Federal Court  Cour fédérale

Date: 20170717

Docket: T-690-15

Citation: 2017 FC 689

Ottawa, Ontario, July 17, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

YVONNE SOULLIÈRE

Applicant

and

CANADIAN BLOOD SERVICES
HEALTH CANADA

Respondents

and

THE CANADIAN HUMAN RIGHTS COMMISSION

Intervener

JUDGMENT AND REASONS

I. Introduction

[1] This case is about Yanhong Dewan, a young woman of exceptional kindness and generosity. It has been estimated that just under half of Canadian adults are eligible to give blood, and of those eligible only 3-5% actually donate (see *Canadian Blood Services v Freeman*, 2010 ONSC 4885 at para 49 [*Freeman*]). Ms. Dewan is one of those exceptional individuals who wanted to donate her blood to help others in need. Regrettably, she was also one of the many found to be ineligible to donate blood.

[2] Ms. Dewan's mother, Ms. Soullière, seeks judicial review of a March 26, 2015 decision of the Canadian Human Rights Commission ("Commission") dismissing the complaint against Canadian Blood Services ("CBS"), pursuant to section 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [Act] on the basis that further inquiry was not warranted in the circumstances (the "Decision"). Although it is regrettable that Ms. Dewan is not eligible to donate blood, I find no reviewable error in the Commission's Decision, and therefore this judicial review is dismissed, for the reasons explained below.

[3] In an application heard concurrently (Court file No. T-691-15), Ms. Soullière also seeks judicial review of a related Commission decision dismissing her complaint against Health Canada ("HC"), also pursuant to section 44(3)(b)(i) of the Act. Due in part to the outcome of this judicial review (Court file No. T-690-15), I have also dismissed the HC judicial review. A copy of both decisions shall be placed in each of these two Court files.

II. Background

[4] The genesis of this action occurred when Ms. Yvonne Soullière (the "Applicant") filed a December 5, 2012 human rights complaint against CBS (the "Complaint") on behalf of her daughter, Yanhong Dewan. The Complaint alleged that Ms. Dewan was rejected as a blood donor and deemed indefinitely ineligible on the basis of her inability to understand and complete the blood donor screening questionnaire, due to her intellectual disability.

[5] Although CBS contends that the Commission properly dismissed the Complaint, CBS submits that the Commission erred by failing to dismiss the Complaint on the preliminary basis that blood collection is not a "service customarily available to the general public" under section 5 of the Act. All statutory references below are to the Act, unless otherwise specified.

A. *Ms. Yanhong Dewan*

[6] Ms. Dewan's intellectual disability has not been specifically identified. However, it is not disputed that she was screened out of the blood donation process as a result of her disability.

B. *Canadian Blood Services*

[7] The Respondent, CBS, is a charitable organization responsible for managing the blood and blood component ("blood") supply for all provinces and territories of Canada, except Québec. It was created in 1998 in response to the tainted blood tragedy which resulted from the Canadian Red Cross Society's failure to limit the transmission of Human Immunodeficiency

Virus (HIV) and Hepatitis C through the blood supply in the late 1970s and early 1980s. The tragedy reportedly resulted in the infection of more than 20,000 recipients of blood products, and the death of over 1,000 Canadians. As a result, the Canadian government appointed the Commission of Inquiry on the Blood System in Canada, known as the "Krever Inquiry" (Investigation Report at para 9).

[8] The Krever Inquiry recommended that Canada have a national system for the collection and delivery of blood, and that there continue to be a federal entity dedicated to its regulation. CBS was created as a result to be Canada's national blood operator. Since Canada considers blood products to be biological products, CBS is considered a biological drug manufacturer subject to the *Food and Drugs Act*, RSC, 1985 c F-27 and, as such, is subject to regulation by HC.

[9] CBS collects blood from volunteer donors, processes them into blood products, and distributes these products to hospitals across Canada. As part of CBS' blood donation screening process, potential donors are asked to complete the "Donor Health Assessment Questionnaire" (the "DHAQ"). The DHAQ asks a series of questions to assess the potential donor's health, potential for giving blood, and potential risk to the blood system.

C. *The Complaint*

[10] On February 2, 2012, Ms. Dewan attended a mobile blood donor clinic in Lasalle, Ontario, intending to donate blood. The CBS nurse screener met with Ms. Dewan alone, and attempted to explain some of the DHAQ questions in "simpler" language. However, the nurse

ultimately screened Ms. Dewan out of the process and did not allow her to donate. Ms. Soullière communicated to CBS that she did not agree with this decision.

[11] On February 15, 2012, CBS learned that Ms. Dewan intended to again attempt to donate blood. Since CBS had recently determined that Ms. Dewan was "indefinitely deferred" and this would not change if she attended a different clinic, it contacted Ms. Soullière to dissuade her daughter from attending the upcoming blood donor clinic.

[12] Subsequently, there were communications between the parties. On August 17, 2012, Dr. Skeate, CBS' Associate Medical Director, spoke to Ms. Soullière on the telephone and offered to conduct an External Medical Examination ("EME") process for her daughter – a personalized process that CBS may offer when there are issues arising from the initial screening and DHAQ. The EME involves a customized approach including a discussion with CBS medical staff, such as Dr. Skeate. Ms. Soullière did not proceed with the EME on behalf of her daughter. There is some dispute as to what exactly was communicated and offered in terms of the EME.

[13] On December 7, 2012, Ms. Soullière filed the Complaint against CBS on behalf of her daughter. In her Complaint, Ms. Soullière alleged, among other things, that CBS discriminated against her daughter on the basis of her intellectual disability by denying her the ability to donate blood, and by barring her from doing so indefinitely.

[14] On February 8, 2013, CBS requested that the Commission dismiss the Complaint, on the basis that it was beyond the jurisdiction of the Commission, pursuant to section 41(1)(c) of the

Act. Specifically, CBS argued that the Commission lacked jurisdiction because the 'opportunity to give blood' does not constitute a service within the meaning of section 5.

