Federal Court  Cour fédérale

Date: 20210610

Docket: T-1788-19

Citation: 2021 FC 594

Ottawa, Ontario, June 10, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

CHRISTOPHER KARAS

Respondent

and

CANADIAN HUMAN RIGHTS COMMISSION

Intervener

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a September 25, 2019 decision [the Decision] of the Canadian Human Rights Commission [the Commission]. The Commission made the Decision, pursuant to s 49 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the Act], to

request that the Chairperson of the Canadian Human Rights Tribunal [the Tribunal] institute an inquiry into a complaint by Christopher Karas [Mr. Karas] dated August 15, 2016, against Health Canada [the Complaint].

[2] The Complaint alleged that Health Canada has discriminated against him based on his sexual orientation, through a policy that deems men who have sex with men [MSM] to be prohibited or ineligible from donating their blood, subject to a deferral period. The Attorney General of Canada [the AGC] is seeking judicial review of the Decision on the basis that the Commission's reasons are not sufficiently justified, intelligible and transparent to meet the reasonableness standard of review.

[3] As explained in more detail below, this application is dismissed, because, having considered the parties' arguments, I find that the Decision satisfies the reasonableness standard.

II. **Background**

A. *The Statutory Scheme*

[4] Section 5 of the Act establishes that it is a discriminatory practice, in the provision of goods, services, facilities or accommodation customarily available to the general public, to deny access to any such good, service, facility or accommodation to an individual, or to differentiate adversely in relation to any individual, on a prohibited ground of discrimination. The prohibited grounds of discrimination are set out in s 3(1) of the Act and include sexual orientation. Under s 40(1) of the Act, an individual or group of individuals may file a complaint with the Commission

if they have reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice.

[5] Under s 43(1) of the Act, the Commission may designate an investigator to investigate the complaint. After the conclusion of the investigation, s 44(1) requires the investigator to submit a report with its findings to the Commission. The Commission also has discretion, under s 47, to appoint a conciliator for the purpose of attempting to bring about a settlement of the complaint.

[6] Under s 44(3)(a) of the Act, upon receipt of an investigator's report, if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, it may request the Tribunal to institute an inquiry into the complaint. Alternatively, s 49(1) of the Act gives the Commission discretion to refer a complaint to the Tribunal for inquiry at any stage, as long as it is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted. After the conclusion of a Tribunal inquiry, s 53 of the Act gives the Tribunal the authority to decide whether or not the complaint has been substantiated.

B. *The Human Rights Complaint*

[7] Canada's blood transfusion system is run by two independent organizations, also known as blood establishments: Héma Québec, operating in Québec, and Canadian Blood Services [CBS], operating in every other province and territory. As identified in more detail later in these Reasons, Health Canada has regulatory oversight with respect to blood establishments.

[8] Mr. Karas filed the Complaint with the Commission on August 15, 2016, alleging that Health Canada discriminated against him on the basis of his sexual orientation, in the provision of goods, services, facilities or accommodation contrary to s 5 of the Act, by forcing him to adhere to what he referred to as Health Canada's and CBS's donor deferral policy for MSM. He challenges a requirement contained in CBS's Donor Health Assessment Questionnaire [the Questionnaire] that prevents MSM from donating blood unless a deferral period has elapsed since the last time they had sexual contact with another man. At the time that Mr. Karas filed the Complaint in August 2016, the required deferral period for MSM was one year. The policy has since changed so that the current deferral period is three months.

[9] In the Complaint, Mr. Karas explains that he has felt discriminated against when reading and viewing CBS advertisements encouraging people to donate blood. After he learned that he was labelled "MSM" and forbidden from donating his blood because of his classification and sexual orientation, these advertising messages made him feel of very little value or that he could not make a significant difference in someone's life who needed blood.

[10] Mr. Karas filed an identical complaint against CBS. In the process before the Commission, this complaint was addressed separately from the Complaint against Health Canada.

C. *Commission Process for the Complaint*

[11] In the present matter, the Commission invoked its authority under s 43(1) of the Act to designate an investigator to investigate the Complaint. Following the investigation, the

investigator prepared a report, completed on February 7, 2018 [the Assessment Report], to assist the Commission in determining whether a conciliator should be appointed to attempt to resolve the Complaint, whether further inquiry by the Tribunal was warranted, or whether the Complaint should be dismissed. The Assessment Report recommended that the Commission deal with the Complaint and that it appoint a conciliator to attempt to achieve settlement of the Complaint. It further recommended that, if the parties failed to reach a settlement, the Commission should request that the Tribunal institute an inquiry into the Complaint pursuant to s 44(3)(a) of the Act.

