

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2021 CHRT 2

**Ruling dated:** January 7, 2021

**Reasons dated:** January 21, 2021

**File numbers:** T2424/8319 and T2425/8419

**Between:**

**Christopher Karas**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Canadian Blood Services and Health Canada**

**Respondents**

**Ruling**

**Member:** Gabriel Gaudreault

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## **I. Background of the motion**

[1] This is a decision of the Canadian Human Rights Tribunal to determine the scope of the complaints filed by Christopher Karas (the “Complainant”) against Health Canada and Canadian Blood Services (“CBS”) (the “Respondents”).

[2] This is the second interlocutory decision in this case; the first ordered a single inquiry into Mr. Karas’s two complaints (see *Karas v. Canadian Blood Services and Health Canada*, 2020 CHRT 12 [*Karas 2020 CHRT 12*]).

[3] With respect to this motion, Health Canada already raised certain concerns and objections in March 2020, with respect to the scope of the complaint as identified by the Complainant and the Canadian Human Rights Commission (the “Commission”) in their respective statements of particulars.

[4] In July 2020, following *Karas 2020 CHRT 12* issued by the Tribunal on May 25, 2020, Health Canada formally objected to the scope of the complaint. As a result, during the summer of 2020, the parties undertook discussions aimed at resolving the issue, without having to proceed with the filing of motions. Their efforts were unsuccessful, and the Tribunal imposed time limits on the parties to file submissions on this issue.

[5] All parties have now had an opportunity to make representations, and for the following reasons, the Tribunal grants the motion of CBS and Health Canada, with certain clarifications.

## **II. Issue**

[6] The issue is relatively straightforward: the Tribunal must establish the scope of Mr. Karas’s complaint.

[7] More precisely, the Tribunal must determine whether the inquiry into the complaint extends to the following situations:

- Women who have had sex with men who have had sex with other men (“women who have had sex with MSM”); and

- Certain transgender individuals who have had sex with men.

[8] Another situation also appears to be problematic but has not been addressed in depth by all parties. This is whether the inquiry into the complaint also covers organ and tissue donations. For the sake of clarity and in order to avoid any possible confusion, the Tribunal will deal with this question in a subsidiary manner.

### III. Law on scope of a complaint

[9] The parties have not challenged the Tribunal's jurisdiction to expand the scope of the complaints referred to it, and as a corollary, to limit it (see, for example, *Canada (Attorney General) v. Parent*, 2006 FC 1313 at paras 30, 41, 43; *Constantinescu v. Correctional Service Canada*, 2018 CHRT 17 at para 14; *Casler v. Canadian National Railway Company*, 2017 CHRT 6 at paras 7–11 [*Casler*]).

[10] The *Canadian Human Rights Act* (the "CHRA") is the legislation that governs complaints of discrimination within the legislative authority of Parliament (section 2 CHRA).

[11] It is therefore the CHRA that establishes the mechanisms for dealing with discrimination complaints (*Canada (Human Rights Commission) v. Lemire et al.*, 2012 FC 1162 [*Lemire*]; *Canada (Human Rights Commission) v. Warman*, 2012 FC 1162 (CanLII), at para 55 [*Warman*]; *Oleson v. Wagmatcook First Nation*, 2019 CHRT 35, at para 29 [*Oleson*]).

[12] The Commission, which is a separate entity from the Tribunal, plays a key role in dealing with discrimination complaints. It is the Commission that receives complaints (subsection 40(1) CHRA). Without ignoring its other powers and important mandates, for purposes of this decision, it is sufficient to understand that the Commission has the power to investigate complaints that have been filed with it (subsection 43(1) CHRA).

[13] As such, Parliament has not given the Tribunal the power to investigate complaints under the CHRA. Rather, the Tribunal has jurisdiction to institute an inquiry into complaints that have been referred to it by the Commission (subsections 44(3), 49(1) and 50(1) CHRA).

[14] In other words, it is the referral of the complaint by the Commission, following its investigation, that creates the Tribunal's jurisdiction to institute an inquiry into the complaint. The Tribunal can act only when the complaint is referred to it (see *Lemire* and *Warman*, above; *Oleson* at para 35; *AA v. Canadian Armed Forces*, 2019 CHRT 33 at para 59 [AA]; *Connors v. Canadian Armed Forces*, 2019 CHRT 6 at para 28 [Connors]; *Cook v. Onion Lake First Nation*, 2002 CanLII 61849 (CHRT) [Cook]).

[15] Conversely, the Commission does not have jurisdiction to institute inquiries into complaints. Nor does it have adjudicative authority. Its function is to screen complaints (*Desgranges v. Canada (Administrative Tribunals Support Service)*, 2020 FC 315 at para 29 [Desgranges]). As such, when it deems that an inquiry into a complaint is warranted having regard to all the circumstances, it **may refer** the complaint to the Chairperson of the Tribunal (subsections 44(3) and 49(1) CHRA). The Chairperson of the Tribunal will institute an inquiry by assigning a member to inquire into the complaint (subsection 49(1) CHRA; *Oleson* at para 32).

[16] For this reason, the Commission's role is often described as that of an administrative gatekeeper for complaints under the CHRA.

[17] When a complainant files a complaint with the Commission, they do so in a form acceptable to the Commission (section 40(1) CHRA). The complainant describes the events that they believe led to the alleged discriminatory practices. As the Tribunal understands it, the complaint is submitted on a form designated for this purpose (*AA* at para 56).

[18] As noted above, once the investigation process is complete, the Commission may decide to refer the complaint to the Tribunal if the circumstances warrant (subsection 49(1) CHRA). It does so in the form of a letter to the Chairperson of the Tribunal (*Connors* at paras 42, 43).

[19] As indicated by the Commission in paragraph 26 of its submissions, and as understood by the Tribunal, the Commission issues two separate letters: one setting out the Commission's decision, which is sent to the parties, and one that is sent to the Chairperson of the Tribunal confirming the referral for inquiry. It is on the basis of this second letter that

the Tribunal acts (*Itty v. Canada Border Services Agency*, 2013 CHRT 33 at paras 47 and 48 [*Itty*]).

