined in the *Blood Regulations*, SOR/2013/178 (the “Blood Regulations”). It is responsible for approving the policies of Canadian Blood Services (CBS) on whether particular donors are eligible to donate blood. However, Health Canada’s oversight is limited to considerations of human safety and the safety of blood. Mr. Karas had a separate complaint against CBS which was settled.

[3] Health Canada’s role in regulating CBS is not a service within the meaning of section 5 of the Act. In particular, it does not have the transitive connotation of services passing from a service provider and being held out to the public.

[4] In addition, this complaint is a challenge to Health Canada’s role as set out in the Blood Regulations. Mr. Karas’ complaint seeks actions from Health Canada which are not available to it under these regulations. The source of the alleged discrimination is the Blood Regulations, which cannot be found to be a service.

[5] Health Canada’s motion to strike the complaint is granted, and the complaint is dismissed in its entirety.

II. ISSUE(S)

[6] This decision addresses the following issues:

A) What principles guide the Tribunal in deciding whether to strike a human rights complaint on a motion?

B) Is this motion an abuse of process?

C) What principles guide the Tribunal in deciding whether a human rights complaint involves a “service” under section 5 of the Act?

D) Does the act of “law making” include making regulations?

E) Is the complaint a direct challenge to the Blood Regulations?

F) Is it plain and obvious that the complaint has no reasonable chance of success and should be struck?

III. PROCEDURAL HISTORY

[7] In 2016, Mr. Karas filed two separate human rights complaints with the Canadian Human Rights Commission (the “Commission”) against CBS and Health Canada.

[8] In September 2019, the Commission referred both complaints to the Tribunal for inquiry. The Commission is also a party to the complaints and is participating in the Tribunal’s inquiry.

[9] In November 2019, after the Commission referred the complaints involving Health Canada and CBS to the Tribunal, the Attorney General of Canada applied to the Federal Court for judicial review of the Commission’s decision to refer the complaint against Health Canada. In June 2021, the Federal Court dismissed Health Canada’s request.

[10] In February 2020, Mr. Karas, the Commission and CBS filed their initial Statements of Particulars (SOPs). Health Canada filed its SOP in February 2021.

[11] The Tribunal has issued two rulings. In May 2020, the Tribunal decided to hear the two complaints together, and, in January 2021, the Tribunal ruled about the scope of the complaints.

[12] From October 2021 to May 2023, the Tribunal held the proceedings in abeyance, at the parties' request, while settlement discussions occurred.

[13] In July 2023, the Tribunal Member who was initially assigned to this case was appointed to be a judge. The Tribunal's Chairperson informed the parties that this matter would be reassigned to a different Tribunal Member but that there would be a delay until a Tribunal Member became available or new members were appointed.

[14] In January 2024, Mr. Karas and CBS settled the complaint against CBS. The complaint against Health Canada continued.

[15] In May 2024, Health Canada filed a motion to dismiss the complaint. It argues that the Blood Regulations define and restrict its role as the regulator of Canada's blood system and that Health Canada does not provide a "service" or "services" under section 5 of the Act when it applies the Blood Regulations' criteria and approves a policy or policy change involving the blood donation deferral period for MSM. For that reason, Health Canada submits that the complaint is beyond the scope of the Act and has no reasonable chance of success.

[16] All parties requested that the Tribunal rule on the Respondent's motion to strike before considering the other outstanding issues in the complaint. I agreed to proceed on that basis.

[17] Mr. Karas is opposed to Health Canada's motion and submits that it be dismissed.

[18] The Commission submits that, given the circumstances of this complaint, the Tribunal should grant the motion.

IV. FACTUAL BACKGROUND

A. History of the blood system in Canada

[19] Health Canada's and the Commission's materials describe the recent history of the blood system in Canada and its current regulatory structure. This is an important context for the complaint and for understanding Health Canada's role, and the limits of its role, as the

blood system's regulator. I accept Health Canada's and the Commission's information about the blood system, as set out in their SOPs and their submissions, and as I have summarized below.