[12] The Commission referred the Complaint to a conciliator in August of 2018. The parties agreed to enter into negotiations and explore options for settlement. However, as the parties were ultimately unable to reach a settlement, the conciliator returned the matter to the Commission.

[13] On September 25, 2019, the Commission issued its Decision, pursuant to s 49 of the Act, to refer the matter to the Tribunal for inquiry into the Complaint. This Decision is the subject of this application for judicial review.

D. *Application for Judicial Review*

[14] In this application, the AGC seeks to have the Court set aside the Decision and issue an order directing the Commission to dismiss the Complaint against Health Canada under s 44(3)(b) of the Act on the grounds that:

A. having regard to all the circumstances, further inquiry is not warranted; and

B. the Complaint is beyond the jurisdiction of the Commission.

[15] In the alternative, the AGC seeks an order remitting the matter to the Commission for re-determination.

E. *Intervention by the Commission*

[16] In an Order dated September 28, 2020, upon motion by the Commission on consent of the parties, Case Management Judge Furlanetto granted the Commission leave to intervene in this application. The Order granted the Commission leave to file evidence and make submissions on certain limited matters related to the Commission's complaint process. The Commission's submissions are not permitted to extend to supplementing or defending its Decision.

III. **Issues**

[17] Based on the parties arguments, which will be canvassed below, I would characterize the issues for the Court's determination as follows:

A. Does the Assessment Report form part of the reasons for the Decision?

B. Is the Decision reasonable?

C. If the Decision is unreasonable, what relief should the Court grant?

[18] As reflected in the above articulation of the issues, and as recognized by the parties, the standard of review applicable to the Court's consideration of the Decision is reasonableness. I will comment further on the standard of review later in these Reasons.

IV. **Analysis**

A. *Does the Assessment Report form part of the reasons for the Decision?*

[19] The Commission communicated the Decision on September 25, 2019, in a one-page document entitled "Decision of the Commission," the full text of which reads as follows:

> Decision rendered by the Canadian Human Rights Commission on September 25, 2019.
>
> After reviewing the Complaint Form, the Assessment Report, the Conciliation Report and all of the submissions of the parties, the Commission requests that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into this complaint pursuant to s.49 of the *Canadian Human Rights Act*.
>
> The Commission referred this complaint to conciliation in August 2018. It has been returned to the Commission for decision as the matter was not resolved.
>
> The Respondent has a regulatory oversight role over the Canadian blood supply system. The complaint relates to the blood donor deferral policy of Canadian Blood Services as it applies to gay men (a policy which was approved by the Respondent). The Complaint alleges this policy discriminates against him and others on the basis of sexual orientation.
>
> Although the Commission believes that the Respondent made an offer in good faith to resolve this complaint, it is not satisfied that the proposed Minutes of Settlement are consistent with the remedies that could be ordered by a Tribunal if the complaint were substantiated.
>
> It is also the Commission's view that the issues raised in the complaint would be most appropriately considered by the Tribunal, which can examine and weigh the extensive and highly technical evidence submitted by the parties in support of their respective positions. The Commission notes, for example, that the deferral period has been reduced from five years to three months since the complaint was substantiated and that the parties strongly disagree as to the necessity of any deferral period whatsoever. In all of the

> circumstances, referral to the Tribunal for further inquiry is warranted.

[20] Mr. Karas submits that the Assessment Report should be treated as part of the Commission's reasons for the Decision. The AGC disagrees. However, the parties agree that, subject to the effect of the recent decision by the Supreme Court of Canada on standard of review in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the leading authority governing this question is *Sketchley v Canada (Attorney General)*, 2005 FCA 404 [*Sketchley*] at paras 36-37:

> 36. The Applications Judge treated the analysis in the investigator's Reports as representing the Commission's reasoning for its decision, citing the brevity of the Commission's decision as a factor necessitating this approach (para. 12). The appellant argues that this treatment constitutes an error of law, as such treatment is said to negate the separate and distinct roles of the investigator and the Commission.
>
> 37. In my view, the appellant's argument on this issue must fail. While it is true that the investigator and Commission do have "mostly separate identities", (*Canada (Human Rights Commission) v. Pathak* (1995), 180 N.R. 152, [1995] 2 F.C. 455 at para. 21, *per* MacGuigan J.A., (Décary J.A. concurring)), it is also well-established that, for the purpose of a screening decision by the Commission pursuant to subsection 44(3) [as am. by R.S.C., 1985 (1st Supp.), c. 31, s. 64; 1998, c. 9, s. 24] of the *Act*, the investigator cannot be regarded as a mere independent witness before the Commission (*Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at para 25 [*SEPQA*]). The investigator's Report is prepared *for* the Commission, and hence for the purposes of the investigation, the investigator is considered to be an extension of the Commission (*SEPQA*, *supra* at para 25). 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 subsection 44(3) of the *Act* (*SEPQA*, *supra* at para 35; *Bell Canada v. Communications, Energy and Paperworkers Union of*

> *Canada* (1999), 167 D.L.R. (4th) 432, [1999] 1 F.C. 113 at para 30 (C.A.) [*Bell Canada*]; *Canadian Broadcasting Corp. v. Paul* (2001), 247 N.R. 47, 2001 FCA 93 at para. 43 (C.A.)).