[15] After considering submissions from the parties, the Commission prepared a section 40/41 report that recommended dealing with the Complaint as it was not "plain and obvious" that CBS did not provide a service within the meaning of section 5. The parties were given this section 40/41 report and provided submissions in response to it.

[16] After reviewing the submissions, on December 18, 2013 the Commission made a final decision under section 41(1) to deal with the Complaint, finding that on the question of "service":

> The Commission should deal with the complaint because it is not frivolous. It is not plain and obvious that the activity in question is not a service. For the reasons discussed above CBS appears to provide a service when screening potential blood donors. Screening is the first step of the blood supply system. This first step cannot be artificially divorced from the other steps in the system (i.e. collecting, testing, production and distribution), which CBS admits are services customarily available to the public.
>
> [Section 40/41 Report at para 95]

[17] As a result of this section 41 decision, the Commission began its investigation process. The Commission's investigator ("Investigator") compiled information received from the parties and witnesses.

[18] On December 29, 2014, the Investigator delivered the Investigation Report ("Report"), which recommended dismissing the Complaint, on the basis that further inquiry was not

warranted in the circumstances. The parties were invited to – and duly provided – submissions in response to the Report. They also subsequently provided replies to one another's submissions. Consistent with its position before this Court, CBS agreed that no further inquiry was warranted, but disagreed that the Complaint was directed to a "service" within the meaning of section 5 of the Act.

[19] The Commission ultimately dismissed the Complaint in its Decision, confirming the finding of the Report that a further inquiry was not warranted. A summary of the Decision follows.

III. The Decision Under Review

[20] The Decision simply states that after reviewing the Report and the submissions filed in response, the Commission dismisses the Complaint pursuant to section 43(3)(b)(i) of the Act, because further inquiry is not warranted, having regard to all of the circumstances.

[21] It is common ground between the parties that in these circumstances, the Commission's reasons are deemed to be those provided in the Report (*Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 37 [*Sketchley*]).

[22] The Report begins by noting that the Commission does not determine whether discrimination has actually occurred, but rather whether a complaint requires further inquiry by the Canadian Human Rights Tribunal (the "Tribunal"). The Investigator, in coming to her recommendation, states that she reviewed the parties' positions, and all of their documentary

evidence presented. She also states that she conducted five telephone interviews – with Ms. Soullière and Ms. Dewan, along with three CBS representatives: Debra Freeman (the CBS Nurse/Screener who met with Ms. Dewan when she attempted to donate blood); Dr. Mindy Goldman (Medical Director of CBS' Donor and Clinical Services); and Dr. Robert Skeate (an Associate Medical Director at CBS).

[23] As for the decision-making matrix, the Investigator describes the investigation process as constituting three steps: (1) whether there was support for the allegation of discrimination; and if so (2) whether it was *bona fide* justified; and (3) whether any support existed for the allegation of a failure to accommodate. The detailed Report, numbering some 138 paragraphs, comprehensively summarizes the evidence and submissions considered for each of these three questions.

A. *Step 1: Whether there was support for the allegation of discrimination in the provision of a service customarily available to the general public*

[24] The Report identifies the service at issue in the Complaint as being CBS' screening of potential blood donors when determining a person's eligibility to donate blood. The Report states that this service was customarily available to the general public and notes that CBS did not ask this Court to review the Commission's section 41 decision to deal with the Complaint. The Report also notes that CBS provided a full defence to the investigation.

[25] The Report further notes that it was not disputed that Ms. Dewan's disability affects her comprehension level of words and language, and that CBS acknowledges that it denied Ms.

Dewan the opportunity to donate blood on the basis that she could not adequately comprehend the screening and donation process. The screener documented the reasons for determining Ms. Dewan's ineligibility thus: "…donor has a mental disability and as per mother has intellectual ability of 3 to 5 year old child. Mother wanted to answer questions for daughter. Donor cannot read and doesn't have an understanding of timeframes, transmissible disease – unable to understand questions even when restated in a simpler fashion…" (Report at para 22).

[26] The Report concluded, under this first step of the analysis, that CBS had denied Ms. Dewan access to the blood donation service on a basis related to her disability.

B. *Step 2: Whether CBS' standard is bona fide justified*

[27] The Report identified the standard relied upon by CBS in denying Ms. Dewan access as "the ability to understand and complete the DHAQ without help (other than from a respondent screener)." CBS screens all individuals who volunteer to donate blood, requiring them to comprehend the blood donation process, including the DHAQ, without the assistance of a third party other than the CBS nurse-screener (with two exceptions which will be discussed below). The purpose of this is twofold: to ensure that giving blood will not place the donor's health at risk, and to ensure that the donation is safe for transfusion to recipients. The question for the Investigator was therefore whether this standard could be justified.

[28] The Report accepted that CBS had adopted the standard in good faith, and for a purpose rationally connected to the general function being performed – namely following the recommendations of the Krever Inquiry in order to safeguard the safety of the blood supply. CBS

required comprehension of the DHAQ without the assistance of a third party, save for two exceptions: certified American Sign Language (ASL) and foreign language translation. The rule and its two exceptions were strictly enforced, and potential donors must answer the questions accurately and appreciate the risks of blood donation – both to oneself and to others. CBS explained that it adopted the standard following the recommendations of the Krever Inquiry, consistent with HC's regulatory requirements and with the policies and practices of other major blood operators and policy-making bodies around the world.

[29] The Investigator then turned to the question of whether the standard was reasonably necessary to achieve the purpose or goal, and noted that this issue is considered by asking whether accommodating Ms. Dewan would cause undue hardship based on health, safety, and/or cost, a question which turned on the key third step in the Commission's matrix.

