Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2020 CHRT 12

Date: May 25, 2020

File Nos: T2424/8319 & T2425/8419

[ENGLISH TRANSLATION – CORRECTED VERSION]

Between:

Christopher Karas

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Blood Services and Health Canada

Respondents

Ruling

Member: Gabriel Gaudreault

Table of Contents

I. Background to the decision

[1] This decision is to determine whether the Canadian Human Rights Tribunal (Tribunal) should deal with the two complaints (T2424/8319 and T2425/8419) filed by Christopher Karas (complainant), the first against Health Canada (HC) and the second against Canadian Blood Services (CBS), in a single inquiry.

[2] Christopher Karas filed two separate complaints with the Canadian Human Rights Commission (Commission) on August 15, 2016, against two different respondents: Health Canada and Canadian Blood Services.

[3] He alleges that he was discriminated against in the provision of services because of his sexual orientation (s. 3 of the *Canadian Human Rights Act* [*CHRA*]), contrary to s. 5 of the *CHRA.*

[4] More specifically, he states that the creation and implementation of policies by HC and CBS for male blood donors who have had sex with men (MSM policies) are discriminatory.

[5] The Tribunal's chairperson, David L. Thomas, has assigned me under subsection 49(2) of the *CHRA*, as a member, to inquire into Christopher Karas's two complaints. It is important to note that when it referred the complaints to the Tribunal, the Commission did not exercise its discretion under subsection 40(4) of the *CHRA* to deal with the two complaints together. Consequently, they have been dealt with separately since the inquiry into the complaints began.

[6] On March 6, 2020, I asked the parties in both complaints, including both respondents, to provide me with their representations on whether to hold a single inquiry into the two complaints.

[7] The parties had an opportunity to submit detailed representations and replies to the Tribunal's queries, which has allowed me to make an informed decision on the matter.

[8] For the following reasons, I order that the Tribunal deal with Mr. Karas's complaints in a single inquiry.

II. Issues

[9] The Tribunal has already set out the issues in its letter dated March 6, 2020.

[10] The main issue is the following:

(1) Should the Tribunal deal with the two complaints in a single inquiry?

[11] The other questions are accessory to, or a corollary of, the Tribunal's basic question as to whether to deal with the complaints together. They are concerned with determining how the Tribunal should proceed with and manage the complaints if they are not dealt with in a single inquiry.

(2) The following questions arise should the Tribunal not hear the complaints in a single inquiry:

a. How will the Tribunal's findings of fact and law in the first inquiry impact the second inquiry?

b. How should the Tribunal manage and conduct the inquiry into each complaint?

i. How should the Tribunal manage the evidence in the two inquiries given that they may involve similar, if not identical, witnesses and documents?

ii. Should the evidence from the first inquiry be added to the record of the second inquiry?

c. Should a respondent not named in one complaint be entitled to intervene or participate in the other complaint?

III. Law – Single Inquiry into Complaints

[12] Above all, the parties do not dispute that the Tribunal has the discretion to deal with complaints referred to it by the Commission together or to sever them (ss. 48.9(1) *CHRA* and s. 50 *CHRA*; also see the following decisions: *Gullason and Attaran v. Tri-agency Institutional Programs Secretariat* [*Gullason*], 2018 CHRT 21; *Lattey v. Canadian Pacific Railway* [*Lattey*], 2002 CanLII 45928 (CHRT); *Cruden v. Canadian International Development Agency & Health Canada and Wheatcroft v. Canadian International*

Development Agency [*Cruden*], 2010 CHRT 32; *Kanagasabapathy v. Air Canada*, 2013 CHRT 29).

[13] I would add that it also seems clear to me that the issue of whether complaints should be the subject of a single inquiry is very different from the addition of parties. Simply put, the addition of parties means the act of adding a party to a complaint, while dealing with complaints together merely means instituting a single inquiry into these complaints. In other words, both complaints survive and remain the same in terms of their respective parties and particularities, but become the subject of a single procedure and inquiry.

[14] Now that this has been clarified, my colleague, Member Colleen Harrington, recently reiterated in her decision in *Gullason*, at paragraphs 50 and following, that the factors developed by the Honourable Anne Mactavish in her decision in *Lattey*, "are a useful way to evaluate whether it is in the public interest to proceed with a single inquiry or separate inquiries".

[15] To determine whether to order a single inquiry into complaints, the Tribunal must balance various factors, including the following (*Lattey*, above, at paragraph 13):

(1) The public interest in avoiding a multiplicity of proceedings, including considerations of expense, delay, the convenience of the witnesses, the repetition of evidence, and the risk of the Tribunal reaching inconsistent findings;

(2) The prejudice to the respondents that could result from a single hearing, including the lengthening of the hearing for each respondent and the potential for confusing evidence before the Tribunal that does not necessarily concern each respondent; and

(3) Whether there are common issues of fact or law.