[21] The AGC takes the position that, before a reviewing court can treat an investigator's report as part of the Commission's reasons, *Sketchley* requires that the Commission's own decision: (a) explicitly adopt the investigator's recommendations; and (b) provide no reasons or only brief reasons for the decision. The AGC argues that *Sketchley* does not apply to the present matter, because: (a) the Commission did not explicitly adopt the recommendations in the Assessment Report; and (b) the Commission's own multi-paragraph set of reasons cannot be characterized as no reasons or only brief reasons.

[22] Mr. Karas responds that *Sketchley* does not require that the Commission explicitly adopt an investigator's report in order for it to form part of its reasons. He also submits that the brevity of the Commission's one-page document, communicating the Decision, clearly fits the circumstances described in *Sketchley* in which an investigator's report should be treated as part of the Commission's reasons. I agree with Mr. Karas' position on this issue.

[23] First, I agree with his argument that the brevity of the reasons issued by the Commission represent precisely the sort of circumstances in which the analysis in *Sketchley* applies. Indeed, the AGC itself submits that it is only the last three paragraphs of the one-page document issued by the Commission that contain any analysis. This clearly qualifies as a set of very brief reasons, which militates in favour of a conclusion that the more fulsome reasons are found in the Assessment Report explaining the results of the investigation ordered by the Commission.

[24] Second, I agree that *Sketchley* does not refer to explicit adoption of an investigator's report. The question is whether, explicitly or implicitly, the Commission's reasons are to be read as adopting the investigator's recommendations. In the present case, those reasons expressly refer to the Commission having reviewed the Assessment Report (along with the complaint form, the conciliation report, and the parties' submissions). More significantly, the Commission makes a decision consistent with the recommendation in the Assessment Report that, if conciliation is unsuccessful, the Commission request that the Chairperson of the Tribunal institute an inquiry into the Complaint. This supports an inference that the Commission has adopted the Assessment Report. Indeed, in *Tutty v Canada (Attorney General)*, 2011 FC 57 at paragraph 13, it was on the basis of such consistency between the investigator's recommendation and the Commission's decision that Justice Barnes invoked the principle from *Sketchley*.

[25] I note that, in arriving at this conclusion, I have considered an argument made by the AGC that *Vavilov* has overtaken *Sketchley* and now requires a more express and therefore transparent adoption of the investigator's reasons than is present in this case. The AGC relies on the explanation in *Vavilov* that administrative decision-making must be justified, intelligible and transparent (at paras 95-96).

[26] Of course, I accept this instruction from *Vavilov*, which will also guide my analysis of the reasonableness of the Decision later in these Reasons. However, I do not regard the requirement for transparent administrative decision-making to detract from Mr. Karas' argument that the record before the Court in this case supports a conclusion that the Assessment Report forms part of the reasons for the Decision. *Vavilov* explains that the transparency of an administrative

decision can be supported by recourse to the history and context of the proceeding in which it is rendered and guidelines that inform the decision-maker's work (at para 94). I accept Mr. Karas' submission that the principle identified in *Sketchley,* based on the structure of the Act and the resulting processes, and cases that have followed that authority, contribute to the transparency required by *Vavilov*. That is, the Commission's adoption of the report is transparent in part because it is consistent with the Commission's past practice as endorsed in *Sketchley*.

[27] I also note that authorities that have followed *Sketchley* subsequent to *Vavilov* demonstrate no departure from this principle (see, e.g., *Desgranges v Canada (Elections),* 2020 FC 314 at para 56; *Dixon v TD Bank Group*, 2020 FC 1054 at para 39).

[28] In conclusion on this point, I find that the Commission has adopted the Assessment Report, such that the reasons therein form part of the reasons for the Decision.