C. *Step 3: Whether there is support for the Complainant's allegation of a failure to accommodate to the point of undue hardship*

[30] The bulk of the Report's written discussion addressed the accommodation issue. The Investigator recommended dismissing the Complaint, concluding at paragraph 131:

> Based on the evidence, the respondent's reasons for being unable to accommodate Ms. Dewan by modifying the DHAQ or permitting a third party (such as the complainant) to help Ms. Dewan answer questions in the donor screening process, appear justified. The evidence supports that allowing the complainant's requested accommodation would result in undue hardship for the respondent, as it would create undue risk to the safety of the blood supply.

[31] Moreover, the Investigator, at paragraph 130 of her Report, rejected the Complainant's submission that CBS had breached its procedural duty to accommodate, relying on *Canada (Human Rights Commission) v Canada (Attorney General)*, 2014 FCA 131 at para 16 [*Cruden*], to conclude that that there is no separate procedural duty to accommodate.

IV. Issues Raised

[32] Counsel for Ms. Soullière claims that the Commission made four reviewable errors in its Decision:

A. breaching procedural fairness by

   i. relying on an inadequate investigation, and

   ii. failing to address Ms. Soullière's submissions in response to the Report, and not addressing the entirety of Ms. Soullière's responses;

B. rendering its decision on the basis of no evidence, including by failing to consider the alternative accommodation options raised by Ms. Soullière;

C. exceeding its jurisdiction by adjudicating the Complaint rather than applying the threshold test to determine whether further inquiry is warranted; and

D. erring in law by:

   i. applying the wrong legal test to determine undue hardship, and

   ii. rejecting the procedural duty to accommodate Ms. Dewan's disability.

[33] CBS, in addition to denying these claims, contends that it was in any case unreasonable for the Commission to have proceeded on the premise – as a foregone conclusion – that blood collection was a service within the meaning of section 5 of the Act.

[34] Given that I am writing this decision so that Ms. Dewan and Ms. Soullière understand why the judicial review is not being granted, I will proceed to address each of these claims in turn as formulated by counsel for Ms. Soullière. I will also address whether the Decision as a whole is reasonable. However, this necessarily means there will be some repetition in my reasons, given that several of the arguments overlap.

V. Standard of Review

[35] There is no dispute that the standard of review applicable to questions of procedural fairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79). Ms. Soullière argues that the correctness standard should also apply to issues of jurisdiction and law (of central importance to the legal system that are outside of the adjudicator's expertise) that it has raised, per *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 59-60 [*Dunsmuir*].

[36] The Commission's discretion not to refer a complaint to the Tribunal is reviewable on the reasonableness standard (*Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 17 [*Halifax*]). Nevertheless, Ms. Soullière notes that this Court has previously held in *Gravelle v Canada (Attorney General)*, 2006 FC 251 at para 39, that decisions dismissing complaints should be more closely scrutinized than decisions referring complaints to the Tribunal, for the reasons articulated in *Larsh v Canada (Attorney General)*, [1999] FCJ No 508 (Fed TD) at para 36:

> A dismissal is, after all, a final decision that precludes the complainant from any statutory remedy and, by its nature, cannot advance the overall purpose of the Act, namely protection of individuals from discrimination, but may, if wrong, frustrate it.

[37] Although there is general agreement between the parties on the broad parameters of standard of review, the parties disagree as to the standard on particular issues, and those instances will be addressed in turn below.

VI. Submissions and Analysis

A. *Did the Commission breach procedural fairness?*

[38] First, Ms. Soullière contends that the Commission erred by relying on an investigation that failed to thoroughly investigate crucial evidence and adequately address her submissions, including alternative forms of accommodations proposed by Ms. Soullière that were rejected by CBS. These proposed accommodations included the following: (1) clear language interpretation by an independent third party experienced in working with intellectually disabled individuals; (2) models of accommodation set out in the World Health Organization's *Guidelines on Assessing Donor Suitability for Blood Donation*; (3) alternative forms for administering screening questionnaires used in other jurisdictions; (4) United Kingdom models of accommodation that permit communication in alternative formats; (5) models based on CBS' own research, to modify the DHAQ; and (6) allowing disabled individuals to take the DHAQ home in order to familiarize themselves with it, before returning for blood donor screening.

[39] Ms. Soullière, while acknowledging the Investigator made reference to some (but not all) of her proposed accommodations, contends the Investigator merely summarized her submissions without evaluating their merits. She asserts this does not meet the standard of thoroughness required for procedural fairness. Ms. Soullière states that she even drew these deficiencies to the

Commission's attention in her submissions responding to the Report, yet the Commission failed to provide any reasons regarding the proposed accommodations in its subsequent refusal. Ms. Soullière points to the following passage from Justice Martineau's decision in *Dupuis v Canada (Attorney General)*, 2010 FC 511 at para 16 [*Dupuis*]:

> Moreover, where a party's submissions allege substantial and material omissions in the investigation and provide support for that assertion, the Commission must refer to those discrepancies and indicate why it is of the view that they are either not material or are not sufficient to challenge the recommendation of the investigator; otherwise one cannot but conclude that the Commission failed to consider those submissions at all.

[40] Ms. Soullière submits that the Commission's failure to address all of the alternative forms of accommodation constitutes a breach of procedural fairness, and that the opportunity to make submissions in response to the deficiencies in an investigator's report does not compensate for a defect in procedural fairness in the investigation where evidence has been disregarded or ignored (*Herbert v Canada (Attorney General)*, 2008 FC 969 at para 18 [*Herbert*]; *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 (Fed TD) [*Slattery*] at paras 55-57, aff'd (1996), 205 NR 383 (FCA)).

[41] Second, Ms. Soullière alleges that the Commission further breached her procedural fairness rights in failing to consider the entirety of her responding submissions to the Investigator's two reports (for both the CBS and the HC complaints). Ms. Soullière's responding submissions addressed both investigation reports in a single document, and for the purposes of the CBS complaint, the Commission excerpted and only considered the submissions pertaining to the CBS Report, and not the portions related to the HC investigation report. She maintains that

some aspects of the submissions pertaining to the HC investigation report were relevant to both complaints.

i. Inadequate investigation and alleged failure to consider crucial evidence

[42] Justice Mosley discussed the requirements of procedural fairness in the Commission's investigation stage in *Carroll v Canada (Attorney General)*, 2015 FC 287 at para 67 [*Carroll*]:

> The case law clearly establishes that an investigation which does not deal with the substance of a complaint, fails to investigate a relevant question, or fails to consider crucial evidence is unfair because it is not thorough. That unfairness carries over to any eventual dismissal decision rendered by the Commission. Whether the complainant has been able to make submissions is irrelevant. If submissions were made but disregarded, that does not increase the thoroughness of the investigation - it decreases it.