[16] The *Lattey* factors remain a benchmark or guide for the Tribunal in determining whether some complaints should be dealt with in a single inquiry.

[17] That said, it is also well established that these factors are not exhaustive and that a case-by-case approach should be preferred (*Cruden*, at paragraph 15). Indeed, in my opinion, the particularity of the complaints before the Tribunal requires an approach based on the circumstances of each case, allowing the Tribunal some latitude, an opportunity, to consider other factors that might be relevant.

IV. Parties' positions and analysis

[18] This Tribunal is a quasi-judicial administrative tribunal, whose jurisdiction is rooted in its enabling statute, the *CHRA*. Subsection 48.9(1) of the *CHRA* requires the Tribunal to conduct proceedings as expeditiously as the requirements of natural justice and the rules of procedure allow.

[19] In order to make a quick, effective decision in the cases involving each party, I will concentrate on the arguments that are necessary, essential and relevant to making my decision (*Turner v. Canada (Attorney General)*, 2012 FCA 159, at paragraph 40; *Constantinescu v. Correctional Service Canada*, 2020 CHRT 3, at paragraph 54).

[20] The Commission and the complainant believe that the two complaints should be dealt with in a single inquiry. Even though Mr. Karas did not file representations in response to the Tribunal's questions, he communicated through the Commission's lawyers on April 17, 2020, that he was in agreement with his complaints being dealt with together. On May 11, 2020, his representative also confirmed that he would not submit a reply.

[21] Conversely, the respondents, CBS and HC, are both opposed to the complaints being dealt with together.

A. Common questions of fact or law

[22] I will deal with these factors first because they will provide useful, instructive insight into the other factors and aspects of this decision.

[23] First, we need to understand who the respondents in Mr. Karas's complaints are. The parties filed fairly detailed representations, giving the Tribunal a proper grasp of who the respondents are.

[24] Without going into too much detail, it is enough to understand that Canadian Blood Services is a non-profit organization that, among other things, is responsible for collecting, processing, storing and distributing blood and its components across Canada (except Quebec). CBS therefore seems to be an "operating" agency, in the sense that it is on the ground and takes care of blood-related operations.

[25] I also understand that Health Canada is an entity in charge of administering and enforcing a wide range of acts and regulations covering everything from consumer products to environmental pollutants and toxic substances. HC is a regulatory entity in that its role is to develop and implement policies to protect the health and safety of Canadians, which includes blood establishments such as CBS.

[26] Now that we have a better understanding of the identities of both respondents, it should be noted that many of the arguments of HC and CBS are very similar. Both essentially rely on their respective roles and the differences between them, and, consequently, the differences between the two complaints, in order to justify separate inquiries.

[27] More specifically, HC finds that while some of the facts and questions in the two complaints may be similar, the issues are fundamentally different depending on the respondent in the complaint.

[28] According to HC, in the complaint against it, the issue is whether, in fulfilling its role as a regulatory agency, HC is providing a service within the meaning of section 5 of the *CHRA*. HC also wonders whether it could be held liable for a discriminatory practice allegedly engaged in by an independent organization such as CBS.

[29] HC further finds that in the complaint against CBS, the issue before the Tribunal is rather whether the opportunity to give blood is a service within the meaning of section 5 of the *CHRA*.

[30] CBS shares this opinion in that it believes that the legal analysis required to determine whether the opportunity to give blood is a service should be performed by CBS alone, and not HC. CBS confirms that it is the entity that collects blood. In other words, CBS is the operator, and HC, as the regulatory entity, does not interact with donors.

[31] In contrast, the Commission believes that Mr. Karas's complaints involve facts, questions of law and potential remedies that are necessarily interconnected.

[32] The Commission alleges that the complaints have basically arisen from the same set of facts, namely, the screening imposed on male blood donors who have or who have had sex with men. The Commission adds that any remedies ordered by the Tribunal would also engage both respondents, in their respective roles. Consequently, if the Tribunal found this practice to be discriminatory, it should hear HC and CBS together on the feasibility of potential remedies.

[33] Interestingly, the Commission clarifies, by the same token, that Mr. Karas filed two identical complaints with the Commission, changing only the respondents' names. The Commission explains that only one respondent can be entered on its complaint form. In other words, if a person wishes to file a complaint arising from the same facts against two different respondents, they have to do so by completing two separate forms. The Commission confirms that Mr. Karas filed two identical complaints on two separate forms, against two respondents, CBS and HC.

[34] The Commission adds, moreover, that Mr. Karas filed the same statement of particulars in both proceedings.

[35] The representations of both HC and CBS make it clear that both draw a clear line between the two cases, especially with respect to what they consider to be the main, key issue in their respective cases.