B. *Is the Decision reasonable?*

[29] Turning to the AGC's arguments challenging the reasonableness of the Decision, I note the AGC's position that, even if the Assessment Report is found to form part of the reasons for the Decision, the Decision is still unreasonable. The AGC asserts three principal arguments in support of this position:

A. The AGC submits that the Commission failed to address Health Canada's key argument, that it is not a proper party to the Complaint because it has no authority to devise or implement the MSM policy, no direct interactions with

Mr. Karas, and no authority to oblige CBS to change the policy on the grounds advanced by Mr. Karas;

B. The AGC submits that the Decision cannot be reconciled with the evidence before the Commission, as there are no facts that allow the Commission to decide that Health Canada has the discretion to alter the MSM policy. As the AGC acknowledges, this submission overlaps somewhat with the first submission above, that the Commission failed to address Health Canada's argument that it is not a proper party to the Complaint; and

C. The AGC submits that the Commission failed to explain how the Decision can be reconciled with its earlier decision in *Soullière v Health Canada* (26 March, 2015), Complaint No. 2012105 [*Soullière*]. The AGC argues that the complaint in *Soullière*, which the Commission dismissed, is sufficiently parallel to the Complaint in the case at hand that the Commission was required to explain how it reached the inconsistent Decision to refer the Complaint to the Tribunal.

[30] I will first consider the two related arguments surrounding Health Canada's submission that it has no authority to alter the MSM policy.

(1) Did the Commission fail to address Health Canada's key argument that it is not a proper party to the Complaint, and can the Decision be reconciled with the evidence before the Commission related to that argument?

[31] I accept the AGC's submission that Health Canada's argument, that it is not a proper party to the Complaint, was one of the key planks of its position before the Commission. In asserting that argument, both before the Commission and in this application, Health Canada relies significantly on the *Blood Regulations*, SOR/2013-178, made under the *Food and Drug Act*, RSC 1985, c F-27 [the Blood Regulations] to support its position that its limited regulatory authority makes it a stranger to the discrimination alleged by Mr. Karas in the Complaint. The following is a more detailed explanation of Health Canada's argument.

[32] As previously noted, other than in the Province of Québec, Canada's blood transfusion system is run by CBS, an independent organization known as a blood establishment. The Blood Regulations treat transfused blood as a drug and charge Health Canada with regulatory oversight with respect to blood establishments, solely to ensure that blood is processed safely.

[33] In order to operate as a blood establishment, an organization must apply to the Minister of Health for authorization to do so under s 6 of the Blood Regulations. The application must describe all the processes, including processes for donor screening, that the establishment will use when handling blood donations. Section 7 of the Blood Regulations provides that the Minister must authorize a blood establishment to operate if it has provided sufficient evidence to demonstrate that issuance of the authorization will not compromise human safety or the safety of blood. Health Canada emphasizes that safety is the only criterion for the Minister's approval under s 7.

[34] A blood establishment that seeks to implement a significant change to its processes must apply to the Minister for an amendment to its authorization. Under s 9 of the Blood Regulations, the Minister must then assess whether this change could compromise human safety or the safety of blood. Again, safety is the only criterion for the Minister's approval.

[35] When accepting blood donations, the CBS screens donors by means of the Questionnaire. CBS designs and implements the Questionnaire, with Health Canada reviewing and approving it if it is safe under ss 7 and 9 of the Blood Regulations. The MSN policy at issue in the Complaint and this application for judicial review is part of the Questionnaire.

[36] Against that backdrop, the AGC highlights the following submission by Health Canada to the Commission, in which it raised the argument now under consideration by the Court:

> Health Canada is a regulator who reviews CBS's policies and procedures for safety only. Health Canada has no legal authority to order CBS to change its policies for any reason unrelated to safety. The arms-length relationship between CBS and Health Canada is itself a pillar of blood safety, and was specifically recommended by the Krever Commission following the tainted blood tragedy. One of the Commission's primary recommendations was "The operator of the blood supply system must be sufficiently insulated from political decision makers so that it is not forced to make decisions that are incompatible with the safety of the blood supply…"
>
> [Emphasis added by AGC.]

[37] The AGC submits that the Decision, even if considered to include the Assessment Report, does not demonstrate any analysis of this argument or, taking into account the *Vavilov* emphasis on the requirement for transparency and intelligibility in decision-making, allow either

Health Canada or the Court to understand how the Commission reasoned that Health Canada might be responsible for the alleged discrimination against Mr. Karas. The AGC further submits that such a conclusion cannot be supported by the evidence that was before the Commission, relying principally on the effect of the Blood Regulations, as to Health Canada's limited regulatory authority with respect to the MSM policy.

[38] In response to these arguments, Mr. Karas submits that the Commission did not make any determination as to the merits of Health Canada's argument regarding its regulatory role. He submits that the Decision demonstrates that the Commission understood the argument and the evidence but concluded that they warranted further inquiry by the Tribunal into the question of whether Health Canada is a proper party to the Complaint.