[20] If no limitations or exclusions are expressed by the Commission in this letter, and unless otherwise specified, the Tribunal assumes that the complaint is referred for inquiry in its entirety. This letter, in a sense, therefore establishes the scope of the complaint to be inquired into by the Tribunal (*Murray v. Canada (Human Rights Commission)*, 2014 FC 139 at para 67 [*Murray*]; *Itty* at paras 47 and 48; *Connors* at paras 42 and 43; *AA* at para 59; *Casler* at paras 7–11).

[21] The Commission's letter to the Chairperson of the Tribunal is not the only tool for determining the scope of the complaint, however. The Statement of Particulars filed in the Tribunal record is essentially the procedural vehicle that forms the basis of the proceeding, in that it sets out the terms of the inquiry or, in other words, what the inquiry is about (rule 6(1) of the Tribunal's *Rules of Procedure* (03-05-04)); *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 at para 11 [*Gaucher*]; *AA* at para 58).

[22] The Statement of Particulars clarifies, refines and elaborates on the allegations of discrimination by the complainant and the Commission (*Gaucher* at para 11; *Casler* at para 9; *AA* at para 59).

[23] It is therefore important to understand that the original complaint filed at the Commission stage, as well as forms such as the complaint summary and other administrative documents, do not constitute pleadings in the Tribunal's quasi-judicial process (*Casler* at paras 8 and 9).

[24] However, the substance of the Statement of Particulars must reasonably respect the factual foundation and original allegations of discrimination as set out by the complainant in the original complaint (*AA* at para 59; *Gaucher* at para 10; *Connors* at para 25; *Casler* at para 7).

[25] But when the Tribunal receives a motion to modify, amend, expand or narrow the scope of the complaint, it must use other tools, materials or documents in order to decide the matter.

[26] I believe it would be useful to quote here para 10 of *Casler*, which provides a useful overview of the Tribunal's role in deciding motions such as those filed by Health Canada and CBS:

The role of the Tribunal in a motion such as the present is to **consider the documentation and submissions regarding the scope or amendment sought; determine what the substance of the complaint is; and, decide whether the definition of scope or the amendment sought is connected to the substantive complaint and required to enable the Tribunal to inquire into the real issues in dispute.** In doing so, it is not the Tribunal's role to reconsider the Commission's investigation or its decision to refer a complaint in light of the investigation. That jurisdiction rests exclusively with the Federal Court (see *Waddle v. Canadian Pacific Railway and Teamsters Canada Rail Conference*, 2016 CHRT 8 at paras 32-38).

[Emphasis added]

[27] The original complaint and the Commission's letter to the Chairperson of the Tribunal are therefore among the materials and documents that enable the Tribunal to define the scope of a complaint (*AA* at paras 58 and 59; *Casler* at para 7; *Gaucher* at paras 9–13). Moreover, the letters sent by the Commission cannot be disconnected from the history and general context of the complaint (*Oleson* at para 38; *Murray* at para 67).

[28] With respect to the report by the Commission's investigator, the Federal Court has long recognized that the Commission may rely on and even adopt the investigator's report as its own reasons in support of its decision to refer the complaint to the Tribunal (*Desgranges* at para 33). As such:

When the Commission adopts an investigator's recommendations and provides no reasons or only brief reasons, the Courts have rightly treated the investigator's Report as constituting the Commission's reasoning for the purpose of the screening decision under section 44(3) of the [CHRA].

(*Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at para 37)

[29] Therefore, if the Commission has relied on the investigation report to reach its decision, this is all the more reason for the Tribunal to consult that report with a view to understanding the scope of the complaint.

[30] In my view, the situation is as follows: the Tribunal may consider the documents and information made available to it in order to develop an overall understanding of the complaint, its history and the general context. This allows the Tribunal to determine the scope of the complaint before it.

[31] It is with these principles in mind that the Tribunal renders this decision.

#### **IV. Positions of the parties**

[32] The Tribunal will refine its analysis by considering the arguments of the parties that it considers necessary, essential and relevant to its decision (*Turner v. Canada (Attorney General)*, 2012 FCA 159 at para 40; *Constantinescu v. Correctional Service Canada*, 2020 CHRT 3 at para 54).

##### **A. Canadian Blood Services**

[33] The Tribunal can summarize CBS's key arguments as follows.

[34] CBS's principal contention is that Mr. Karas's complaint does not include allegations regarding women who have had sex with MSM, or certain trans individuals who have had sex with men, nor does it include the prohibited grounds of discrimination of "sex" or "gender identity or expression."

[35] CBS alleges that in his Statement of Particulars (the "SOP") filed on February 5, 2020, Mr. Karas set out his understanding of the scope of the complaint that was referred to the Tribunal. Specifically, CBS states that Mr. Karas refers only to the prohibition on donating blood imposed on him as a result of the deferral period and the criteria set out in the policy on men who have had sex with men (the "MSM policy"). CBS therefore argues that the Complainant did not expand the scope of his complaint beyond these allegations.

[36] On the other hand, CBS believes that in the Commission's SOP, which was also filed on February 5, 2020, the Commission included other issues not covered by Mr. Karas's complaint. CBS is of the opinion that the Commission is attempting to expand the scope of the complaint to situations involving women who have had sex with MSM as well as certain



trans individuals who have had sex with men. The Commission refers to these situations in paragraphs 1, 18, 24, 25 and 78 of its SOP, as well as in paragraph 82, where it requests additional disclosure of documents.

[37] CBS alleges that these additions create new complaints that were not anticipated and were not referred to the Tribunal for inquiry. CBS adds that Mr. Karas's original complaints and the investigation that was conducted by the Commission did not address those allegations.

[38] CBS understands that Mr. Karas's original complaints allege discrimination under section 5 of the CHRA in that Mr. Karas cannot donate blood because of his sexual orientation, which he alleges is adverse differential treatment compared with that afforded heterosexuals. CBS also maintains that Mr. Karas did not include the prohibited grounds of "sex" and "gender identity or expression" in his complaints, focusing rather on the ground of "sexual orientation." Specifically, Mr. Karas relied on his personal experience as a homosexual man who is prevented from donating blood due to the implementation of the MSM policy.