[20] The existing blood system is built upon the foundation of a tragic crisis in the 1970s and 1980s, when Canada's blood supply became infected with HIV and the hepatitis C virus. Tens of thousands of people became infected by receiving blood transfusions.

[21] In 1993, the Government of Canada established a royal commission, known as the Krever Commission, to inquire into the crisis. The Krever Commission's 1997 report described the event as a "nationwide public health calamity". It recommended how Canada's blood system should be reorganized and governed in the future. It called for the creation of a publicly administered blood supply system, with a national blood authority to run the system independently from government and with a government regulator providing oversight. The report recommended that the safety of the blood supply system be "paramount" (Commission of Inquiry on the Blood System in Canada, Final Report, Part VI, at 1047–49).

[22] In 1998, the Government of Canada and the provinces signed agreements to establish a blood system that includes many of the Krever Commission's recommendations. The agreements have led to the blood system that currently exists.

B. Governing legislation and the Blood Regulations

[23] Human blood in Canada is regulated under the federal *Food and Drugs Act* (R.S.C., 1985, c. F-27) and the Blood Regulations that are made under the statute. According to the Blood Regulations, Health Canada regulates the blood system by overseeing independent "establishments" that operate the system and conduct the "processing" of blood. For the purposes of this complaint, CBS is the establishment that conducts the processing of blood, which includes the collecting and testing of blood and the conducting of donor suitability assessments (Blood Regulations, section 1, definition of "processing").

[24] Judicial decisions confirm the division of authority between Health Canada and CBS, and Health Canada's circumscribed oversight role as the regulator for blood safety. CBS

has complete management discretion over all operational blood system decisions and for creating and administering the blood screening system and policies under which blood donors are accepted or rejected (*Canadian Blood Services/Société canadienne du sang v Freeman*, 2010 ONSC 4885, at paras 356–57, 364, 367 and 371; *Soullière v. Canada (Health),* 2017 FC 686, at para 32).

[25] According to the Blood Regulations, Health Canada must only consider "human safety" and "the safety of blood" in making decisions:

A) Health Canada must authorize an establishment to process blood if doing so "will not compromise human safety or the safety of blood" (Blood Regulations, section 7).

B) Health Canada must authorize a significant change to an establishment's authorization to process blood if the establishment has provided sufficient evidence that the change, or the way it implements the change, will not compromise human safety or the safety of blood (Blood Regulations, section 9(1) and 9(2)).

C) Health Canada can impose terms and conditions on CBS, but only to prevent a compromise to human safety or the safety of blood (Blood Regulations, section 13(1)). Health Canada can also remove a term or condition if it is no longer necessary to prevent a compromise to human safety or the safety of blood (Blood Regulations, section 13(5)).

[26] The Blood Regulations also define CBS's authority:

A) Before an establishment can make a significant change in how it processes blood, it must provide all relevant information for Health Canada to determine whether the change, or the way the change is implemented, could compromise human safety or the safety of blood (Blood Regulations, section 9(1)).

B) CBS must assess every donor's suitability to donate blood by a questionnaire, or by similar means, that obtains information to evaluate the donors' medical history, their test results and physical examinations, and their social history as needed to determine the presence of risk factors for diseases transmissible by blood (Blood Regulations, sections 1, definition of "donor suitability assessment", 39 and 41(a)).

C) Donors are considered unsuitable to give blood if CBS's questionnaire or other screening tool indicates that human safety or the safety of blood could be compromised (Blood Regulations, section 42).

C. The blood donation deferral policy

[27] The Policy that is the subject of this complaint consists of CBS's Donor Health Assessment Questionnaire (the "Questionnaire") and its Donor Selection Criteria Manual (the "Manual"). Using these resources, CBS assesses each donor's suitability and determines if human safety or the safety of blood could be compromised by their blood donation. CBS must obtain Health Canada's approval for any changes to the Questionnaire or Manual. Health Canada must approve the proposed changes if they will not compromise human safety or the safety of blood (Blood Regulations, section 9).

[28] CBS's donor suitability criteria previously required that MSM defer their blood donations for a period of time following their last sexual contact with a man. The Questionnaire obtains information about the donor's sexual history and the Manual determines the donor's suitability or his requirement to defer the donation.