[43] Investigations carried out by the Commission must be neutral and thorough. For instance, an investigation is not thorough where an investigator fails to investigate crucial evidence (*Slattery* at paras 49-50; *Hughes v Canada (Attorney General)*, 2010 FC 837 at paras 32-33 [*Hughes*]).

[44] With respect to the argument that the Investigator overlooked some of the alternative accommodations, I find that any alternatives not expressly referenced in the Report are all variations of those that are expressly considered in the Report. Broadly speaking, the alternative accommodations fall under themes of either having a third party clear language interpreter participate in the process, or altering the DHAQ directly to be a more plain language document. The Report extensively canvassed these alternatives and why it is not feasible for CBS to implement such alternatives without incurring undue hardship.

[45] The Commission concluded, after considering the options, that CBS could not accommodate Ms. Dewan without undue hardship. It did not have to expressly refer in detail to each and every specific one of the possible alternative accommodation measures. The Report covered the essential aspects of the alternatives, which is all that is required. Procedural fairness does not require the Commission to mention every piece of evidence (*Bergeron v Canada (Attorney General),* 2015 FCA 160 at para 76; *Alkoka v Canada (Attorney General)*, 2013 FC 1102 at para 56 [*Alkoka*]).

[46] In *Hughes* at para 34, Justice Mactavish noted some of the competing considerations when assessing whether an investigation was deficient:

> The requirement for thoroughness in investigations must also be considered in light of the Commission's administrative and financial realities. With this in mind, the jurisprudence has established that some defects in the investigation may be overcome by providing the parties with the right to make submissions with respect to the investigation report. As the Federal Court of Appeal observed in *Sketchley*, the only errors that will justify the intervention of a court on review are "investigative flaws that are so fundamental that they cannot be remedied by the parties' further responding submissions": at para. 38.

[47] The Commission retains broad discretion to determine whether further inquiry is warranted (*Alkoka* at para 41) and this Court has held that judicial intervention is only warranted where the Commission failed to consider "obviously crucial" evidence, not for minor omissions and defects that can be corrected by the parties' further submissions to the Commission (*Slattery* at paras 56 and 57). An investigator is not required to refer to all of the evidence submitted, nor does its failure to do so necessarily indicate that it failed to take all of it into account. And as noted in *Herbert* at para 26, "[w]here the parties' submissions on the report take no issue with the

material facts as found by the investigator but merely argue for a different conclusion, it is not inappropriate for the Commission to provide the short form letter-type response."

[48] Ms. Soullière correctly observes that the Report only addresses the alternative accommodations expressly in the course of recounting the parties' submissions. However, I do not find that constitutes overlooking or ignoring the evidence of alternative accommodations. Rather, the lengthy summaries, followed by brief conclusions, were simply a feature of the Investigator's writing style. The Report extensively summarized CBS' submissions regarding the limitations and risks of the alternative accommodations, and found these persuasive. The Report dealt with the substance of the Complaint, and there is no indication that the Investigator failed to investigate a relevant question or to consider crucial evidence. Accordingly, I find no procedural unfairness, in either the process followed by the Investigator, or ultimately – as I will address next – in the Commission adopting the Investigator's recommendation. The Report addresses all key submissions, including the range of alternative accommodations proposed.

[49] In sum, procedural fairness does not require that the Decision expressly itemize all of the evidence submitted. There is, in my view, no basis upon which to conclude that the Investigator, or in turn the Commission, failed to consider crucial evidence. Finally, I will also address the "alternative accommodations" argument as part of the substantive review of the Decision on the reasonableness standard, below.

ii. Failure to address the entirety of Ms. Soullière's responses

[50] I also disagree with Ms. Soullière's second procedural fairness allegation that the Commission improperly excised portions of her responding submissions that pertained to the other complaint against HC, to which CBS is not a party. Indeed, the Commission properly decided to excise the portions of Ms. Soullière's response regarding the HC complaint. Two complaints were levied by Ms. Soullière (consistent with the Commission's procedure): one against CBS, and another against HC. CBS was not privy to the HC complaint, and had no opportunity to make submissions on any of the issues raised in that investigation (and vice versa).

[51] Therefore, it may have been procedurally unfair to CBS had the Commission conflated the two complaints, considering information gathered in the HC investigation when making its findings in the CBS complaint. Again, CBS was not privy to the HC complaint (and vice versa). Otherwise stated, excising the portions of Ms. Soullière's response related to the HC complaint, as the Investigator did, was both appropriate and necessary in the circumstances.

[52] Rather, it is what Ms. Soullière advocates for that would have been procedurally unfair. Counsel for Ms. Soullière chose to file a single consolidated response to both investigation reports, each of which proceeded as a separate complaint. The fact that the Commission needed to sever the information pertaining to each complaint therefore should not have come as a surprise.

[53] To conclude, I do not agree with the allegations of unfairness raised. First, I find the investigation was thorough and neutral, and that the Commission dealt with all of the relevant issues after considering the appropriate evidence and submissions. Second, I do not find any unfairness in the severing of the Applicant's response to the Report.

B. *Did the Commission render its decision on the basis of no evidence?*

[54] Ms. Soullière submits the Commission's conclusion – that the requested accommodation would result in undue hardship to CBS by creating a risk to the safety of the blood supply – was based on no evidence, unreasonable inferences, or mere speculation.