[39] CBS adds that at the Commission's investigative stage, the investigator also focused her analysis on this specific issue. She investigated whether Mr. Karas had experienced adverse differential treatment on the basis of his sexual orientation as a result of the MSM policy adopted by CBS.

[40] The grounds of "sex" and "gender identity or expression" were not included in the investigation, nor did Mr. Karas raise these grounds at that stage. CBS points out that although the investigation report mentions the MSM policy, which also imposes a deferral period on women who have had sex with MSM, that issue was not specifically investigated by the investigator. CBS believes that this was not the focus of the analysis and was only mentioned by the investigator in passing.

[41] With respect to the issue of trans individuals, CBS points out that neither the complaint nor the investigation made reference to this particular situation.

[42] CBS adds that the Commission's letter of September 25, 2019, which was sent to CBS to inform it that the complaint would be referred to the Tribunal, also outlines the scope of the complaint. Specifically, the letter states:

At issue is whether the Respondent's blood donor deferral policy which is applied to gay men is discriminatory on the basis of sexual orientation.

[43] In addition, CBS argues that the Tribunal would be overstepping its jurisdiction if it were to analyze the new allegations concerning women and trans individuals. It maintains that consideration of these additional allegations by the Tribunal would represent a circumvention of the Commission's referral process and its screening or gatekeeping function, which would be contrary to the legislative scheme of the CHRA.

[44] CBS adds that when the Tribunal is assessing whether there is a link or nexus between additional allegations and the original complaint, the Tribunal must also consider the prejudice caused to the respondent. In its view, adding these allegations would be prejudicial to CBS and would open the door to unanticipated issues, which would be contrary to procedural fairness.

[45] As it stands, CBS points out that no materials or representations regarding women and trans individuals have been filed by the parties in the Tribunal record. Given that these allegations were not raised before the complaint was referred to the Tribunal, CBS maintains that it was not notified of these new allegations. As a result, it has not had the opportunity to respond to them and has not had the benefit of an impartial investigation by the Commission and the conciliation process, thereby compromising its right to a fair process.

[46] CBS also believes that adding these allegations will further delay the Tribunal process and will necessarily lead to more evidence being added to the inquiry, including significant scientific evidence, which would also be prejudicial to CBS.

[47] In this regard, CBS argues that the scientific evidence that is at issue in cases of women who have had sex with MSM and certain trans individuals who have had sex with men is different from that which will be presented with regard to homosexual men.

[48] More precisely, it explains that for these situations, as opposed to that of Mr. Karas, the selection criteria are based on epidemiological and scientific data and a review of international scientific experience, which are different and may vary from one situation to another. As a result, the approvals sought by regulators are different for these three distinct situations.

[49] In this regard, CBS explains that the selection criteria for female blood donors who have had sex with MSM are based on a different risk model. This is one of the reasons the deferral period for a man who has had sex with another man is three months, while for women it is always twelve months.

[50] Similarly, CBS adds that for trans blood donors, new standardized screening criteria were introduced in 2016 and have been approved by Health Canada. These criteria are specific to trans individuals and take into account other factors unique to them. Blood component processing algorithms may change, for example, in response to pregnancy history, the presence of hormone therapy, the gender of the donor at the time of selection by CBS and the donor's legally recognized gender.

[51] As a result, CBS believes that the addition of these allegations would increase costs to the parties, result in additional expert witnesses, force the disclosure of additional documents, and ultimately increase the amount of hearing time required.

[52] On the other hand, CBS asserts that Mr. Karas would not be prejudiced if these allegations were not included in the complaint, since the Tribunal would still be able to hear the allegations in the complaint that directly concern him. In addition, CBS believes that the complaint could be heard more expeditiously if its scope were not expanded, which would be beneficial to all parties.

[53] CBS raises a final argument, which is Mr. Karas's lack of standing. Specifically, CBS argues that since the Complainant is neither a woman nor a trans person, he is not personally affected by the selection criteria that apply to these individuals. In other words, CBS asserts that Mr. Karas is not the appropriate person to support these additional allegations. It would therefore be inappropriate for the Tribunal to consider allegations regarding these women and trans individuals who want to donate blood, without actually

hearing from them. CBS submits that Mr. Karas cannot speak on behalf of these individuals or groups of individuals.

## **B. Health Canada**

[54] Health Canada's key arguments may be summarized as follows.

[55] Health Canada argues, as does CBS, that Mr. Karas's complaint should not be expanded to include the situation of women who have had sex with MSM, or trans individuals who have had sex with men.

[56] According to Health Canada, the complaint that was referred to the Tribunal by the Commission is limited to the issue of whether the MSM policy discriminates against homosexual men on the basis of their sexual orientation. In other words, the core of Mr. Karas's complaint concerns the deferral period established by CBS's MSM policy, which applies to men who have had sex with other men.

[57] Health Canada's involvement in this complaint stems from the fact that it is a regulatory body with an oversight role over the blood collection and distribution system in Canada.

[58] Health Canada explains that during the discussions between the parties that took place in the summer of 2020 with a view to resolving the issues related to the scope of the complaint, the parties agreed that organ and tissue donation, as well as other policies affecting trans individuals who want to donate blood and that are not related to the MSM policy, are not included in the scope of the complaint.

[59] Like CBS, Health Canada is of the view that the Tribunal should not hear these issues as they were not referred to it by the Commission. It reiterates that the Commission is the entity that screens complaints under the CHRA. Health Canada states that since the role of the Commission is to decide whether the complaint should be referred to the Tribunal for inquiry, the Tribunal is bound by the scope of the complaint so referred.

[60] It goes on to state that the essence of the original complaint must therefore be respected. A complainant cannot expand the scope of the complaint before the Tribunal by

introducing new allegations that would constitute entirely new complaints. These allegations will not have been investigated by the Commission.

[61] Health Canada argues that the limits of the complaint referred to the Tribunal are clearly described in the Commission's decision of September 2019. As such, the complaint referred by the Commission relates to the blood donation deferral period for homosexual men as set out in CBS's MSM policy. The Tribunal should therefore only determine whether this policy discriminates against homosexual men on the basis of their sexual orientation.

[62] Health Canada's position is therefore that the situations involving women and trans individuals were not referred by the Commission, as they do not arise from Mr. Karas's complaint.