[36] Both place great importance on their respective roles, their independence and the distinction between an "operator" and a "regulatory entity". They also place great importance on what should be defined as a "service" within the meaning of section 5 of the *CHRA*.

[37] When I read the statements of particulars Mr. Karas filed in both cases, which are indeed identical, it is clear to me that his representations essentially concern both entities, without distinction.

[38] Furthermore, my review of the statement of particulars CBS has already filed in its case, and the parties' arguments regarding the possibility of dealing with the complaints together, leads me to believe that the clear line, the rigid distinction, HC and CBS are attempting to draw does not seem quite as rigid as they claim.

[39] While it is true that analyzing section 5 of the *CHRA* and characterizing what is a "service" within the meaning of the *CHRA* will be one of the issues the Tribunal will have to address, it is not the only issue in this case, in my opinion. While CBS's and HC's representations on the concept of "service" may seem different given their respective roles, I believe that a number of other interconnections and interrelationships in the file may justify a single inquiry.

[40] Again, the issue in both cases is not limited solely to determining whether a service was provided within the meaning of the *CHRA*. The key analysis the Tribunal has to perform with regard to human rights and alleged discriminatory practices was developed in *Moore v. British Columbia (Education)*, 2012 SCC 61.

[41] It is recognized that the Tribunal has to perform a three-prong analysis:

(1) Does Mr. Karas have a prohibited ground of discrimination under the *CHRA* (in this case, sexual orientation)?

(2) Did Mr. Karas experience an adverse impact contrary to section 5 of the *CHRA*?

(3) Is there a link between the adverse impact and the prohibited ground of discrimination?

[42] Determining whether this situation involved a "service" within the meaning of the *CHRA* is just one of the many factors to consider. It is not the main issue.

[43] The other elements to consider in the complaints are essential, in my opinion, and just as important. The respondents are merely focusing the dispute on what they consider to be the main issue in the cases.

[44] Furthermore, and according to Mr. Karas's statement of particulars and the parties' representations about the possibility of dealing with the complaints together, the other aspects of the complaints, such as the prohibited ground of discrimination and the adverse impact, seem very similar if not identical to me. Mr. Karas's complaints arise from the same set of facts, and it appears that the two respondents are equally involved because they are both, in their own way, involved in the alleged discrimination.

[45] It is clear for me at this stage that no one can presume what the Tribunal's decision on the concept of "service" will be. The respondents have made a considerable effort to concentrate their arguments on what they describe as being the heart of the matter. They make interesting arguments and will be able to present them to the Tribunal when the time is right.

[46] I am indeed in agreement with the Commission when it writes that hearing the two respondents together could, contrary to what the respondents allege, put a broader perspective on their respective roles.

[47] I also agree with the Commission when it states that what predominates in this case are the requirements for male blood donors who have or who have had sex with men. Consequently, despite the differences noted by HC and CBS, HC's and CBS's respective actions in association with the MSM policy and its requirements form a whole, and the whole arises from the same set of facts.

[48] Hearing both respondents in the same inquiry will not prevent them from presenting evidence and making representations on what they do and what they do not consider to be a "service" within the meaning of the *CHRA*. In presenting this evidence, they will necessarily take into account each organization's respective roles. I do not find that this will violate the principles of natural justice or fairness given that both respondents will have an opportunity to respond to the allegations made against them in the complaints and to be heard (subsection 50(1) *CHRA*).

[49] The Commission adds that, in its opinion, HC's and CBS's respective defences seem to have the same foundation. CBS relies on paragraph 15(1)(g) of the *CHRA* in its statement of particulars. Without going into detail, it argues that the measures set out in the MSM policy were implemented for public health and safety reasons.

[50] It is true that before the Tribunal determines whether or not the complainant was discriminated against, the respondents may submit a defence under the *CHRA*. Section 15 of the *CHRA* is relevant here. If they so wish, HC and CBS can later present evidence establishing *bona fide* justification (paragraphe 15(1)(g) *CHRA*).

[51] If a respondent is able to establish that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on it, considering health, safety and cost, the Tribunal cannot make a finding of discrimination. In simple terms this means that if there is justification under section 15 of the *CHRA*, and this justification is proven, there is no discrimination (see the language of subsection 15(1) *CHRA*: "It is not a discriminatory practice if […]").

[52] Even though HC's statement of particulars is not yet available, CBS has indicated in various places, in both its statement of particulars and its representations in view of this decision, that, in carrying out its mandate, HC is also guided by the principles protecting the health and safety of Canadians.

[53] HC has also stated that the scientific evidence to be filed by CBS in support of its MSM policy is, at this stage, assumed to be the same as its own. In other words, I understand that if the requirements of CBS's MSM policy are justified for health and safety reasons, reasons that are based on science, HC assumes at this stage that it would provide the same scientific basis.