[55] Ms. Soullière asserts that there was "no evidence before the Commission to suggest that the proposed alternative accommodation would cause undue hardship to CBS" (Applicant's Memorandum of Fact and Law at para 50). In particular, Ms. Soullière states that there was no evidence of any evidence-based risk analysis having been conducted by CBS to support its position of undue hardship. Therefore, the Commission failed to consider whether CBS had demonstrated that it adequately engaged in a risk analysis in reaching its conclusion that the alternative accommodations pose undue risk to the safety of the blood supply.

[56] By contrast, Ms. Soullière points to CBS' deferral policy for males who have sex with males. Ms. Soullière argues in that instance, CBS engaged in a thorough evidence-based risk assessment to determine whether the deferral policy could be changed without causing undue risk to the blood supply.

[57] Further, Ms. Soullière states that in a 2009 pilot project, CBS tried having multi-skilled clinic employees - instead of nurses - perform all clinic functions, found that the change did not compromise safety, and changed the blood donation process as a result. Ms. Soullière asserts that in both of these examples, CBS gathered data to determine actual risk to the safety of the blood supply, but failed to do so in this case.

[58] Ms. Soullière submits that the facts before the Commission demonstrated that the alternative forms of accommodation she proposed may meet the screening requirements established by CBS, yet the Commission failed to explore the accommodation options analogous to ASL and foreign language interpretation, such as "plain language" translation. Therefore, the Commission arbitrarily made its decision on the basis of no evidence regarding the actual risks posed by the alternative forms of accommodation.

[59] This is one of the issues, mentioned above, where the parties fundamentally differ on the applicable standard of review. Ms. Soullière contends that findings based on no evidence, unreasonable inferences, or mere speculation, constitute errors of law subject to the correctness standard of review, as they are elevated to "jurisdictional errors". Ms. Soullière relies on *Fashoranti v College of Physicians and Surgeons of Nova Scotia*, 2015 NSCA 25 at para 21 [*Fashoranti*], where the Nova Scotia Court of Appeal relied on its earlier decision in *Fadelle v Nova Scotia College of Pharmacists*, 2013 NSCA 26 [*Fadelle*] at paras 12-17. *Fadelle* states at paragraph 15 that a finding based on no evidence is an arbitrary finding, and an error of law.

[60] For its part, CBS contends that the applicable standard of review is reasonableness.

i. Analysis

[61] In terms of standard of review, determinations on questions of fact are entitled to deference (*Dunsmuir* at para 53), and so is the Commission's discretionary decision to dismiss a complaint (*Halifax* at para 17).

[62] In *Fadelle*, the Nova Scotia Court of Appeal was dealing with a statute that provided for an appeal on "any point of law", and was faced with the question of when an error in an administrative tribunal's fact finding process may constitute an appealable error of law – an entirely different context than this judicial review. As noted in *Fashoranti* at para 23, and in *Fadelle* at para 12, before applying the administrative law standard of review, a court must isolate any ground of appeal permitted by statute (in that case, on any "point of law"). There is no statutory ground of appeal in this case.

[63] Furthermore, nothing in *Fadelle* held that fundamentally unreasonable inferences can be an error of law, or that a finding of an essential fact based on no evidence rises to an error of jurisdiction, in relation to a standard of review analysis. Rather, the Court of Appeal simply observed that the factual grounds being challenged were "beyond the Court's appellate jurisdiction, that is confined to errors of law" (*Fadelle* at para 17; emphasis added). This is an entirely different proposition than the one raised by Ms. Soullière.

[64] Moreover, even if one puts aside the different context of *Fadelle*, and accepts that the Tribunal's factual findings in this case were properly considered a question of law, they could

well now be subject to the reasonableness standard of review under modern administrative law principles. There is simply no indication that any of the categories that rebut the presumption of reasonableness are present here (see generally *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at paras 22-24 [*Edmonton East*]; *Keith v Canada (Correctional Service)*, 2012 FCA 117 at para 48 [*Keith*]).

[65] Finally, the applicable standard of review would make no difference in this case. If an important finding, such as whether alternative accommodations would require undue hardship, was indeed based on no evidence, it is hard to imagine circumstances where such a decision would not be unreasonable.

[66] In any case, I do not find that there is any foundation to the argument that the Decision was based on no evidence. At best, the Applicant's argument in this case might be that the Decision was based on insufficient evidence.

[67] Either way, I find that the Commission reasonably concluded, based on the evidence, that the proposed accommodations would result in undue hardship because all donors must understand the risks and responsibilities of blood donation, and the proposals would undermine CBS' ability to assess that understanding. Briefly, at this stage I would note the evidence of the tainted blood tragedy and that, as the Ontario Superior Court of Justice warned in *Canadian Blood Services v Freeman*, 2010 ONSC 4885 at paras 28-30 [*Freeman*], blood recipients are also vulnerable and "[i]t is these same groups who would once again suffer devastating consequences if any reduction of standards led to increased transmission of pathogens."

[68] Given that, in my view, the proper standard of review for this issue is reasonableness, I will more fully address the evidence supporting the Commission's Decision under the next section.

C. *Was the Commission's Decision reasonable?*

[69] Ms. Soullière makes similar arguments above, in contending that the Commission's Decision was procedurally unfair. Specifically, Ms. Soullière alleges that the Commission did not properly consider all of the alternative accommodations, such as clear language interpretation, and that the finding of undue hardship was unsupported by any evidence-based risk analysis.

[70] CBS takes the position that it cannot modify the DHAQ or permit a third party to assist Ms. Dewan in answering questions in the donor screening process.

[71] As discussed above, the Report canvassed the positions of the parties in detail and addressed the essential evidence and issues. The Commission concurred with CBS' position that the various accommodations proposed for Ms. Dewan would require undue hardship in the form of undue risk to the safety of the blood supply. This conclusion was well supported by the evidence detailed in the Report, and while I do not propose to repeat those details in full, I will highlight some of the evidence in support of why waiving or deviating from the established safeguards would result in undue hardship.