[63] Health Canada adds that additional evidence would have to be presented to the Tribunal as these other situations affecting certain women and certain trans individuals do not have the same foundation as the MSM policy.

[64] Health Canada goes on to agree with CBS that Mr. Karas does not have standing to act on behalf of these women and trans persons. It states that in order to discharge his burden of proof, the Complainant must show that because of one of his personal characteristics that is protected by the CHRA, he has been adversely affected with respect to section 5 of the CHRA. As Mr. Karas claims in his complaint that his personal characteristic is sexual orientation, this characteristic does not automatically apply to situations involving these women and trans persons. Health Canada therefore claims that the Complainant would not be able to testify on behalf of these women and trans individuals with respect to their personal experiences in the blood donation process.

[65] Finally, Health Canada states that although the MSM policy appears to have the same effect in all three situations with regard to blood donation (men who have had sex with other men, women who have had sex with MSM, and trans individuals who have sex with men), the risks of HIV transmission are not necessarily the same.

[66] Health Canada states that although the MSM policy may indeed apply to these three situations, the reasons for its application are not the same. Therefore, multidimensional

scientific evidence pertaining to each group and each situation would have to be presented to the Tribunal. As the science does not overlap, Health Canada asserts that each situation would have to be analyzed separately.

[67] As such, it argues that expanding the complaint to include these elements would result in lengthier proceedings and an increase in costs and necessary resources, as well as require the disclosure of additional documents.

### **C. Commission**

[68] The Tribunal can summarize the Commission's key arguments as follows.

[69] First, the Commission is of the view that it did not limit the scope of the complaints it referred to the Tribunal, and that neither the decisions transmitted to the parties nor the letter sent to the Chairperson of the Tribunal supports such a conclusion. The Commission believes that the complaints were referred in their entirety.

[70] The Commission argues that CBS's MSM policy also applies to women who have had sex with MSM, as well as certain trans individuals who have had sex with other men. These categories of people would therefore also be subject to a deferral period similar to that imposed on Mr. Karas.

[71] As such, it believes that the reasoning behind the MSM policy and the deferral period is based on the perception that men who have had sex with other men constitute a group at higher risk of HIV transmission.

[72] In the Commission's view, therefore, a review of the MSM policy as it applies to these three groups of individuals (women who have had sex with MSM, and men and certain trans individuals who have had sex with other men) is sufficiently related to the original complaints filed by Mr. Karas.

[73] In this regard, the Commission specifies that in his original complaints, the Complainant not only refers to his own experience, but also mentions the situation of these women who have had sex with MSM and makes reference to the broader LGBTQIA community. It argues that the expansive nature of the allegations contained in Mr. Karas's

original complaints provides for establishing a link between these three groups of individuals and the original complaint.

[74] The Commission adds that with respect to the complaint against CBS, the investigation report refers to the situation involving women who have had sex with MSM. In fact, the Commission points out that CBS stated in its representations at the Commission stage that the deferral period under the MSM policy applies to both men who have had sex with other men and women who have had sex with MSM.

[75] The Commission is further of the view that when it investigates, it is under no obligation to investigate every single issue raised by the parties involved; it need only be satisfied that, under the circumstances, the complaint warrants referral to the Tribunal for inquiry.

[76] The Commission adds that the application of the MSM policy to certain women and certain trans individuals stems from the same rationale as its application to homosexual men, namely the higher risks of HIV transmission for men who have sex with other men.

[77] The Commission clarifies that it is not asking the Tribunal to review all policies affecting women and trans individuals who wish to donate blood. Rather, it believes that in light of the link between some individuals in these groups and the MSM policy, the Tribunal could also consider the imposition of the deferral period on these other groups.

[78] The Commission argues that it has the option of adding the ground of “sex” in its Statement of Particulars, despite the fact that it was not specified in Mr. Karas’s complaint forms. The Commission believes that this ground should be added because the MSM policy applies to men who have sex with men and not women who have sex with women, given the stereotypes and perceived risks that apply to homosexual men in particular.

[79] With respect to the prejudice being argued by the Respondents, the Commission does not believe that these additions would cause further delays or significantly increase costs for the parties.

[80] In this regard, the Commission notes that since the situations of women who have had sex with MSM and certain trans individuals who have had sex with men are affected by

the MSM policy by extension, it does not believe that the evidence that will be presented at the hearing will be substantially different if these additions are considered.

[81] It also notes that the request for additional disclosure made in its Statement of Particulars does not cover all policies that apply to trans individuals or women who donate blood. Since these groups appear to be affected, in certain cases, by the implementation of the MSM policy, which is rooted in the risks associated with sex between men, the Commission does not consider the additional disclosure to be significant.

[82] Finally, the Commission is of the view that the CHRA allows a person to file a complaint even if they are not a victim of the alleged discriminatory practice. The Commission therefore has discretion to investigate even in the absence of victim consent.

[83] In this case, the Commission submits that it had the discretion to investigate Mr. Karas's complaints on behalf of these groups of people. The Commission argues that the concept of standing under the CHRA should be interpreted liberally. The Commission does concede, however, that it is not certain that Mr. Karas actually filed his complaints on behalf of these groups of individuals, or that he has a personal and direct interest in acting on their behalf.

[84] The Commission nevertheless points out that Mr. Karas may be affected by, among other things, the manner in which the deferral period under the MSM policy impacts certain women and certain trans individuals, in that it stems from harmful stigmas and stereotypes regarding homosexual men.

[85] The Commission also argues that these groups of individuals—certain women and certain trans individuals—could ask the Tribunal to allow them to intervene in the inquiry, or could be called as witnesses at the hearing. It notes that if the Tribunal determines that there is insufficient evidence at the hearing regarding the impacts on these groups, it could always dismiss these specific elements of the complaints.



#### **D. Complainant**

[86] Mr. Karas provided the Tribunal with only a brief e-mailed response to the motions from CBS and Health Canada. While it is both his choice and his right, he did not provide detailed and specific representations in response to those of the Respondents.

[87] Nevertheless, he agreed with the Commission's submissions and indicated that he consented to the inquiry not including organ and tissue donation. He does believe, however, that the issue of donations by trans individuals should be included in the Tribunal's inquiry.