[29] Health Canada has approved CBS's requests to change the policy, both before and after Mr. Karas filed this complaint. The allegations in the Complainant's SOP involve Health Canada's alleged discriminatory actions in relation to the Policy that was in effect in 2016 and its deferral requirements for MSM. The Policy has been replaced with a sexual behaviour-based screening tool that CBS uses to assess the suitability of all blood donors.

[30] Mr. Karas' submissions refer to CBS's updated screening tool and its "new policy". However, the Tribunal has made no decisions to expand the scope of the complaint to include the updated blood donor screening tool or the later changes to CBS's Policy. These are disputed issues between the parties. Health Canada submits that Mr. Karas cannot expand the scope of the existing complaint by including these references in his submissions. The parties also agreed that I decide this motion before considering other motions to expand the complaint's scope.

[31] It is the SOPs that establish the terms of the Tribunal inquiry. Health Canada and the Commission frame their cases based on the allegations in Mr. Karas' existing SOP. Therefore, this motion is determined based on the parties' existing SOPs and the CBS policy that was in effect in when Mr. Karas filed his complaint in 2016. I consider the specific allegations in the original complaint to the Commission and the corresponding allegations

that are included in Mr. Karas' SOP, but I do not consider the allegations in Mr. Karas' submissions that are not included in his SOP.

V. ANALYSIS

[32] I have reviewed the parties' materials and submissions for the motion. For the sake of efficiency, and because some of the arguments in the submissions are not relevant and do not assist me in deciding this motion, I will only address the arguments of the parties that I consider necessary, essential and relevant to my decision (*Turner v. Canada (Attorney General)* 2012 FCA 159, at para 40; *Constantinescu v. Correctional Service Canada*, 2020 CHRT 3, at para 54).

A. What principles guide the Tribunal in deciding whether to strike a complaint on a motion?

[33] On a motion to strike, a court or tribunal must assume the facts are true and must ask whether there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial (*R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42 at para 21 (CanLII) [*Imperial Tobacco*]). Evidence is not admissible, and the Tribunal must only strike particulars in advance of a hearing in the "clearest of cases" (*Dorey et al. v. Employment and Social Development Canada*, 2023 CHRT 23 [*Dorey*] at para 17; *Richards v. Correctional Service Canada*, 2020 CHRT 27 at para 86). But even a complex and novel legal claim may properly be struck from a complaint if on a proper analysis of the law it is plain and obvious that the claim cannot succeed (*Dorey* at para 17, citing *Callan v. Cooke*, 2012 BCSC 1589 at para 19).

[34] A complainant must clearly outline the facts upon which they rely in making their claim. A complainant is not entitled to rely on the possibility that new facts may turn up as the case progresses. At the time of the motion, a complainant may not be in a position to prove the facts that they allege. They may only hope to prove them, but the facts must be asserted. The facts are the firm basis upon which the possibility of success of a claim must

be evaluated. If they are not alleged, the exercise cannot be properly conducted (*Imperial Tobacco* at para 22*).*

B. Is Health Canada's motion an abuse of process?

[35] Mr. Karas submits that Health Canada's motion unreasonably delays the Tribunal's proceedings, is an abuse of process and prejudices his rights. He argues that many years have passed since he filed his complaint and that the motion is nearly identical to Health Canada's previous unsuccessful application to the Federal Court for judicial review.

[36] I do not agree with Mr. Karas' submission about delay or with the characterization of Health Canada's judicial review application.

[37] There is no doubt that the time taken in addressing this complaint has been long. However, as detailed above, this proceeding has involved an application for judicial review, Tribunal rulings, an abeyance for settlement discussions and other procedural matters. I also note that all parties requested that this motion proceed. For these reasons, I do not find that there has been an undue delay in the progress of this case.

[38] I also do not accept that Health Canada's motion is essentially a repeat of the Respondent's application in 2019 to the Federal Court for judicial review. The Federal Court reviewed a different decision involving different issues and distinct legal considerations.