[72] There was substantial evidence of positive actions taken by CBS to accommodate individuals like Ms. Dewan, to the extent possible. It is clear to me that CBS takes a proactive approach to inclusion, actively seeking to accommodate differences. There was evidence that in designing the full donor screening process, of which the DHAQ is one part, CBS has actively sought to use plain, accessible language, including in collaboration with groups such as Community Living, an organization dedicated to supporting and advancing the inclusion of people with intellectual disabilities (Report at paras 40-43). Moreover, CBS closely follows industry standards internationally, and considers screening questionnaires and processes used in other countries.

[73] That said, the screening process is designed to be thorough and to effectively elicit reliable information about risk factors – risk to both the potential donor and potential blood recipients. Therefore, while CBS has strived to replace medical terminology with plain language, some of the questions are necessarily complex, as the information required is complex.

[74] In short, there was evidence that the DHAQ, and the full screening process, was already designed to be as simple as safety permitted. CBS' overarching objective is to collect as much safe blood as possible to support Canada's healthcare system; as a result, it is in CBS' interest to find ways to accommodate potential donors in order to be able to screen them 'in', rather than exclude them. The fact that CBS takes the results of the Krever Inquiry seriously, and considers the safety of the blood supply paramount, does not mean that it discriminates whenever it comes to the limits of possible accommodations.

[75] The screening process is individualized. CBS requires that a potential donor understand the process, their responsibilities as a donor, and the questions, as well as be able to accurately answer those questions and follow through on the responsibilities. The fact that a potential donor has an intellectual disability does not render him or her ineligible; blood donations from some individuals with intellectual disabilities are accepted, but it is on a case-by-case basis depending on demonstrated comprehension of the process. Moreover, in addition to the individualized assessment conducted in the normal screening process, CBS may engage the EME process to consult physicians and external experts, if necessary.

[76] CBS generally prohibits any third party (other than its own screeners) from assisting potential donors. One particular point of contention was CBS' policy making an exception for accredited translation services for ASL and foreign languages, but not allowing for the proposed accommodation of clear language interpretation. CBS requires that ASL and foreign language interpreters must be at arm's-length from the potential donor. Furthermore, all aspects of the screening process must be translated "verbatim" and not modified in any way, minimizing the risk of misinterpretation.

[77] These excepted types of interpreters are regulated, in that they must be accredited for their translation services. There was no evidence, on the other hand, that clear language interpretation is currently a regulated and accredited service. Moreover, as summarized above, there was evidence that the DHAQ is already as clear and accessible as possible. Translation services do not alter CBS' requirement that, in all cases, the screener be completely satisfied that the potential donor has provided informed consent and fully understood the questions.

[78] Finally, I would note that the Report expressly recognizes Ms. Soullière's submissions in detail, including her position on clear language interpretation (see the Report at paras 111-113 and 126-128). Ultimately, however, the Commission favoured CBS' submissions regarding whether further accommodation would result in undue hardship. After reviewing this evidence, the Report concludes:

> Based on the evidence, the respondent's reasons for being unable to accommodate Ms. Dewan by modifying the DHAQ or permitting a third party (such as the complainant) to help Ms. Dewan answer questions in the donor screening process, appear justified… evidence supports that allowing the complainant's requested accommodation would result in undue hardship for the respondent, as it would create undue risk to the safety of the blood supply.
>
> (Report at para 131; see also para 134.)

[79] Returning to the fundamental principles of a reasonableness assessment, I am satisfied that the Decision meets the requirements of "justification, transparency and intelligibility within the decision-making process", and falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above at para 47). While one might differ with its conclusion to dismiss the Complaint at the investigation stage, that outcome was nonetheless open to the Commission in light of the copious amount and quality of evidence on the record. The Commission's Decision was thus reasonable.

D. *Did the Commission exceed its jurisdiction and adjudicate the Complaint?*

[80] Ms. Soullière submits that in dismissing the Complaint, the Commission acted without jurisdiction or exceeded its jurisdiction by adjudicating the Complaint rather than applying the threshold test to determine whether an inquiry is warranted. Ms. Soullière cites the Supreme

Court of Canada's ("SCC") discussion of the role of the Commission, as distinct from that of the Tribunal, in *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 [*Cooper*] at para 53:

> The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it.

[81] Ms. Soullière contends that the Commission overstepped its limited 'screening' role by dismissing the Complaint on the basis of a finding that the alternative accommodations would result in undue hardship to CBS. Ms. Soullière contends that evidence relating to undue hardship needs to be weighed by the Tribunal in order to make this determination. She relies on *Freeman* at para 5, as being illustrative of the need for expert evidence to understand the complexity of the operation of Canada's blood system, the regulatory framework applying to the blood system in Canada, the criteria for blood donor screening in other jurisdictions, and the risk management principles that inform decision-making related to blood safety issues.

[82] Ms. Soullière also contends that the circumstances in this case are similar to those in *Dupuis* at para 23, where this Court held:

> Moreover, instead of asking whether there was a factual basis for the applicant's allegations of discrimination, the investigator appears to have appointed himself as a Human Rights Tribunal by deciding on the merits of the complaint, apparently preferring the employer's characterization without genuinely analyzing the basis of the applicant's allegations. Not only are the investigator's

> findings arbitrary and capricious, but it can also reasonably be asked whether the investigation process leading to the impugned decision was neutral and thorough.

[83] Beginning with the standard of review question, I do not agree with, nor do I find any jurisprudential support for, arguments made by Ms. Soullière that this is a true question of jurisdiction requiring a review on the correctness standard. Rather, the standard of review applicable to the discretionary decision of the Commission to dismiss a complaint under section 44(3)(b) of the Act is reasonableness, albeit keeping in mind that this is a final decision made at an early stage in the proceedings (*Keith* at para 47).

[84] Having said this, I acknowledge that in *Gupta v Canada*, 2011 FC 56 [*Gupta*], the correctness standard was applied to the "jurisdictional" issue of whether, in the course of making this decision, the Investigator and then the Commission exceeded their jurisdiction by stepping into the role of the Tribunal. However, it should be noted that the parties in that case agreed on this point (at para 18).