[54] CBS's and HC's arguments therefore suggest that the foundations of their respective defences under paragraph 15(1)(g) and subsection 15(2) of the *CHRA* are very similar. At the very least, I can assume from their representations that their defences are interconnected. It appears that the two respondents will be guided by similar health and safety concerns for Canadians in the implementation and application of the MSM policy, on the basis of the same scientific evidence.

[55] I therefore find that these factors, which are necessarily interconnected in the two complaints, weigh in favour of a single inquiry.

[56] That being said, CBS argues that hearing evidence on HC's regulatory role is not relevant in its case given its role as an operator and will not help in determining whether it provides a service within the meaning of the *CHRA*. It further submits that hearing evidence that is specific to HC will confuse matters and will negatively affect its ability to respond to the allegations against it.

[57] CBS states that HC has no control over its operations; it merely approves or rejects CBS policies. The job of HC is to monitor CBS operations, and it does not participate in its operations or control them, directly or indirectly. CBS adds that, in some cases, it makes representations on specific topics to HC.

[58] CBS further believes that any evidence to be presented on HC's regulatory role is irrelevant to its case and that hearing this evidence will cause it prejudice. CBS's evidence will focus more on CBS's role as an operator in the blood collection, processing, storage and distribution system; in contrast, HC's evidence will concentrate on HC's regulatory role.

[59] HC's reasoning is similar in that HC claims not to be CBS's collaborator, but rather a regulatory agency. According to HC, the two organizations' distinct roles and independence are important in keeping Canada's blood supply safe and weigh in favour of separate inquiries. HC also relies on a decision of the Federal Court, *Soullière v. Health Canada and Canadian Blood Services* [*Soullière*], 2017 FC 686, at paragraph 30, which holds that the *CHRA* does not require regulatory agencies to automatically be named as a party in complaints against individuals or entities under their purview.

[60] Right away, I do not find this argument by HC, which it bases on *Soullière*, to be very persuasive or relevant. I have read the *Soullière* decision cited by HC, and Justice Diner does not say that regulatory agencies can **never** be named as respondents in a complaint against individuals or entities under their purview. In this case, Mr. Karas decided to name HC as a respondent; he did not do so automatically, but it was an option he chose, or a choice he made, when he filed his complaints.

[61] Now, my goal in this decision is not to rule on the substance of the complaint or to decide whether HC is the right respondent. HC will have an opportunity to submit its arguments, representations and defence, and the Tribunal will decide on the outcome of the complaint at the appropriate time.

[62] That said, the Commission feels that HC and CBS have to work together in managing blood in Canada and that their respective roles and involvement are essential. Based on the Commission's understanding of the facts, even though the MSM policy was developed by CBS, the fact remains that it had to be approved by HC. Without this approval, the MSM policy could not have been implemented.

[63] The Commission adds that in CBS's statement of particulars, CBS claims that it cannot amend its policy unilaterally, without HC's participation. It also argues that HC asked CBS to conduct a two-year review after the MSM policy was implemented before it could make any changes to the policy. CBS must also report on this review to HC. Also according to the Commission, CBS claims that it complied with HC's requirements. Finally, it submits that HC funds CBS research in connection with the MSM policy.

[64] Still with respect to CBS and HC's argument that the clear distinction between these two entities justifies a separate inquiry, as explained previously, CBS and HC put a great deal of emphasis on their respective, distinct roles in their arguments. They submit that it is important to preserve these distinct roles.

[65] I understand HC's and CBS's arguments. But it is true that a review of the parties' representations in view of this decision, and also of CBS's and the Commission's statements of particulars, reveals that HC also plays a part in the MSM policy and its implementation.

[66] In its statement of particulars, CBS clearly states that the MSM policy is not the result of its own initiative. In other words, there has to be another player so that the MSM policy can be enforced and implemented: HC's approval is required. This, in my opinion, is a form of interrelationship or interconnection between the two entities. CBS's and HC's actions are part of the same sequence of actions, part of the same set of facts.

[67] The Commission has persuaded me that the complaints are sufficiently interconnected and that there are enough questions of fact and of law to justify a single inquiry.

[68] I also do not agree that hearing the complaints together would blur the distinction between CBS's and HC's respective roles, as both respondents allege. The Tribunal has no trouble making this distinction, just as it would between a union and an employer or an employer and an employee. Every party has a different role, and the Tribunal is fully able to distinguish between the parties involved in the disputes before it.

[69] Moreover, hearing the two respondents in the same inquiry and understanding the system as a whole and the roles of each respondent will give the Tribunal not only great insight into, but also a better understanding of, the facts surrounding Mr. Karas's complaints.

[70] Even though HC and CBS attempted to distinguish between their respective roles in what can only be described as a rigid manner, it is my opinion that the two complaints contain a number of other questions of fact and of law that are similar enough and that warrant being dealt with together.