[39] The issue before the Federal Court was whether the Commission's decision to refer the complaint against Health Canada to the Tribunal for inquiry was reasonable. The Federal Court considered whether the Commission's decision disclosed "any reasonable basis on the law or the evidence" for the referral to the Tribunal. The Federal Court decided that the Commission's decision was reasonable (*Canada (Attorney General) v. Karas*, 2021 FC 594, [*Karas FC*] at paras 43, 51 and 65).

[40] In the Federal Court's analysis of the Commission's decision, it found that the Commission had been alert to Health Canada's arguments about the complaint and engaged with them. The Federal Court also found that the decision's analysis of the issues in the Commission's internal assessment report was intelligible (*Karas FC,* at paras 44–45

and 51). The Federal Court also found that the Commission's decision was reasonable despite its failure to reconcile the decision to refer Mr. Karas' complaint with a previous decision where the Commission did not refer a complaint involving arguable similar facts (*Karas FC*, at paras 54–64).

[41] Mr. Karas' submissions refer to the Court's finding that the Commission's internal assessment report referred to "a 'live contest' as to the exact nature of the relationship between Health Canada and CBS, which warrants further inquiry". The Federal Court found that reference in the Commission's decision to be intelligible (*Karas FC*, at para 48). The Federal Court did not find that the relationship between Health Canada and CBS "warrants further inquiry" and did not consider whether Health Canada's action constitute a service under section 5 of the Act.

[42] The Federal Court's decision to uphold the Commission's referral decision does not limit the Tribunal's choice of procedure for addressing a complaint. The Tribunal has the authority to determine its own process for deciding the issues in a human rights complaint. Tribunal proceedings must be fair, and they proceed as informally and expeditiously as the requirements of natural justice and the *Canadian Human Rights Tribunal's Rules of Procedure, 2021 (SOR/2021-137)* (the "Rules") allow. The Act and the Rules authorize the Tribunal to hear this motion about whether Health Canada has provided a "service" or "services" under section 5 of the Act (the Act, sections 48.9(1), 50(1), 50(2), and Rules 3(2) and 7).

[43] I appreciate Mr. Karas' submission that his recourse to a court challenge of the Policy at issue in his human rights complaint can be impractical. However, the Tribunal does not consider whether a complainant has alternative legal options when it determines the legal question of whether the allegations in a human rights complaint are beyond the scope of the Act.

C. What principles guide the Tribunal in deciding whether a complaint involves a "service" under section 5 of the Act?

[44] Services that are customarily available to the general public must be provided in a non-discriminatory manner. The first step in applying section 5 is to determine whether the "particular actions" complained of are "services" (*Watkin v. Canada (Attorney General)*, 2008 FCA 170 [*Watkin*] at paras 28 and 31).

[45] Not all government actions are "services" under section 5 of the Act. The fact that government actions are undertaken in the public interest does not make them "services" (*Watkin,* at para 22). "Services" contemplate something of benefit being "held out" as services and "offered" to the public (*Watkin,* at paras 28, 31 and 33; *Dorey,* at para 40). Similarly, a "service" is characterized by its "transitive connotation", in which it "passes from the service provider and has been held out to the public" (Andrews/*Matson*, at para 98, citing *Gould v. Yukon Order of Pioneers*, 1996 CanLII 231 (SCC), [1996] 1 S.C.R. 571 [*Gould*] at para 55; *Dorey*, at para 67). There is "a requisite public relationship between the service provider and the service receiver, to the extent that the public must be granted access to or admitted to or extended the service by the service provider" (*Gould*, at para 55).

[46] Even if a particular interaction has the hallmarks of a "service" relationship, the source of the alleged discrimination must be determined. A "service" may have occurred if it involved the conduct of government officials or the exercise of their discretion. But if the source is government officials applying legislative criteria, it is not a "service" under section 5 (*Forward v Canada (Minister of Citizenship and Immigration*), 2008 CHRT 5 at paras 37–38; *Public Service Alliance of Canada v. Canada (Revenue Agency),* 2012 FCA 7 at paras 5–6; *Dorey*, at paras 40–41).