[88] This calls for an observation. Mr. Karas is unclear when he refers to "donations by trans individuals", as the term "donation" can cover both blood donation and organ and tissue donation. But given his statement that the inquiry should not include organ and tissue donations, his comment would seem to refer specifically to blood donations from trans individuals.

[89] As such, he agrees to limit the scope of the inquiry to blood and plasma donations, and asks that the complaint proceed without further submissions as to its scope, as the inquiry has already been delayed, since filing the complaints in 2016.

[90] He is of the view that the issues raised do not exceed the scope of the inquiry before the Tribunal. Again, this calls for comment. It is not clear to the Tribunal what the Complainant is referring to here. The Tribunal might infer that when he refers to issues not exceeding the scope of the complaint, he is referring to situations affecting women who have had sex with MSM and certain trans individuals who have had sex with men.

[91] Finally, Mr. Karas asserts that if the Tribunal were to decide to consider the issues of organ and tissue donation and donations by trans individuals, it would have to do so in the context of separate complaints.

#### **E. Replies of CBS and Health Canada**

[92] The principal argument in the CBS reply is that contrary to the assertions of the Commission and the Complainant, the scientific and epidemiological evidence regarding the

risks associated with the situations of women who have had sex with MSM and certain trans individuals who have had sex with men is not based on the same research and scientific data.

[93] Consequently, each situation is based on specific scientific data pertaining to each group of individuals in a specific way. CBS maintains that it is not a matter of perceptions or opinions, but of facts and data.

[94] CBS therefore argues that the scientific evidence to be presented to the Tribunal must be complete in order to avoid the Tribunal drawing conclusions based on partial and incomplete evidence. CBS argues that in order to reflect the complexity of these issues, the documentary and expert evidence that will be presented to the Tribunal must be augmented if these two categories of persons are added. CBS submits that it would be prejudicial to prevent it from presenting the scientific data and research that would enable it to justify the specificities of these additional situations.

[95] On another front, CBS believes that the mere fact that Mr. Karas referred to the situation of these women and the LGBTQIA community in his original complaints, and that there is a mention in the Commission's investigation report to that effect, does not mean that there is a sufficient nexus to allow for additional allegations. According to CBS, Mr. Karas mentioned these situations in passing, in order to provide context or background to his allegations, and did not intend to include them in his complaints.

[96] CBS also argues that the Commission, in its letter to the parties, could not have been clearer as to the allegations that were referred to the Tribunal. In this regard, CBS submits that the Commission clearly stated that the issue in this case is whether the deferral period set out in CBS's MSM policy, which applies to homosexual men, is discriminatory on the ground of sexual orientation.

[97] Lastly, CBS reiterates that Mr. Karas lacks standing to represent women and trans individuals, even though they may be affected by the MSM policy. CBS submits that the Tribunal has jurisdiction to refuse to expand the inquiry to include these two groups of people, even though the concept of standing is given a liberal interpretation in the CHRA.

[98] CBS submits that it would be inappropriate to expand the scope of the inquiry on the basis of these groups' hypothetical involvement or intervention. It states that neither of the groups has intervened in the complaints so far, and it believes that the groups' intervention in the Tribunal's inquiry could lengthen and complicate the process and hearing.

[99] Health Canada states that, although the MSM policy may affect women who have had sex with MSM and certain trans individuals who have had sex with men, the underlying science for each group is substantially different.

[100] Like CBS, Health Canada does not believe that the stigmatization of homosexual men is a sufficient factual basis for expanding the complaint to include the other two groups. Health Canada states that the MSM policy must be analyzed on the basis of the science specific to each affected group, according to its specific circumstances.

[101] Consequently, Health Canada believes that adding these allegations would require the filing of additional documentary and testimonial evidence, which would be onerous and time-consuming for both Health Canada and CBS, bearing in mind also that their mandates are different. Health Canada submits that, if the two groups are added to Mr. Karas's complaints, the Tribunal must give it the opportunity to present full scientific evidence to explain how the MSM policy applies differently depending on the group.

[102] Health Canada also shares Mr. Karas's concerns regarding delays. Indeed, it believes that possible delays are an argument against adding the two groups and the other prohibited grounds of discrimination to the inquiry.

[103] Health Canada also believes, as does CBS, that Mr. Karas referred to women and trans individuals in his original complaints in an attempt to demonstrate the other impacts that the MSM policy could have, without making these elements the basis of his complaint.

[104] Moreover, Health Canada views the Commission's letter and the referral to the Tribunal in the same light as CBS: the complaint that the Commission specifically referred to the Tribunal concerns the deferral period imposed under the MSM policy that allegedly discriminates against homosexual men by reason of their sexual orientation.

[105] Lastly, Health Canada submits that it would be unfair for Mr. Karas to speak on behalf of trans individuals and women who may be affected by the MSM policy. It further submits that the Complainant may testify only about his own experience and not about the experience of the other groups (certain women and certain trans individuals). Accordingly, Health Canada submits that to include these other groups in the complaint without their consent would be unfair and inequitable because it would take away their voice on a very sensitive issue.

[106] Health Canada ends by stating that, in this case, the public interest would be better served if the discussions were limited to Mr. Karas's situation and his experience as a homosexual man; Mr. Karas lacks standing to represent the other groups. Health Canada asserts that the Commission's proposal regarding the other groups' potential involvement in the inquiry or the addition of witnesses from those groups is, in effect, unfeasible. Moreover, Health Canada believes that it would result in procedural unfairness for the Respondents because of the lack of notice as to the scope of the complaints against which they must defend themselves.

## **V. Analysis**

### **(i) Issues concerning certain women and certain trans individuals**

[107] First, I must point out that the issue I must decide is sensitive and highly complex. As a human rights tribunal, the Tribunal is very mindful of the allegations and representations made by Mr. Karas, the Commission, Health Canada and CBS. Nevertheless, when a motion is filed with the Tribunal, the Tribunal must decide the issues on the basis of the parties' representations and the evidence they have presented.

[108] That said, I must now decide whether the scope of the complaints includes the situation of women who have had sex with MSM and certain trans individuals who have had sex with other men.