[71] Now to a final argument made by CBS, that of section 15 of the *Canadian Charter of Rights and Freedoms*, S.C. 1982, Schedule B to the Canada Act 1982 (UK), 1982, c. 11 [*Canadian Charter*]). According to CBS, Mr. Karas is alleging in his statement of particulars that his right to equality under section 15 of the *Canadian Charter* was violated, which for CBS highlights a sharp difference between the questions of law raised in the two complaints before the Tribunal given that, unlike HC, which is a government organization, CBS is not subject to the *Canadian Charter*.

[72] The Commission finds that CBS's *Charter* argument has no real basis. In its opinion, Mr. Karas's statement of particulars does not seem to be asking the Tribunal to deal with a violation under section 15 of the *Canadian Charter*. It adds that the Tribunal does not have the jurisdiction to deal with a violation of the right to equality set out in this provision, noting that, while the Tribunal may consider the *Canadian Charter*, it has to do so as part of the analysis under the *CHRA*.

[73] While the parties' arguments are interesting, I will not rule on the merits of Mr. Karas's argument and the potential violation of section 15 of the *Canadian Charter*. That is not the purpose of this decision. Having said that, I do not believe that CBS's argument that the Tribunal may have to dispose of a *Charter* issue weighs in favour of the complaints being heard separately.

[74] The *Lattey* test on common issues of fact and of law does not mean that all questions of fact and of law must be common in their entirety. That would be nonsense in my view as it would considerably limit, if not extinguish, any possibility of dealing with complaints together in a single inquiry as soon as there is a question of fact or of law that is not common.

[75] For example, some cases before the Tribunal that were dealt with together involved employers and employees, employers and unions, and even different complainants who had experienced a situation specific to them, but who filed a complaint against the same respondent. There are particularities specific to each of the parties involved, but the questions of fact and of law are, in other words, common enough to justify a single inquiry.

[76] The Tribunal has to review the issue as a whole. This is an exercise that, in each case and its circumstances, requires weighing and balancing the parties' various interests with those of the public, as well as other relevant factors.

[77] When I look at the parties' arguments together, I find that even though each complaint has certain particularities specific to its respondent, there are enough interconnected and interrelated common issues of fact and of law that support dealing with Mr. Karas's complaints in a single inquiry.

B. Prejudice and public interest

[78] There is little to say on public interest. Administrative tribunals and courts of justice are necessarily guided by the idea that the public, broadly speaking, benefits from judicial proceedings not being multiplied and their being simplified and shortened, as it does from evidence not being repeated and costs being saved. It is also in the public's interest to

minimize inconvenience for witnesses and the risk of administrative tribunals and courts of justice arriving at inconsistent decisions or findings.

[79] The Commission believes that it is in the public's interest to deal with both complaints in a single inquiry and not debate the matter twice. According to the Commission, the documentary evidence and testimony for each complaint are potentially relevant to both proceedings: they are similar, if not identical. As noted previously, the Commission also feels that the questions of fact and of law, as well as the remedies, are just as interconnected.

[80] The Commission further notes that the parties will not be prejudiced by a single inquiry into the two complaints. Were there any prejudice, it argues, the prejudice caused to the complainant and the public by a separate inquiry into each complaint would outweigh that which a single inquiry into both complaints would cause to the respondents. The Commission also believes that hearing the complaints together would enhance the Tribunal's general understanding of the two cases.

[81] Both HC and CBS find that a single inquiry into their complaints is neither in the public interest nor in their own interests: dealing with the complaints together would cause them prejudice. According to HC and CBS, dealing with the complaints together would be inefficient, would not save time and would cost them more.

[82] More specifically, CBS believes that the evidence to be presented at the hearing will be very different for each respondent. As stated in the previous section, CBS believes that the two entities' operations are distinct and that the documentary evidence and witnesses will therefore be different, given that their respective cases will focus on their respective roles.

[83] HC makes the same arguments in this regard, submitting repeatedly that the analysis under section 5 of the *CHRA* would not be the same, that its evidence would be limited because of its role as a regulatory entity and that CBS's evidence would be much longer.

[84] I have already determined that the complaints are interconnected and similar, if not identical, in a number of other aspects. Hearing the two respondents in a single inquiry appears to me to be in the public interest. The Tribunal will not have to assess the evidence or to perform its legal analyses twice. It will also provide a coherent, logical understanding of the case as a whole and of the respondents' respective involvement. Mr. Karas's complaint arises from the same set of facts, and CBS's and HC's actions are part of this general set of facts.

[85] CBS also notes that it is a non-profit organization. Involving HC in its proceedings, with the latter being a regulatory agency, would require CBS to invest more human, organizational and financial resources (including some public funds), which is not in its interests.