[39] Consideration of the parties' respective positions on this issue requires a deeper dive into the standard of review applicable to decision-making by the Commission, particularly in the context of a decision to refer a complaint to the Tribunal for further inquiry. As Mr. Karas notes, when considering the reasonableness of such decisions, courts have consistently applied the guidance in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 [*Halifax*] and *Canada (Human Rights Commission) v Saddle Lake Cree Nation*, 2018 FCA 228 [*Saddle Lake*].

[40] *Halifax* establishes several broad principles governing judicial review of human rights commission decisions to refer complaints to a tribunal. Such a decision represents a screening function, within which the Commission has broad discretion. The Commission need not

determine that the complaint passes some merit threshold before referring it to the Tribunal. It must simply be satisfied, having regard to all the circumstances of the Complaint, that an inquiry is warranted (see paras 19 and 21). As the Commission's function is one of screening and administration, not of adjudication, a decision to refer a complaint to the Tribunal is not a determination that the complaint is well-founded (at para 23). The courts of course have the jurisdiction and discretion to intervene in such decisions. However, they are encouraged to show restraint in doing so (at para 36). A reviewing court should ask itself whether there was any reasonable basis on the law or the evidence for the Commission's decision to refer a complaint to the Tribunal (at para 45).

[41] Relying on *Halifax*, the Federal Court of Appeal in *Saddle Lake* emphasized that judicial review is not a mechanism by which legal issues for the Tribunal to decide at first instance can be removed and placed before the courts (at para 30). Absent truly exceptional circumstances, issues that the Commission has referred to the Tribunal should not be reviewed by a court prior to the Tribunal having made a decision (at para 34).

[42] I am also conscious of the distinction drawn by the Federal Court of Appeal in *Keith v Canada (Correctional Service)*, 2012 FCA 117, between a decision to refer a complaint to the Tribunal and a decision by the Commission to dismiss a complaint. In the latter circumstance, a more probing review by the Court is required (at para 45), but it is not required in a matter like the case at hand, where a complaint has been referred to the Tribunal.

[43] Taking into account these principles, as well as the instruction in *Vavilov* (at paras 24 and 84) for a reviewing court to focus on a decision-maker's justification for its decision, I turn to considering the AGC's argument. In this analysis, I will apply the standard of whether the Decision discloses any reasonable basis on the law or the evidence for the Commission to refer Mr. Karas' Complaint to the Tribunal.

[44] First, I find that the record demonstrates that the Commission was alert to Health Canada's argument that it is not a proper party to the Complaint because it has limited regulatory authority with respect to the MSM policy. The Assessment Report notes Health Canada's position that it is not the appropriate respondent to the Complaint, as its regulatory role in relation to CBS's policies, including the MSM policy, relates to assessment of human safety or the safety of blood. Notwithstanding that argument, the Assessment Report concluded that the evidence collected warranted an inquiry by the Tribunal into Health Canada's role in relation to CBS's MSM policy. As previously explained, I consider the Commission to have adopted that reasoning, such that that conclusion forms part of the Commission's reasons for its Decision.

[45] To be clear, that reasoning does not include a conclusion that Health Canada's argument is without merit, as the AGC suggests. Rather, the Commission concluded that further inquiry by the Tribunal was warranted. This reasoning is intelligible and does not support a finding by the Court that the Commission failed to engage with Health Canada's argument.

[46] As to whether the Decision can be reconciled with the evidence before the Commission, I note Mr. Karas' submission that the evidence was not limited to the regulatory scope identified

in the Blood Regulations. As identified in the Assessment Report, the evidence surrounding Health Canada's role in relation to the MSM policy included the following:

A. CBS requires Health Canada's approval for the Questionnaire which incorporates the MSM policy;

B. Health Canada must approve any changes to the MSM deferral criteria that can potentially impact the safety of the Canadian blood supply system;

C. Health Canada funds research by CBS into possible changes to the screening criteria for MSM donors;

D. Health Canada engages in "pre-submissions meetings" with CBS, in which it provides CBS with feedback on potential changes to donor screening criteria and regulatory requirements; and

E. Health Canada can request that CBS modify its donor screening criteria, although only where there is an emerging health issue affecting the safety of the blood supply that would warrant such an amendment.

[47] As Mr. Karas characterizes Health Canada's argument, it is taking the position that the limitations upon its regulatory authority under the Blood Regulations represent a complete answer to his allegations that Health Canada is implicated in the discrimination alleged in the Complaint. However, Mr. Karas notes that the evidence before the Commission includes the points summarized above, extending to the manner in which Health Canada interacts with CBS "on the ground." Mr. Karas argues that, independent of Health Canada's arguments related to the

scope of its authority under the Blood Regulations, this evidence supports the conclusion that there was a reasonable basis on the law and the evidence for the Commission's decision to refer the Complaint to the Tribunal.