**(a) Insufficient nexus**

[109] The parties' representations and the evidence before me suggest that the MSM policy may apply to and affect other groups of individuals who are not MSM.

[110] In other words, and as Health Canada conceded in its submissions, the Tribunal understands that the implementation of the MSM policy may, as a corollary, affect other groups of people wishing to donate blood, such as women who have had sex with MSM and certain trans individuals who have had sex with men. In this specific context, a deferral period to donate blood may therefore be imposed.

[111] However, although there may at first glance be a kind of connection or nexus between the complaints of Mr. Karas against CBS and Health Canada and the cases of certain women and certain trans individuals, I am not satisfied that this nexus to the original complaint is sufficient in and of itself. I am not persuaded that these elements were fundamentally contemplated when Mr. Karas filed his original complaints.

[112] It is settled case law that, for the Tribunal to allow an addition or amendment, whether it is to add a prohibited ground of discrimination or a discriminatory practice, there must be a sufficient nexus between the addition and the factual foundation of the original complaint (*AA* at para 59; *Gaucher* at para 10; *Connors* at para 25; *Casler* at para 7).

[113] I do not believe that Mr. Karas actually intended to include these women and trans individuals in his complaints. I also do not believe that he actually intended to advocate on their behalf.

[114] I agree with the submissions made by CBS and Health Canada. On the basis of Mr. Karas's original complaints, I cannot conclude that Mr. Karas wished to include women and trans individuals. Moreover, I agree completely that a mere mention that the MSM policy may also apply to women who have had sex with MSM or a simple reference to the LGBTQIA community does not directly support the conclusion that Mr. Karas was asking for these issues to be dealt with by the Commission and ultimately by the Tribunal if the complaints were referred.

[115] In reviewing Mr. Karas's complaints, the investigation reports, the Commission's letters to the parties, the parties' submissions during the Commission's investigation and the submissions received for this motion, I note that the focus is on Mr. Karas's experience and the impact of the MSM policy on him by reason of his sexual orientation. I believe that this is the crux of the complaints that have been filed.

[116] The Tribunal understands that Mr. Karas's two complaints against Health Canada and CBS have the same basis, namely the implementation of the MSM policy and the deferral period it imposes on MSM. In particular, it appears that the MSM policy was created specifically for the situation in which a man has had sex with another man.

[117] To be clear, the Tribunal certainly does not intend to simplify the issue, science or data, or any prejudices, stigmas or stereotypes that may exist in this regard.

[118] Nevertheless, it is clear to me from the submissions of Health Canada and CBS that the deferral period imposed by the MSM policy stems from the risks of transmission of certain diseases, risks that may be higher in the case of MSM.

[119] The condition that two men have had sex suggests, by extension, that the risks that the MSM policy seeks to control may also exist for other groups of people, such as women who have had sex with MSM and certain trans individuals. To put it another way, a woman who comes to donate blood would not be asked whether she has had sex with a man who may have had sex with another man if it did not matter. The MSM aspect is an essential part of the question that a female blood donor must answer.

[120] That said, Health Canada and CBS have explicitly stated that other risk factors may also be considered for the other groups, depending on the circumstances, in terms of applying the MSM policy.

[121] I realize that the policy also applies to the situation of certain trans individuals, specifically trans women who have not undergone sex reassignment surgery and trans men who have undergone sex reassignment surgery. It appears that their situation is considerably more specific and depends on each person's circumstances.

[122] Even so, the Tribunal understands that the basis remains inextricably linked to the application of the MSM policy, which concerns sex among men and the associated risks.

[123] The Commission's letter to the Chairperson of the Tribunal does not state the scope of the complaint. However, the Commission's letters to the parties are more specific and include more details on the matter in dispute, the issue, and the core of Mr. Karas's complaints. Health Canada and CBS, as Respondents, received these letters, which clearly establish the Commission's decision.

[124] The letters to the parties specifically refer to the MSM policy and the deferral period it imposes on homosexual men by reason of their sexual orientation. The Commission wrote that the issue is whether the deferral period set out in the MSM policy discriminates against homosexual men by reason of their sexual orientation.

[125] It is through this letter that the parties know or understand what has been decided by the Commission. This is the argument Health Canada and CBS put forward in their submissions: these letters explain to them the nature of the Commission's decision, which has been referred to the Tribunal.

[126] To now allege that Mr. Karas's complaints also include new alleged victims (certain women and certain trans individuals) as well as new prohibited grounds of discrimination (sex and gender identity or expression) when this had not been anticipated raises, in my view, a serious issue of natural justice and procedural fairness.

[127] I find that the Commission's letters to the parties are crystal clear, setting out what has been referred to the Tribunal, under what authority and on what grounds. These letters must be understood in the context of the proceedings that preceded them, including the original complaints, the investigation and the parties' submissions. The Tribunal must consider the context and history of the complaints as a whole to determine whether there is a sufficient nexus between the additions and the original complaints (*AA* at para 59; *Gaucher* at para 10; *Connors* at para 25; *Casler* at paras 7 and 10).

[128] Looking at Mr. Karas's original complaints, the forms, the investigation reports and the parties' representations at each stage, I believe that that is where the Commission's decisions take on their full meaning.

[129] The Commission argues that there is no limitation on what it refers unless it clearly states that the scope of the complaint is limited. Nevertheless, I do not believe that, where the Commission has not expressly limited the scope of the complaint or explicitly excluded some elements of the complaint, the Tribunal has carte blanche as to what may be included in its inquiry. This would be nonsensical and contrary to the process set out in the CHRA and to the role of the Commission in dealing with complaints.

[130] The Tribunal points out that the Canadian Human Rights Commission plays a major and important role in the complaint process for discrimination in the federal sphere. Although the Commission is not an adjudicative body (*Desgranges* at para 30; *Georgoulas v. Canada (Attorney General)*, 2018 FC 652 at para 87), it is the gatekeeper for complaints and the starting point for all Canadians who believe they have experienced discrimination that falls within the jurisdiction of the Parliament of Canada.

[131] The Tribunal is inextricably bound by the function and role of the Commission. It is the Commission that receives complaints, investigates them and determines whether they may be referred to the Tribunal for inquiry (subsections 44(3) and 49(1) CHRA). The Commission also determines what is referred to the Tribunal. Without this process, without this decision, the Tribunal cannot act.