[86] The concept of prejudice, be it financial, human or organizational, cannot be simply hypothetical (as opposed to real prejudice). In support of its representations, CBS did not file any concrete evidence of potential prejudice. I am sensitive to the fact that CBS is a non-profit organization, but the prejudice—the financial, human and organizational effects—was not established.

[87] Moreover, and as I noted previously, I am rather of the opinion that dealing with the case in a single inquiry and hearing the evidence as a whole will generally benefit both parties.

[88] CBS submits that a single inquiry into the complaints will bring confusion in the assessment of the respective allegations against the two respondents. In other words, it fears that the evidence involving one respondent will wrongly be held against the other respondent, and vice versa. CBS alleges that, in a single inquiry into the complaints, it would also be difficult for the Tribunal to separate the evidence and to decide which evidence is admissible for which respondent, which, in its opinion, would deprive it of a fair hearing.

[89] In this regard, I find that the Tribunal is able to avoid the confusion worrying CBS. The Tribunal is able to review complaints in a single inquiry in full awareness that the

respondents and their roles are different. Indeed, determining whether evidence is admissible or relevant to complaints is one of the Tribunal's jobs.

[90] CBS and HC will therefore enjoy full participation in the single inquiry into the complaints. They will definitely have an opportunity to present their defence on all aspects and allegations pertaining to them in the case.

[91] Lastly, I am also certain that HC and CBS will be able to help the Tribunal with the evidence to be filed at the hearing and to present their arguments on whether the evidence applies to their respective situations. It is also, in my opinion, reasonable to hear the complaints in a single inquiry, and the respondents' concerns about procedural fairness and violations of the principles of natural justice are not persuasive at this stage. On the contrary, there are no breaches, and everyone's rights will be protected.

[92] On another topic, HC feels that it plays a limited role in the complaints filed by Mr. Karas and believes that its hearing will be shorter. Consequently, CBS's involvement and participation, and the administration of evidence that is not relevant to the complaint against it, would prolong the proceedings and increase costs.

[93] HC has not yet filed its statement of particulars in the case concerning it. The Tribunal has only seen a small part of HC's representations and the defences HC is planning to raise. I repeat, the goal of this decision is not to determine each respondent's level of involvement.

[94] That being said, based on the parties' representations, it seems that HC definitely plays a part. What remains to be determined is the extent of its involvement. I believe that hearing the complaints in a single hearing will make it possible to properly define the respondents' roles and to better understand the dynamic or interrelationship that seems to exist. Unlike HC, I cannot conclude from the outset that its role is limited and that, consequently, the inquiry into its complaint will be shorter. Such a conclusion seems hasty. HC will have an opportunity to submit its arguments and to make its defence, including on what it sees to be its involvement in Mr. Karas's allegations, when the time is right.

[95] HC also submits that in analyzing prejudice under *Lattey*, the Tribunal must clearly do so from the respondents' perspective. Here, the respondents are arguing that dealing with the complaints together would result in additional delays and costs for the respondents.

[96] I do not share HC's opinion. Nothing in my reading of *Lattey* suggests that prejudice should be assessed **solely** from the respondents' perspective. The Honourable Anne Mactavish did not draw such a conclusion anywhere, on the contrary. In paragraph 15, the Honourable Anne Mactavish writes as follows:

> Further, **any potential prejudice to the respondents is, in my view, outweighed by the prejudice to the complainant and the public** that would result from requiring the complainant to go through two separate hearings, having to testify twice about the same allegations, and presumably having to call many of the same witnesses to repeat their testimony. Finally, two separate hearings would also expose all of the parties to the potential risk of inconsistent findings with respect to the same underlying facts.
>
> [Emphasis added]

[97] The Honourable Anne Mactavish therefore not only considered the potential prejudice to the respondents, but also considered the prejudice caused to the complainant, and even to the public.

[98] I would add that in *Lattey*, the Commission had referred the complaints to the Tribunal together. It is clearly the Commission's prerogative to do so (subsection 40(4) *CHRA*). Respondents Canadian Pacific Railway and Murray Douglas had requested separate inquiries. Here, the Tribunal itself has asked the parties to make submissions on this subject. In my opinion, just like the Honourable Anne Mactavish, the Tribunal must look at the issue as a whole and weigh the interests of all parties and the risk of prejudice to them, the public interest and any other factors deemed relevant in the circumstances.

[99] Here, the Commission has also raised the fact that not dealing with the complaints together would result in greater prejudice to Mr. Karas and the public than it would to the respondents. Disregarding the potential prejudice, be it to the public, the Commission or Mr. Karas, of a possible single inquiry into the complaints is unreasonable. I believe that

the Tribunal must look at the prejudice that would result to each party in order to weigh the various effects and finally determine whether the complaints should be dealt with together or not.