[48] I find these submissions compelling. As previously observed, the Assessment Report (and therefore the Decision) concluded that the evidence collected warranted an inquiry by the Tribunal into Health Canada's role in relation to CBS's MSM policy. In summarizing the investigator's findings, the Assessment Report states that it appears there is a "live contest" as to the exact nature of the relationship between Health Canada and CBS, which warrants further inquiry. This finding is intelligible within the context of the evidence described above, which extends beyond the confines of the regulatory authority found in the Blood Regulations. This evidence also informs an understanding of the final paragraph of the one-page document by which the Commission conveyed its Decision:

> It is also the Commission's view that the issues raised in the complaint would be most appropriately considered by the Tribunal, which can examine and weigh the extensive and highly technical evidence submitted by the parties in support of their respective positions. The Commission notes, for example, that the deferral period has been reduced from five years to three months since the complaint was substantiated and that the parties strongly disagree as to the necessity of any deferral period whatsoever. In all of the circumstances, referral to the Tribunal for further inquiry is warranted.

[49] In relation to this particular paragraph, Health Canada takes issue with the reference to "the extensive and highly technical evidence submitted by the parties in support of their respective positions." Health Canada argues that this portion of the Commission's analysis is unintelligible, as there was no evidence (such as scientific evidence underpinning the MSM

policy) before the Commission in relation to this Complaint that meets this description. Health Canada raises the possibility that this reference represents confusion between its evidence and that of CBS in the other complaint.

[50] Reading the above paragraph as a whole, including its reference to reductions in the deferral period, I agree that it appears to refer to evidence, potentially including scientific evidence, relevant to the history of the MSM policy. However, I accept Mr. Karas' submission that this interpretation does not support a conclusion that the Commission was confused as to the source of evidence before it. The paragraph is at least in part forward-looking, as it speaks to the role the Tribunal can play in analysing a large volume of technical evidence, and therefore represents recognition of the nature of the record required to be analysed in assessing the parties' respective positions in relation to the Complaint.

[51] In summary, as I read the Decision (including the reasons found in the Assessment Report), the Commission concluded that an inquiry by the Tribunal, with its facility for assessment of a fulsome evidentiary record, was warranted in order to develop a more complete understanding of the role of Health Canada (beyond simply the scope of its regulatory authority as defined by the Blood Regulations) in the processes that have resulted in the MSM policy including past amendments thereto. Having considered the arguments by the AGC set out above, I find this analysis intelligible and conclude that there was a reasonable basis on the law and the evidence for the Decision.

[52] Before turning to the AGC's remaining argument, that the Commission failed to explain how the Decision can be reconciled with its decision in *Soullière,* I note that I have turned my mind to Mr. Karas' efforts to rely upon the developments in the course of the Tribunal's consideration of the Complaint, which he argues further support the conclusion that Health Canada had a role in the development of CBS's MSM policy. He relies in particular on portions of the reasons for a decision by the Tribunal to consolidate his complaints against Health Canada and CBS into a single inquiry.

[53] Mr. Karas acknowledges that the proceedings before the Tribunal do not form part of the record that the Court is to consider in reviewing the reasonableness of the Decision. However, he submits that an understanding of the status of the Tribunal proceedings can be relevant to the Court's decision whether to exercise its discretion to grant relief in this application for judicial review. I of course accept the existence of this discretion (see, e.g., *Halifax* at para 52), as well as the possibility that the status of the Tribunal proceedings could be relevant to the discretionary decision whether to intervene if, for instance, I found the Decision unreasonable. However, subject to my consideration of the AGC's argument based on *Soullière,* I have found the Decision reasonable and therefore need not consider Mr. Karas' arguments based on developments in the Tribunal proceeding that post-date the Decision.

(2) Did the Commission err by failing to explain how the Decision can be reconciled with its earlier decision in *Soullière*?

[54] *Soullière* is a decision of the Commission, issued on March 26, 2015, dismissing a complaint that Health Canada discriminated against a woman with an intellectual disability, by

failing to accommodate her when she could not complete the screening process required to be able to donate blood. The decision in *Soullière* is not publicly available and was not before the Court in this application. However, it was the subject of an application for judicial review, which was dismissed by Justice Diner in *Soullière v Canada (Health)*, 2017 FC 686 [*Soullière FC*], and the facts of the complaint and the Commission's reasoning can be derived from the judicial decision.