[132] In its September 2019 letters to the parties, the Commission took the time to write and clarify its decision and the issue being referred.

[133] The Tribunal is perplexed by the Commission's position that it never intended to limit the issue because otherwise it would have done so expressly. Why take the time to clarify what its decision is about in letters to the parties, if not to clarify what is at issue? In a way, the Commission refines the issue, the legal debate: it explains what the issue is about and why it feels it is appropriate for the Tribunal to conduct an inquiry into the matter.



[134] The argument that the entirety of the complaints has been referred because there are no express limitations is not very helpful in my view. What, then, is “the entirety of the complaint”? Conversely, can it not be said that the Commission’s decision clarifies the issues and scope of the complaint being referred to the Tribunal?

[135] I do not wish to interfere with the prerogatives of the Commission; however, I believe the principles of natural justice and procedural fairness require that parties, including respondents, understand the Commission’s decision and the reasons supporting it. Moreover, it should be noted that parties may file for judicial review of the Commission’s decision.

[136] The Tribunal further notes that respondents have the Commission’s letter and reasons with them when they begin the process before the Tribunal, following the Commission’s referral. When the inquiry begins, that is what is in their minds, that is what they understand has been referred to the Tribunal.

[137] How can the Respondents make a defence if the scope of the referral is unclear to them? How can the Respondents defend themselves if, as the Commission contends, “the whole” complaint is referred to the Tribunal, but the Commission has not expressly excluded elements or made limitations? How can this “whole” be understood if it is not defined?

[138] Statements of particulars must deal with the factual foundation of a complaint that has been referred by the Commission. I realize that complaints may evolve over time, that they are open to refinement and amendment, and that it is the statements of particulars that define the terms of the inquiry (*Gaucher* at para 11; *Casler* at para 9; *AA* at para 59). However, the parties may not include in their statements of particulars totally new, unanticipated elements that lack a sufficient nexus or connection to the original complaint.

[139] I find that with respect to the additions made by the Commission and Mr. Karas in their statements, the new elements were not anticipated and were entirely new allegations involving new victims and new grounds of discrimination. These new elements were not included in Mr. Karas’s original complaints and were not, on the basis of the evidence, central or fundamental to his complaints.

[140] Presenting these additions at this stage and in this manner circumvents the process established by the CHRA, given that the Respondents could not anticipate the additions and present their arguments before the Commission. The Respondents did not have a chance to exhaust the mechanisms provided for under the CHRA, such as filing applications asking the Commission not to deal with the complaint or applying for judicial review of the Commission's actions and decisions.

[141] The Tribunal's reasons supporting this decision do not mean that motions to amend, expand or limit the scope of the complaint can never be presented by the parties. For example, it is difficult to anticipate whether filing a complaint with the Commission will result in future retaliation. It is true that complaints can evolve and that facts can be added and refined.

[142] In this case, the Commission and the Complainant have added elements that are not of the same nature as what is described in the preceding paragraph: they have added victims and prohibited grounds of discrimination. These additions do more than refine the complaint or add context; they are not merely a manifestation of a complaint evolving over time and space. No, they **substantially** change the very foundation of the original complaints.

[143] Had the Commission and Mr. Karas really wanted to add these elements to the original complaints, they could easily have anticipated it and done so at the stage preceding the investigation. They did not. Had they done so, these allegations would have been subjected to the usual investigation process, and the Commission would have made a determination. That is not what happened here. The complaints, the forms, the investigation reports and the decisions conveyed in the Commission's letters support the conclusion that these elements did not form the foundation of Mr. Karas's complaints: the nexus is insufficient.

[144] Even Mr. Karas's Statement of Particulars, despite occasional references to the LGBTQIA community as a whole, does not specifically deal with the situation involving trans individuals who have had sex with men. The situation involving women is also only mentioned in passing, in order to bolster the idea that the MSM policy is based on the fact

of men having had sex with other men and that it discriminates against homosexual men on the basis of their sexual orientation.

**(b) Prejudice**

[145] Even though the sufficiency of the nexus has not been established, the Tribunal also agrees with Health Canada's and CBS's argument that including other situations and grounds would have significant repercussions for the inquiry into the complaint. The Commission believes that these additions would not really affect the proceeding and that the Respondents have failed to establish the prejudice they would suffer. I am not convinced of this.

[146] Based on the Respondents' persuasive arguments, I find that the additions would necessarily lengthen the proceeding and complicate the evidence to be presented at the hearing, be it documentary or testimonial.

[147] Given that we are merely at the beginning of the inquiry, the purpose of this decision is not to determine whether the allegations, additions or amendments have merit (*Constantinescu v. Correctional Service Canada*, 2020 CHRT 4 at para 204). At this stage, it would be unwise, even inappropriate, for the Tribunal to limit or exclude evidence that the Respondents deem necessary to defend themselves against the allegations against them.

[148] They must have an opportunity to explain their position, their theory of the case, to allow them to explain the reasoning behind the MSM policy, its rationale, and its effects on certain other groups of individuals, and to present the science and the data behind this reasoning. I am not certain that the situation is as straightforward as the Commission claims in its submissions.

[149] On the basis of the representations by Health Canada and CBS, the Tribunal does indeed find that the Respondents should have an opportunity to supplement their arguments and their evidence in order to respond to the new allegations, if they were added to the inquiry. The Tribunal must provide the Respondents with a full and ample opportunity to make their case in a timely manner (subsection 50(1) CHRA).

[150] The fact is, the addition of these new elements would necessarily affect the process before the Tribunal, during both the disclosure and hearing stages. It would also affect the documentary and testimonial evidence that would be presented to me, thereby complicating the process.

[151] In his representations, Mr. Karas also notes that the proceedings surrounding his complaints have been ongoing since 2016. The Tribunal understands from this that time is important to him. The addition of these new elements would, I find, affect the length of the proceedings and their complexity, which would not be desirable.

**(c) Interest and standing**

[152] The parties also submitted representations with respect to Mr. Karas's interest and standing on behalf of women who have had sex with MSM and certain trans individuals who have had sex with men.