[100] Based on the representations submitted to me by the parties and the documents before me, I am not certain that, as CBS and HC submit, it would be more efficient to hold separate inquiries. I am not satisfied that it would necessarily mean less time and costs.

[101] Even though CBS and HC have been creative, by suggesting alternatives to the Tribunal to minimize the effects of separate inquiries, I do not believe these alternatives resolve all the difficulties that might arise in the cases.

[102] For example, they proposed that the two cases be heard one after the other. Moreover, the documentary evidence and the transcripts of the testimony in the first case could be added to the record of the second case. The witnesses at the first hearing would only have to testify on necessary points at the second hearing. Less time would therefore be needed for oral testimony. Some witnesses might not have to testify at all at the second hearing.

[103] Contrary to what HC and CBS allege, it is my opinion that taking the evidence from one case and importing it into another is risky, in terms of both the evidence and procedure. It would necessarily make administering the case, the procedure and the evidence more complex, which is contrary to the requirements of the *CHRA* (subsection 48.9(1) *CHRA*).

[104] For example, it is delicate and risky to work with testimony transcripts, just as it is delicate and risky to add evidence from one record to another. The respondents have not contemplated that contradictory evidence might be presented in the second case. Witnesses might contradict one another. The Tribunal might have to deal with objections to contradictions. The parties and the Tribunal would also need time and energy to organize the documentary and oral evidence that would be added to the second record. This does not mean that the parties would all agree to the same measures. The Tribunal would also have to deal with the fact that the parties might disagree on evidence being used in either inquiry.

[105] It seems much more logical, simpler and more efficient to me to deal with the complaints together so as to be able to administer the documentary evidence and to hear the witnesses in a logical order, without having to rely on transcripts and evidence imported from another record.

[106] This is the spirit that the *CHRA* requires us to adopt, to ensure the simplest, most expeditious proceedings possible as the requirements of natural justice and fairness allow.

[107] As I see it, adopting the respondents' suggestions would just make matters more complicated, creating extra costs, delays and formalities. Also, any potential prejudice to the respondents definitely outweighs the potential prejudice to the public in general, but also to the complainant and the Commission, who will have to participate in two hearings. I therefore find that a single inquiry into the complaints is justified.

[108] On another matter, HC believes that since I am the member assigned to inquire into the two complaints, I would therefore have a better understanding of the evidence, which would minimize the risk of inconsistent findings.

[109] In my view, if the parties feel that it is beneficial for their complaints to be heard by the same member, this is an even greater reason for dealing with their cases together as it will automatically guarantee the same member and therefore ensure a better understanding by the Tribunal of the evidence as a whole. Consequently, I find that HC's argument is, quite unintentionally, just as much, if not more, justification for a single inquiry.

[110] Moreover, when the Tribunal asked whether the respondents should be allowed to intervene in the complaint against the other respondent if the proceedings were separate, HC submitted that the evidence and the respondents' positions were different enough for there likely to be no need for the respondents to intervene in each other's complaints. HC believes that if its interests were at stake in the CBS complaint, the Tribunal member would have the jurisdiction to ask it to reply. In contrast, the Commission argues that if the hearings were separate, HC's intervention in the complaint against CBS would, in any case, be inevitable. Consequently, holding two separate hearings would not necessarily reduce the resources invested by HC.

[111] In my opinion, and based on the parties' representations on this motion, and the statements of particulars of Mr. Karas, the Commission and CBS, it seems much more efficient and practical to me to deal with the complaints together. CBS and HC will thus be able to respond to the allegations concerning them and defend their interests at the same inquiry. In other words, in a single inquiry, all the parties will be together at the same place and will be able to respond immediately to the aspects concerning them at the same time, in both their documentary evidence and testimony. This will make it unnecessary to manage a potential intervention from a third party wishing to protect its interests. A single inquiry will improve and bolster procedural fairness and natural justice for all, and inevitably optimize the quality of the evidence.

[112] I would add that the Tribunal's job is also to ensure that it understands the evidence before it. If the Tribunal has questions for the parties or any of the witnesses, they will all be able to answer immediately. Separate inquiries would oblige the parties and the Tribunal to isolate any remarks, questions or intervention in the first proceedings that might affect the second proceeding, which is not desirable in proceedings that should be informal and expeditious.

[113] In conclusion, the respondents did not satisfy me that the proposed alternatives would address the Tribunal's concerns about clashing outcomes, the effects and the substantial risks that could result from separate inquiries into the complaints. I therefore find that it is justified to deal with the two complaints in a single inquiry.