[47] It is well established that the Tribunal does not have the jurisdiction to decide complaints that are direct challenges to legislation. Law-making is not a service customarily offered to the public, and legislation does not in and of itself constitute a "service" *(Dorey*, at para 63, citing *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 (CanLII), [2018] 2 SCR 230 [*Andrews/Matson*], at paras 57–62).

[48] Where a statute has ambiguous language that can be interpreted in more than one way, the administering department must choose the interpretation that is most consistent with human rights law principles (*Dorey*, at para 63, citing *Beattie v. Aboriginal Affairs and Northern Development Canada*, 2014 CHRT 1 [*Beattie*], at para 102; *Hughes v. Elections Canada*, 2010 CHRT 4, at para 44, citing *Council of Canadians with Disabilities v. Via Rail,* 2007 SCC 15 (CanLII), [2007] 1 SCR 650).

[49] The Tribunal's task is to decide if a complaint constitutes a direct attack on legislation, or, conversely, if the complaint is concerned with acts of discrimination in the provision of administrative services (*Andrews/Matson*, at para 57). A tribunal considers the nature of the allegations, the wording of a complainant's submissions and the relationship between the administrative service provider and the legislative provisions they are applying (*Andrews/Matson,* at para 58).

[50] The Tribunal must characterize a complainant's allegations and determine what action, behaviour or practice they allege to be discriminatory. In this complaint, is it alleged that Health Canada decision makers engaged in specific discriminatory actions that occurred in the context of a relationship between a service provider and service recipient? Is it alleged that Health Canada's acts involved an exercise of discretion? Does the Complainant allege that Health Canada officials treated him in a discriminatory way? Or is the Complainant taking issue with the criteria in the Blood Regulations that Health Canada is required to apply? (*Dorey*, at paras 39–42).

D. Does "law making" include making regulations?

[51] Yes. Parliament's power to make rules and regulations is a "subordinate law-making power", in which a statute can set out the legislatures basic objects, and "most of the heavy lifting [gets] done by regulations, adopted by the executive branch of government under orders-in-council" (*Dorey,* at para 71, citing *Reference re Pan-Canadian Securities Regulation,* 2018 SCC 48 (CanLII), [2018] 3 SCR 189 at para 73).

[52] A government department cannot be held accountable under the Act for a regulation "simply because it has been given by Parliament the responsibility of administering

the Act on the authority of which the Regulation was validly enacted by the Governor in Council" (*Dorey,* at para 74, citing *Canada (Attorney General) v. Bouvie*r, 1998 CanLII 7409 (FCA), at para 4).

[53] It would be an absurd result if a complaint targeting legislation was considered to be outside the Tribunal's scope to decide. However, a challenge to regulations that are enacted under the same legislation, and without which the purpose and intentions of Parliament could not be carried out, was considered to be within the Tribunal's ambit and was a "service" customarily available to the public (*Dorey*, at para 74).

[54] Judicial authorities that predate the Supreme Court of Canada's decision in *Andrews/Matson* also support the conclusion that a challenge to a regulation does not engage a service under section 5 of the Act (*Dorey*, at paras 69–70, citing *Canada (Attorney General) v. Bouvier*, 1998 CanLII 7409 (FCA) at paras 1 and 4–5; *Public Service Alliance of Canada v. Canada (Revenue Agency),* 2012 FCA 7, at para 7).

[55] Mr. Karas submits that the Supreme Court of Canada's decision in *Andrews/Matson* and the Tribunal's decision in *Dorey* should be distinguished because they involve provisions in a statute and do not involve the exercise of discretion or the actions of a government official.

[56] I do not agree that these decisions should be distinguished. In *Andrews/Matson*, the Supreme Court of Canada considered a statute, whereas in *Dorey* the Tribunal applied the reasoning from that decision, as well as from Federal Court of Appeal decisions, to a regulation.