[153] Since the sufficiency of the nexus between the additional allegations and the original complaint was not established, I find that this issue becomes secondary, if not moot. It is still worth asking whether Mr. Karas could in fact act for these other groups of individuals and whether he has the interest and standing to do so on their behalf.

[154] It appears to me that Mr. Karas is the person best placed to make a case in connection with the complaints he filed against Health Canada and CBS and the allegations that affect him personally. His interest and standing are clearly established when he claims to be a homosexual man who has sex with other men and who is prevented from donating blood as a result of the deferral period imposed under the MSM policy. This goes directly to the heart of the complaints he filed.

[155] However, I do not think that he has the interest and standing to act on behalf of women who have had sex with MSM and on behalf of certain trans individuals. In any event, since this issue is now hypothetical or moot, it is no longer determinative in the circumstances.

[156] In conclusion, for all these reasons, I allow the motion of Health Canada and of CBS, and I will not allow the inquiry to deal with the situations of women who have had sex with MSM and of certain trans individuals who have had sex with men, nor will I allow the addition of the prohibited grounds of discrimination of “sex” and “gender identity or expression.”

**(ii) Homosexual women and the prohibited ground of “Sex”**

[157] At paragraph 33 of its submissions, the Commission seems to make an addition that the other parties do not appear to have specifically addressed in their submissions.

[158] The Commission states that the prohibited ground of discrimination of “sex” should be added to Mr. Karas’s complaint given that the MSM policy applies to men who have sex with men, but not to women who have had sex with women. In other words, when the policy and the deferral period are applied, homosexual men and homosexual women are treated differently.

[159] While the Tribunal understands the Commission’s representations in this regard, its request seems accidental. It is made in passing in a brief paragraph and appears nowhere else in the Commission’s submissions. No other mention of this subject is made in the Commission’s understanding of the issue at paragraph 24 of its submissions or in any of its other arguments.

[160] The Tribunal also reviewed the submissions of Health Canada, CBS and Mr. Karas: none of the other parties raised this question as formulated by the Commission.

[161] It is also curious that the Commission does not mention the situation of women who have had sex with women elsewhere in its Statement of Particulars. The Commission raised the issue for the first time in its submissions in reply to the Respondents’ motion. The Tribunal is puzzled by this.

[162] Having said that, despite the fact that this is a new and frankly unexpected element, I find that, in any event, it is clear from reading Mr. Karas’s complaint, the investigation report, the Commission’s letters to the parties, the parties’ submissions during the

Commission's investigation, and the submissions on this motion that this new element is not sufficiently connected to Mr. Karas's original complaints.

[163] In light of the context and history of the complaint, the Commission's requested addition, that of the ground of "sex" with respect to the MSM policy differentiating adversely against homosexual men in comparison with homosexual women, is rejected. This issue was neither anticipated nor considered by any of the parties, except for the Commission in its submissions on this motion. The addition is not rooted in Mr. Karas's original complaints and has no nexus with their factual foundation.

[164] Consequently, I do not authorize this addition to the scope of the inquiry into the complaints by the Tribunal.

### **(iii) Organ and tissue donations**

[165] The Tribunal does not intend to deal at length with whether organ and tissue donations are included in the inquiry into Mr. Karas's complaints. Even though it seems clear to me that the Respondents, the Commission and even Mr. Karas did not concentrate their arguments on this aspect, I will address this issue quickly so as to avoid any possible confusion.

[166] In reviewing Mr. Karas's complaint, the investigation report, the Commission's letters to the parties, the parties' submissions during the Commission's investigation and the submissions on this motion, it seems clear to me that organ and tissue donations are not included in the scope of the complaints.

[167] I do not find the nexus, or connection, between Mr. Karas's original complaints and this new allegation to be sufficient to authorize this addition to the inquiry. Organ and tissue donations are not an element that has been considered since Mr. Karas filed his complaints. None of the parties submitted any evidence that is sufficiently persuasive to suggest otherwise.

[168] Consequently, I find that adding this element would amount to a completely new complaint. For these reasons, I do not authorize the addition of this element to the inquiry into the complaints by the Tribunal.

## VI. Ruling

[169] For the above reasons, the Tribunal grants the motion by Health Canada and CBS. The Tribunal does not authorize for the following issues to be dealt with in the inquiry into the complaints:

- Situations of women who have had sex with MSM and of certain trans people who have had sex with other men;
- The prohibited grounds of discrimination of “sex” and “gender identity”;
- The ground of “sex” for the adverse differential treatment allegedly experienced by the Complainant as a homosexual man in comparison to the situation of homosexual women; and
- Organ and tissue donation.

[170] The Tribunal orders that all allegations and all references with respect to the issues listed in paragraph 169 and contained in the Commission’s Statement of Particulars be struck, unless they are only there for context.

[171] More specifically, the Commission must strike all allegations related to the issues listed in paragraph 169 of this ruling from the following paragraphs of its Statement of Particulars: 1, 18, 24, 25, 78 and 82. In addition, the allegations related to the ground of “sex” for the adverse differential treatment experienced by the Complainant as a man must be struck from paragraphs 68 and 69 of the Commission’s Statement of Particulars.

[172] The Tribunal orders that the Commission’s Statement of Particulars be amended accordingly, **solely for the purposes prescribed by this ruling.**

[173] The Tribunal orders that the Commission serve and file its Amended Statement of Particulars no later than January 21, 2021.

[174] In the Commission's Amended Statement of Particulars, deletions must be ~~crossed out~~, and additions must be underlined.

[175] After the Tribunal receives the Commission's Amended Statement of Particulars, a teleconference will be scheduled to continue with the inquiry management.

*Signed by*

Gabriel Gaudreault  
Tribunal Member

Ottawa, Ontario  
January 7, 2021



## **Canadian Human Rights Tribunal**

### **Parties of Record**

**Tribunal Files:** T2424/8319 and T2425/8419

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

**Ruling of the Tribunal Dated:** January 7, 2021

**Reasons of the Tribunal Dated:** January 21, 2021

**Motion dealt with in writing without appearance of parties**

**Written submissions by:**

Christopher Karas, for himself

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, Samantha Pillon and Elizabeth Cunningham, for the Respondent Health Canada