C. Other elements to consider

(i) Co-defendants and interconnections in other procedures

[114] The Commission notes that in *Canadian Blood Services v. Freeman* [*Freeman*], [2010] O.J. No. 3811, in which the MSM policy was challenged under the *Canadian Charter*, CBS and HC were co-defendants. The Commission states that the Ontario Superior Court of Justice's analysis in that case reveals the same interplay and interconnections between the issues. It therefore believes that two separate decisions in the two complaints would be barely conceivable in the circumstances.

[115] HC believes rather that *Soullière* determined the opposite, that is, that the complaints against HC and CBS are not inextricably linked.

[116] I appreciate the Commission's and HC's arguments, but they are not very persuasive at this stage. The reason for this is relatively simple: the matter is before the Tribunal now, and not being investigated by the Commission or heard by the Ontario Superior Court of Justice.

[117] The Tribunal's proceedings do not necessarily involve all the same elements as the *Freeman* and *Soullière* decisions. There are substantial differences, and the Tribunal cannot draw hasty conclusions from what might have happened in those other cases.

[118] These decisions are interesting, and I imagine that the parties will be able to guide the Tribunal with respect to what they consider to be relevant in each decision when the time is right.

[119] That said, HC and CBS having been co-defendants in *Freeman* or their investigations having been performed separately in *Soullière* is of little importance. The Tribunal has to analyze whether the parties should be heard together in the particular case of Mr. Karas's complaints based on the specific aspects of the complaints before it. And I find that, considering the particular circumstances of the complaints and the analysis and weighing of the various factors dealt with in the current decision, the complaints will be heard in a single inquiry.

(ii) Complaints at different stages before being dealt with together

[120] On a different note, the Commission, in contrast to HC, submits that the proceedings are not at such different stages. The two proceedings are still at the disclosure stage. While the statements of particulars have been filed in the complaint against CBS, the Commission considers that once HC has filed its statement of particulars, the two cases will be roughly at the same stage. This can happen quickly.

[121] HC in turn argues that the complaints have reached different stages because in the complaint against CBS, the statements of particulars and replies have already been filed.

[122] Even though technically, the complaints are indeed at different stages, I do not believe that this argument is determinative in the circumstances. I fully agree with the Commission that, in practice, it will be relatively simple to synchronize the complaints again. The Tribunal rightly asked the parties, at the very beginning of the proceedings, to submit their representations on the possibility of dealing with the complaints together so as to avoid that the inquiries into the complaints not be synchronized.

(iii) CBS complaint determinative of HC complaint

[123] HC argues that the complaint against CBS should be dealt with first since the Tribunal's findings on this complaint could be decisive for the one against HC. More specifically, HC submits that if the complaint against CBS is not substantiated, the complaint against HC, in its role as a regulatory body, could not be substantiated either. HC bases this analysis on *Soullière*, above, at paragraph 14, in which Justice Diner made this observation.

[124] I fully share the Commission's opinion that nothing is certain. HC is assuming what the Tribunal's decision will be on the basis of the Federal Court's line of thought in *Soullière*. This argument concerns the merits of the complaint. At this stage, no one can assume how the Tribunal will decide. Nothing therefore allows me to conclude that if the complaint against CBS was unsubstantiated, the complaint against HC would also be found to be unsubstantiated. HC will have every right to make this kind of argument, but it will be up to the Tribunal to determine whether it has merit and to dispose of it at the appropriate time.

[125] In addition, the decision in *Soullière* was made in a specific context, in which the Commission chose not to refer the complaints against HC and CBS to the Tribunal. This is its prerogative, and this type of decision can be submitted to the superior courts for review.

[126] The Federal Court therefore performed its analysis in a very specific context, which is not the current context. Mr. Karas's complaints were referred and now fall under the jurisdiction of the Tribunal.

[127] It is not the role of the Commission or, with respect, the Federal Court to determine whether discrimination occurred when the Federal Court reviews decisions by the Commission not to refer complaints to the Tribunal.

[128] The Parliament of Canada explicitly conferred this decision-making power on the Tribunal (subsections 53(1) and (2) *CHRA*). It falls upon the Tribunal to determine whether there is discrimination upon inquiry into a complaint. Consequently, HC's argument at this stage of the proceedings is certainly neither determinative nor persuasive.

V. Decision

[129] For all those reasons, I order that M. Karas's complaints against Canadian Blood Services (T2424/8319) and against Health Canada (T2425/8419) be heard together in a joint inquiry.

Signed by

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario
May 25, 2020

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T2424/8319 & T2425/8419

Style of Cause: Christopher Karas v Canadian Blood Services and Health Canada

Ruling of the Tribunal Dated: May 25, 2020

Motion dealt with in writing without appearance of parties

Written representations by:

James Hill, for the Complainant

Sasha Hart and Brian Smith, for the Canadian Human Rights Commission

Mark Josselyn and Craig J. Stehr, for the Respondent Canadian Blood Services

Gail Sinclair and Samantha Pillon, for the Respondent Health Canada