[57] The decisions establish a sound approach for determining whether a government decision maker's action is a "service" under section 5 of the Act. To apply this approach, I consider the allegations in the complaint about Health Canada's acts and the specific provisions of the Blood Regulations. I consider if the allegations in the complaint can be reasonably characterized as describing specific discriminatory acts, behaviours or practices involving discriminatory conduct that occur within a service relationship between Health Canada and Mr. Karas. I also consider if the allegations are more appropriately characterized as an application of legislative criteria to undisputed facts or, as in this case,

an application of government regulations. My determination of whether the complaint involves a “service”, or “services”, under section 5 of the Act is grounded in this analysis.

[58] The Complainant also submits that the above decisions can be distinguished because they did not involve a service that is customarily available to the public. I understand that argument as focusing primarily on the availability of the action to the public, rather than on the nature of the action itself.

[59] I do not agree that the decisions should be distinguished on that basis. The Tribunal must first consider whether any impugned action is a “service” under section 5 of the Act. If so, the service’s availability to the public can then be considered. If not, it precludes the consideration of whether the action is customarily available to the public. Without a finding that a “service” under section 5 of the Act has been provided, there cannot be a discriminatory practice under section 5 of the Act.

E. Is the complaint a direct challenge to the Blood Regulations?

(i) Health Canada’s actions as a regulator do not have “the transitive connotation” of a service provider holding out services to the public

[60] The role of a regulator is distinct from that of an organization that engages directly with the public. In the case of Health Canada as the blood system regulator, as the Blood Regulations circumscribe them, its actions do not have the “transitive connotation” of a service passing from a service provider and being held out to the public, as the Supreme Court of Canada required, in *Gould,* for the “anti-discrimination prohibitions” in human rights statutes to be engaged. The “requisite public relationship between a service provider and the service receiver” does not exist where Health Canada applies mandatory criteria to enact a blood donation policy that CBS prepared and that CBS must carry out by its engagement with prospective blood donors. Because the Blood Regulations require CBS to be in the public-facing role of operating the blood system, Health Canada, in its role of system regulator, is a step removed from holding out something of benefit as services and offering it to members of the public who wish to donate blood.

[61] In its regulatory role, Health Canada is also a step further removed from the direct-to-the-public engaged role of the government organization in *Watkin,* in which the Federal Court of Appeal decided that Health Canada had not provided a "service" under section 5 of the Act.

(ii) Analysis of the Complainant's allegations

[62] A close reading of the original complaint and the SOP is necessary on this motion to characterize the allegations of discrimination and to determine the source of the alleged discrimination.

[63] The complaint that Mr. Karas filed with the Commission alleges that the Respondent has acted in the following ways:

> A) It does not permit the Complainant to donate blood for personal use or for transfusions for other people, and it forced him to adhere to the Policy (Complaint Form, Schedule A, at 1, first and third paragraphs).
>
> B) It denied services to the Complainant, and to others, in ways that Canadians commonly believe to be their right (Complaint Form, Schedule A, at 2, first and second lines).
>
> C) It supports a policy that has the effect of prohibiting the Complainant and others from donating blood; of imposing celibacy; of presuming a positive status for HIV/AIDS; and of preventing the Complainant of giving blood like other Canadians can (Complaint Form, Schedule A, at 2, section 1).
>
> D) It contravenes the Act and fails to protect the Complainant's rights to equality (Complaint Form, Schedule A, at 2, section 2).
>
> (emphasis added)

[64] The SOP repeats the allegations and adds:

> A) It erases, rejects and denies the Complainant's satisfaction and pride (SOP, at 7, last paragraph).
>
> B) It categorizes or labels the Complainant and others as sub-normal or second-class citizens (SOP, at 10, second paragraph).
>
> C) It humiliates, embarrasses and stigmatizes the Complainant, and compromises his daily life (SOP, at 12, last paragraph).

D) It implements a policy that causes the Complainant to feel worthless or valueless (SOP, at 15, second to last paragraph).

E) It causes the Complainant to be seen as a pariah and pulls him back into the queer closet of the past (SOP at 15, last paragraph).

(emphasis added)

[65] I have considered all the allegations in the original complaint and in Mr. Karas' SOP. I find on the balance of probabilities that they cannot be reasonably characterized as referring to particular actions, behaviours or practices of Health Canada representatives who are holding out something of benefit as a service and offering it directly to prospective blood donors.