[85] More importantly, in *Dunsmuir* at para 59, the SCC emphasized that "jurisdiction" is "intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry". And post-*Gupta* (heard by this Court over 5 years ago), the trend at the SCC has been against categorizing issues on judicial review as being jurisdictional: see *Alberta (Information and Privacy Commissioner) v Alberta Teachers Association*, 2011 SCC 61 at paras 33-34, 39.

[86] Most recently, in *Edmonton East* at para 26, the majority of the SCC reiterated that the 'jurisdictional' category is limited, if it indeed has any modern application, in stating that "[t]his category is 'narrow' and these questions, assuming they indeed exist, are rare" (emphasis added).

[87] The majority in *Edmonton East* held that it was clear that the Board could hear the complaint about a municipal assessment, and therefore the issue was "simply one of interpreting the Board's home statute in the course of carrying out its mandate of hearing and deciding assessment complaints" (*Edmonton East* at para 26). Given that the presumption of the reasonableness standard was not rebutted due to jurisdiction or any other reason, the majority found that it applied.

[88] There is no question in this case that the Commission can determine whether to dismiss a complaint pursuant to section 44(3)(b)(i) of the Act. It is nevertheless true that the Commission is not authorized to usurp the Tribunal's role and adjudicate a complaint on its merits. However, that is not what the Commission did in this case.

[89] Rather, the Commission simply determined that there was insufficient evidence to justify a full hearing on the merits, in light of the threshold evidence before it, which was obtained and assessed through the investigatory process, as is required under the Act. As stated by Justice Barnes of this Court in *Tutty v Canada (Attorney General)*, 2011 FC 57 at para 14, "the Commission's decision to dismiss or refer a complaint inevitably requires some weighing of the evidence to determine if it is sufficient to justify a hearing on the merits", a role analogous to that of a judge at a preliminary inquiry (*Cooper* at para 53).

[90] In other words, the Commission must tread carefully between determining the sufficiency of evidence, which it may do, and the wholesale weighing of that evidence, which it cannot do. This can indeed be very a fine line to delineate, and a delicate tightrope for the Commission to cross. The best way to describe the balance is that the Commission may screen the probative value of the evidence. That is part of assessing the sufficiency of the evidence. As described by Justice Zinn in *Gupta* at para 24:

> Assessing the weight of evidence involves assessing the evidentiary value of the evidence — in this exercise the decision-maker assesses the persuasiveness of particular evidence in comparison with other evidence. Assessing the sufficiency of evidence involves considering the probative value of the evidence — in this exercise the decision-maker assesses whether the evidence has a tendency to prove or disprove some allegation, such as allegations of discrimination and harassment. It is generally accepted that it is not within the Commission's or the investigator's authority to weigh the evidence… It is, however, within their power to assess the probative value of the evidence… [Citations omitted].

[91] Cases turning on the final step of the test established in *British Columbia (Public Service Employee Relations Commission) v BCGEU*, [1999] 3 SCR 3 [*Meiorin*], namely whether accommodation would result in undue hardship, necessarily involve a comparison of any evidence regarding potential accommodation options and any resulting hardship. There is no scientific formula for the point at which hardship becomes "undue". However, the jurisprudence does not indicate that the Commission cannot decide to dismiss a complaint on the basis of undue hardship (i.e. that this consideration can only be assessed by the Tribunal). In this case, the Commission's Decision did not cross the line, in finding that there was insufficient evidence to justify a full hearing before the Tribunal.

[92] At the third stage of the *Meiorin* framework, the onus is on the respondent (here, CBS) to justify the impugned standard by establishing, on a balance of probabilities, that no further accommodation is possible without imposing undue hardship (*Meiorin* at paras 54-55). If it is not clear that accommodation would require undue hardship, at this screening stage of sufficiency, Ms. Soullière argues that one must conclude that this would properly be referred to the Tribunal for adjudication on the merits.

[93] While I agree that the Investigator's statement that the submissions of undue hardship "appear justified" was not the best turn of phrase, it is nonetheless well known that on judicial review, the decision under review "should be approached as an organic whole, without a line-by-line treasure hunt for error"*: Irving Pulp & Paper Ltd v CEP, Local 30*, 2013 SCC 34 at para 54. The Report concretely found that the "complainant's requested accommodation… would result in undue hardship to the respondent, as it would create undue risk to the safety of the blood supply" (emphasis added). There was, as discussed above, more than sufficient evidence to make this determination, which was properly applied in a manner consistent with the *Meiorin* analysis, as will be explained next.

[94] In sum, I find that the Commission considered all of the evidence and reasonably determined that it was insufficient to support a finding of discrimination, a decision that properly fell within its discretion, did not cross the line into the jurisdiction of the Tribunal, and is entitled to deference. And if I am wrong that deference is owed, I would nonetheless find that the Commission did not err. The Commission undertook a balanced screening process in this case, and one that was consistent with its scope as prescribed by the Act.

E. *Did the Commission err in law?*

i. Did the Commission apply the wrong legal test for determining undue hardship?

[95] Ms. Soullière submits that the Commission erred in law when determining whether accommodating Ms. Dewan's disability would result in undue hardship by failing to investigate alternative forms of accommodation proposed by Ms. Soullière, contrary to *Meiorin*.

[96] She asserts that this issue is subject to the correctness standard, simply stating that it raises a question of law that is reviewable on a standard of correctness and citing *Dunsmuir,* at para 50, without elaboration. In the alternative, she asserts that the error would still be fatal under the reasonableness standard.

[97] Once a complainant has established a *prima facie* case of discrimination, as the Commission found here, the burden shifts to the respondent. In other words, it was up to CBS to demonstrate that it would experience undue hardship if a different, accommodating standard were used. *Meiorin* establishes a three-step test for determining whether a *prima facie* discriminatory standard is justified (at para 54):

> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the

> characteristics of the claimant without imposing undue hardship upon the employer.