[55] Similar to the case at hand, Ms. Soullière brought complaints against both CBS and Health Canada, alleging that the latter was responsible for discrimination against her daughter (Ms. Dewan), because it had approved the CBS policy that screened her out when she was unable to complete CBS's questionnaire due to her intellectual disability. The Commission dismissed both complaints, concluding that inquiries by the Tribunal were not warranted. *Soullière FC* summarizes the Commission's findings as follows, on the basis of which the Commission held that Health Canada did not appear to be a party to the denial of service (at para 10):

- HC has neither a direct role in the donor screening process generally, nor a role in Ms. Dewan's specific situation;
- CBS develops its policies and procedures independently and at arm's length from HC;
- HC plays no role in drafting or administering the DHAQ form, nor does it require that blood operators have a DHAQ; and
- HC had stated that it would not ask CBS to modify its donor screening criteria for any reason except in the event of an emerging health issue (such as occurred, for instance, with SARS and the West Nile Virus), and Ms. Dewan's case did not fit into the ambit of an emerging health issue.

[56] Ms. Soullière sought judicial review, but the Federal Court upheld the Commission's decision as reasonable. Justice Diner considered the evidence before the Commission, that led it to conclude that Health Canada had limited control of the policy that resulted in Ms. Dewar's blood donation being refused, and held as follows (at para 25):

> 25. The evidence simply does not support Ms. Soullière's argument that HC has direct input and control over the design and implementation of the blood donor screening process and policies. Rather, the evidence showed that when HC approved the impugned CBS policies, it did so solely on the basis of the safety of Canada's blood system, consistent with its legislative mandate. Its "control" of CBS was and is limited to that particular oversight function.

[57] Ms. Soullière also argued that Health Canada should be made a party to her challenge to the CBS policy, because Health Canada may eventually frustrate any future policy changes made by CBS, by withholding its regulatory approval. The Commission rejected this argument as hypothetical, and the Court found this decision to be reasonable (at paras 37-38).

[58] Health Canada argues that the facts in *Soullière* closely parallel those in the present matter. Both cases involve complaints against CBS and Health Canada, in which the complainant alleged that a CBS policy underlying the Questionnaire discriminated against certain blood donors. In both cases, the complainant alleged that Health Canada bore responsibility because it regulates CBS. In both cases, Health Canada provided regulatory approval. Finally, in both cases, the complainant argued that Health Canada should be involved in the human rights proceeding, just in case it might decide to withhold approval for some future change to the Questionnaire that the Tribunal might mandate.

[59] Based on what it submits are the parallels between *Soullière* and Mr. Karas' Complaint, Health Canada argues that the Commission erred in the present case by making findings about the relationship between Health Canada and CBS that are inconsistent with its findings in *Soullière*, without distinguishing its reasons from *Soullière*. In advancing this argument, Health Canada relies on the following explanation in *Vavilov* of the importance of consistency in administrative decision-making (at paras 129-131):

> 129. Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court noted in *Domtar*, "a lack of unanimity is the price to pay for the decision-making freedom and independence" given to administrative decision makers, and the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.
>
> 130. Fortunately, administrative bodies generally have a range of resources at their disposal to address these types of concerns. Access to past reasons and summaries of past reasons enables multiple individual decision makers within a single organization (such as administrative tribunal members) to learn from each other's work, and contributes to a harmonized decision-making culture. Institutions also routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers. This Court has also held that plenary meetings of a tribunal's members can be an effective tool to "foster coherence" and "avoid . . . conflicting results": *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 324-28. Where disagreement arises within an administrative body about how to appropriately resolve a given issue, that institution may also develop strategies to address that divergence internally and on its own initiative. Of course, consistency can also be encouraged through less formal methods, such as the development of training materials, checklists and templates for the purpose of streamlining and strengthening

> institutional best practices, provided that these methods do not operate to fetter decision making.
>
> 131. Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.
>
> [AGC's emphasis.]

[60] Mr. Karas submits that there is no conflict between the decision of the Commission in *Soullière* and its Decision in relation to Mr. Karas' Complaint. He would distinguish *Soullière* on the basis of its particular facts. He notes that *Soullière* involved a front-line decision to deny an individual with a disability the ability to donate blood, because she was unable to complete the Questionnaire on her own. Mr. Karas submits that, while that decision engaged CBS's donor screening policy, it did not involve the same sort of broad policy decision as is represented by CBS's MSM policy.