[66] For example, Mr. Karas has alleged that he is "not permitted" to donate blood and that Health Canada discriminates by "forcing him to adhere" to the Policy. However, I find that these allegations cannot reasonably be characterized as particular acts by Health Canada representatives of directly withholding the opportunity to give blood from a person who wishes to receive this benefit. No facts have been alleged to support an allegation of that nature, and, under the Blood Regulations, Health Canada cannot engage in the type of public relationship between a service provider and the service receiver that is required to be a service under the Act.

[67] Similarly, the allegations in the SOP that Health Canada discriminated against Mr. Karas by "supporting" the Policy, or that it acted "in contravention" of the Act, do not invoke specific acts that occurred in a relationship that has the "transitive connotation" of a benefit passing between a service provider and a service recipient.

[68] Other allegations refer to the ways that the Policy itself has affected the Complainant. For example, the Complainant alleges that he was "left feeling humiliated, embarrassed, stigmatized and abnormal in the eyes of society because of Health Canada's outdated policy" (SOP, at 12, last paragraph). However, this wording of the allegation makes clear that the alleged discriminatory effect is "because of" the Policy and not due to an alleged act, behaviour or practice of a Health Canada representative in the delivery of a service.

[69] Mr. Karas submits that Health Canada has not provided evidence in support of its decisions about the Policy. I do not accept this submission. As noted above, the facts in the complaint are assumed to be true on a motion to strike, and evidence to support or refute an allegation is not admissible.

[70] Mr. Karas also argues that the Respondent is required to consider the *Canadian Charter of Rights and Freedoms* and the Act when it acts or exercises discretion. However, I find that the complaint does not include allegations of particular actions or the conduct of Health Canada representatives applying discriminatory interpretations of the Blood Regulations when it approved CBS's Policy.

[71] The notion that the Act takes primacy where it is inconsistent with another statute does not inform the interpretation of the scope of section 5 of the Act. The meaning of section 5 must be determined on its own as a matter of statutory interpretation (*Andrews/Matson*, at para 94).

[72] For the above reasons, I find, on the balance of probabilities, that the allegations in the complaint cannot be reasonably characterized as referring to specific acts, behaviour or conduct on the part of Health Canada in a role of a service provider.

(iii) Analysis of the Blood Regulations

[73] As outlined above, the Blood Regulations set out the division of authority for the blood system between Health Canada and CBS, and they mandate the criteria that Health Canada must apply in its decision-making. On these critical issues related to this complaint, the Blood Regulations do the "heavy lifting" that the Supreme Court of Canada described in *Reference re Pan-Canadian Securities Regulation,* 2018 SCC 48 (CanLII), [2018] 3 SCR 189.

[74] I must consider the relationship between Health Canada and the Blood Regulations it must apply (*Andrews/Matson*, at para 58).

[75] CBS is responsible for the processing of blood, including the conducting of donor suitability assessments, and determining if a donor is unsuitable to donate blood. CBS develops the tools for assessing suitability and submits them to Health Canada for approval.

[76] The Blood Regulations also impose stringent criteria for determining a blood donor's suitability, and they require CBS to implement a policy for doing so. CBS must determine the presence of risk factors for diseases transmissible by blood, and it must conclude that a donor is unsuitable if the screening for disease risk factors indicates that human safety or the safety of blood could be compromised (Blood Regulations, sections 1, 41, 42). For any significant changes, CBS must obtain Health Canada's approval (Blood Regulations, section 9).

[77] The Blood Regulations also require Health Canada to apply stringent and mandatory criteria when it considers a change to the processing of blood. Health Canada must authorize the changes that CBS proposes if it is satisfied that the changes "will not compromise human safety or the safety of blood" (Blood Regulations, section 7). It can only impose terms if they would prevent a compromise to human safety or the safety of blood. The Blood Regulations do not permit Health Canada to consider other factors.