[61] Mr. Karas also emphasizes that the decision in *Soullière* was based on the particular evidentiary record before the Commission in that case, which may of course have been different than the evidence in this case at hand. Similarly, the conclusion by the Court in *Soullière FC*,

that the Commission's decision was reasonable, was based on that particular record. Mr. Karas relies on *Service d'administration PCR Ltée v Reyes*, 2020 FC 659 [*Reyes*], in which Justice Grammond explained that a judicial decision determining that an administrative decision is reasonable is of limited authority, as another decision could very well have been just as reasonable (at para 20).

[62] While I appreciate the potential merits of these submissions, the Decision contains no such analysis by the Commission. I am conscious of the admonition in *Vavilov* that a reviewing Court should not seek to substitute reasons which the administrative decision-maker might have relied upon to arrive at its decision, if those reasons cannot be derived from the decision and the record before the decision-maker (at para 96). Therefore, these submissions are not an appropriate basis to dismiss the AGC's argument that it was unreasonable that the Commission did not address *Soullière.*

[63] However, Mr. Karas makes further submissions in responding to Health Canada's arguments based on the principles governing consistency in administrative decision-making. Mr. Karas again relies on *Reyes*, in which Justice Grammond drew upon the guidance in *Vavilov* and provided the following additional explanation of those principles (at para 21):

> 21. Administrative precedent raises different issues. In principle, administrative decision-makers are not bound by their prior decisions: *Vavilov*, at paragraph 129; Daly, "*Stare Decisis*", at page 768. Since *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756, it is well established that "jurisprudential conflict" does not constitute an independent basis for judicial review. However, it may happen that a community of decision makers—such as the members of an administrative tribunal or the community of grievance adjudicators—reaches an interpretive consensus on a

> given question. The Supreme Court mentions "longstanding practices" or "established internal authority" as examples of such consensus, which is a legal constraint that bears on the decision-maker: *Vavilov*, at paragraph 131. It is only in such situations of quasi unanimity that decision-makers will have to provide compelling justification before rendering a conflicting decision: see, for example, *Wilson v Atomic Energy of Canada Ltd.*, 2016 SCC 29 at paragraphs 59–62, [2016] 1 SCR 770 [*Wilson*]; *Gatineau (Ville de*) *c Syndicat des cols blancs de Gatineau inc*, 2016 QCCA 1596 at paragraph 41 [*Gatineau*].

[64] Mr. Karas submits that the decision of the Commission in *Soullière* does not represent the sort of longstanding practice or established internal authority, amounting to an interpretative consensus or quasi-unanimity among decision-makers, that gives rise to the obligation to provide justification for a departure therefrom. I agree with this submission. It is not possible to characterize the single decision in *Soullière* as the sort of internal authority to which the principles identified above in *Vavilov* apply. As such, those principles do not support a conclusion that the Decision is unreasonable for having failed to distinguish *Soullière*.

V. **Conclusion**

[65] Having considered the AGC's arguments and having found the Decision to be reasonable, this application for judicial review must be dismissed. It is therefore unnecessary for the Court to consider the final issue of what relief the Court should grant.

VI. **Costs**

[66] The AGC confirmed at the hearing of this application that it is not seeking costs against Mr. Karas in the event it prevails in this application. Mr. Karas' counsel advised that he is

seeking costs in the event the AGC's application is dismissed. He takes the position that, given the imbalance between the parties' resources, this asymmetrical approach to costs is appropriate.

[67] Following discussion among counsel and the Court at the hearing, as to a process for addressing Mr. Karas' costs claim in the event he were to be successful in this application, counsel agreed on the following:

A. The parties would be afforded 14 days from the date of my Judgment, for counsel to confer in an effort to agree on the disposition of Mr. Karas' costs claim and to jointly advise the Court as to whether such agreement had been achieved; and

B. If no such agreement is achieved, the parties would then be afforded an additional 14 days to make written submissions in support of their respective positions on the disposition of Mr. Karas' costs claim.

[68] I accept that this is an appropriate process, and my Judgment will provide therefor. In the event that written submissions are necessary, each party's submissions should be limited to three pages in length, plus any supporting material.

JUDGMENT IN T-1788-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. The Respondent's claim for costs of this application shall be addressed as follows:

    a. The parties shall be afforded 14 days from the date of this Judgment, for counsel to confer in an effort to agree on the disposition of the costs claim and to jointly advise the Court as to whether such agreement has been achieved; and

    b. If no such agreement is achieved, the parties shall then be afforded an additional 14 days to make written submissions in support of their respective positions on the disposition of the costs claim, with each party's submissions to be limited to three pages in length plus any supporting material.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1788-19
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA V CHRISTOPHER KARAS
PLACE OF HEARING:	HEARING HEARD BY VIDEOCONFERENCE VIA TORONTO
DATE OF HEARING:	MAY 27, 2021
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	JUNE 10, 2021

APPEARANCES:

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