[78] There is no ambiguity in the Blood Regulations' language. When Health Canada considers a CBS request for a policy change, it must only consider if the change will affect human safety and the safety of blood. Consequently, unlike in *Beattie*, I find there is no opportunity for Health Canada to interpret the Blood Regulations in different ways and to choose an interpretation that is most consistent with human rights principles. The Blood Regulations do not allow Health Canada to exercise such discretion or to consider other factors.

[79] The Commission's submissions characterize the complaint as requiring Health Canada to play an additional role that the Blood Regulations do not permit. According to the Commission, Mr. Karas argues that Health Canada be required to ensure that CBS's policy for assessing the suitability of blood donors be more inclusive towards MSM without compromising safety. I agree with this characterization of the complaint and with the submission that the Blood Regulations do not permit Health Canada to play this additional

role. Doing so would require an amendment to the Blood Regulations, and such action would engage the law-making function, which is not a "service" under section 5 of the Act.

[80] I have also considered Mr. Karas' submissions. Mr. Karas submits that the complaint does not just relate to a challenge to regulations. I do not agree. First, I find that the complaint does not allege that Health Canada acted outside the role that the Blood Regulations require. Second, Mr. Karas' submissions appear to suggest that Health Canada's role of approving changes that CBS requested, of placing conditions on CBS and of CBS having to satisfy Health Canada that any proposed changes are safe, are all roles that are outside the scope of the Blood Regulations. However, as explained above, the Blood Regulations do impose these requirements on Health Canada and CBS.

[81] Mr. Karas also submits that "legislation cannot be read on its own" and that Health Canada should have made efforts to avoid discriminating against donors who are MSM. However, the Tribunal must consider what the Blood Regulations require Health Canada to do and not what the Regulations should require Health Canada to do.

[82] As noted above, the Blood Regulations included many of the Krever Commission's recommendations. Expanding upon the Blood Regulations' clear, stringent and mandatory focus on the safety of the blood supply and human safety would be inconsistent with the Krever Commission's recommendation that the safety of the blood supply system be "paramount".

[83] Based on the above analysis, I find that the "source" of the alleged discrimination that this complaint describes is in the Blood Regulations. Because law-making includes making regulations, this complaint does not challenge a service within the meaning of section 5 of the Act.

F. Is it plain and obvious that the complaint has no reasonable chance of success and should be struck?

[84] Yes. For the above reasons, I decide as follows:

A) On this motion, I have assumed the facts that the Complainant has alleged to be true. I have considered the allegations, and I find they do not impugn any

action, act of discretion, conduct, behaviour or practice of the Respondent acting in a role of a service provider.

B) The Complainant and Respondent do not have the relationship of service provider and service receiver that is required for a service to fall under section 5 of the Act.

C) The source of the alleged discrimination is in the Blood Regulations. Consequently, any alleged acts of discrimination in the complaint derive only from the authority of the executive branch of government to make regulations. Because the making of laws and regulations is not a "service" under section 5 of the Act, the Tribunal does not have the jurisdiction to decide complaints that are a direct challenge to a regulation.

D) It is plain and obvious that the allegations in the complaint do not have a reasonable chance of success, and, therefore, the complaint should be struck in its entirety.

[85] As in *Dorey*, the Blood Regulations reflect policy choices with which the Complainant may disagree, but the Tribunal does not have the authority to second-guess the choices that the executive branch of government makes by enacting regulations that the Respondent must apply. Nor does the Tribunal have the authority to expand the regulatory obligations of the blood system's regulator when the regulator does not have the type of service relationship with the Complainant that the Act authorizes the Tribunal to consider.

VI. ORDER

[86] The Respondent's motion is granted. This complaint is struck in its entirety.

Signed by

Gary Stein
Tribunal Member

Ottawa, Ontario
December 10, 2024

Canadian Human Rights Tribunal

Parties of Record

File No.: T2425/8419

Style of Cause: Christopher Karas v. Health Canada

Decision of the Tribunal Dated: December 10, 2024

Motion dealt with in writing without appearance of parties

Written representations by:

Christopher Karas, Self-represented

Jonathan Bujeau, for the Canadian Human Rights Commission

Gail Sinclair and Wendy Wright, for the Respondent