[98] While the *Meiorin* test was originally developed in the context of discrimination in employment, it also applies to the public provision of services (*British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights),* [1999] 3 SCR 868 at paras 21-22, 43-44).

[99] It is the third step of the *Meiorin* test that is primarily at issue in this case. In *Meiorin*, the government failed to demonstrate that a particular aerobic standard that most women could not pass was reasonably necessary to perform the tasks of forest fighter safely and efficiently. The SCC found that the government did not establish undue hardship if a different standard were used, as there was no evidence that another standard would pose undue risk and could not be safely carried out (at para 79):

> Referring to the Government's arguments on this point, the arbitrator noted that, "other than anecdotal or 'impressionistic' evidence concerning the magnitude of risk involved in accommodating the adverse-effect discrimination suffered by the grievor, the employer has presented no cogent evidence . . . to support its position that it cannot accommodate Ms. Meiorin because of safety risks". The arbitrator held that the evidence fell short of establishing that Ms. Meiorin posed a serious safety risk to herself, her colleagues, or the general public. Accordingly, he held that the Government had failed to accommodate her to the point of undue hardship. This Court has not been presented with any reason to interfere with his conclusion on this point, and I decline to do so. The Government did not discharge its burden of showing that the purpose for which it introduced the aerobic standard would be compromised to the point of undue hardship if a different standard were used.

[100] Ms. Soullière also notes that the fact that Ms. Meiorin was subjected to individualized testing did not immunize the government, as individual testing in that case did not negate discrimination. Rather, the SCC held that Ms. Meiorin had not been tested against a realistic standard that reflected her capacities and potential contributions.

[101] Extending that result to this case, Ms. Soullière contends that by failing to properly investigate the alternative accommodations proposed by Ms. Soullière, the Investigator and thereby the Commission failed to properly apply the third step of the *Meiorin* test.

[102] Ms. Soullière also asserts that the Investigator approached the investigation in three parts, none of which are responsive to the central issues raised by *Meiorin's* three steps. Ms. Soullière submits that an investigator's failure to properly apply the *Meiorin* test is a reviewable error, citing *Walsh v Canada (Attorney General)*, 2015 FC 230 at paras 23-33 [*Walsh*].

[103] Contrary to these submissions, I find that the Commission considered the issues in a manner consistent with the *Meiorin* test, including the third step of whether Ms. Dewan could be accommodated without undue hardship. This case does not resemble *Walsh*, where the investigator ignored the crucial third step of the *Meiorin* test and failed to give any consideration to the question of accommodation short of undue hardship (*Walsh* at paras 31-33).

[104] Here, the Investigator addressed the question of whether undue hardship would ensue, and concluded it would, given the evidence addressing the risks to the safety of the blood supply resulting from the adoption of any of the numerous accommodation measures proposed

(canvassed in the Report at paras 40 to 101 of the Report). At paragraphs 93 and 95 of the Report, the Investigator noted CBS' submission that "patients' lives depend on it fulfilling its mandate to maintain an adequate supply of safe and high quality blood products", and that requiring certain accommodations that will result in placing the lives of others at risk flies in the face of logic (*citing Simcoe (County) v Ontario Public Service Union (2009)*, 314 DLR (4th) 756 at para 30 (Ont Div Ct), [2009] OJ No 5221).

[105] The Commission's consideration of the alternative accommodations and ensuing hardship is thus an entirely reasonable outcome. This is another variation of the same argument rejected above (under the rubric of "procedural fairness" and "no evidence"). Either way, given that the Commission adopted the appropriate legal test, I cannot find fault with the way that it was applied. The three steps, disclosed at the outset of the Report and which have been reviewed at 23 - 31 above, closely follow the *Meiorin* framework.

[106] As for the crucial question of whether the respondent satisfied its onus to establish the third step of *Meiorin*, the Report – unlike in *Walsh* – properly considered whether CBS had accommodated persons with the characteristics of Ms. Dewan to the point of incurring undue hardship, by considering ways in which CBS could have accommodated Ms. Dewan.

[107] As noted in the Report, CBS provided an individualized assessment to Ms. Dewan, after having designed the process to be as accessible as possible and as simple as safety permitted, according to Dr. Goldman's evidence. That evidence showed, and the Report noted, that individuals with intellectual disabilities are not necessarily screened out, save for those who

cannot comprehend the process. Regrettably, Ms. Dewan fit into the latter category, a result that no one desired. The evidence relied upon in coming to this Decision was not merely anecdotal or impressionistic.

[108] Ultimately, after considering the alternative accommodations, the Report concluded that requiring the additional accommodation sought by Ms. Soullière, on her daughter's behalf, would require undue hardship by creating an undue risk to the safety of the blood supply – a reasonable conclusion.

ii. Did the Commission err in law by rejecting the procedural duty to accommodate?

[109] Ms. Soullière submits that the Commission erred in rejecting her argument of a separate, freestanding procedural duty to accommodate under the Act. According to Ms. Soullière, the Commission misapplied the Federal Court of Appeal's decision in *Cruden*, which held that there is no separate procedural duty where the respondent has satisfied the three-part *Meiorin* test for establishing undue hardship.

[110] Ms. Soullière submits that in order to determine whether undue hardship has been established, and the *Meiorin* test is met, it is necessary for the Respondent to demonstrate that it would be impossible to accommodate her daughter. This requires that CBS engage in a process of assessing alternative forms of accommodation, and "[o]n that basis, the procedural duty to accommodate is relevant to the substantive duty to accommodate and the consideration of undue hardship" (Applicant's Memorandum of Fact and Law at para 71).

[111] In other words, Ms. Soullière argues that CBS' procedural failure to search for alternative forms of accommodation led to the breach of its substantive duty. As a result, Ms. Soullière – once again on this ground – submits that further inquiry is warranted to determine if alternative accommodations would cause undue hardship. Ms. Soullière argues that CBS' rush to judgment when it advised her that donating blood "was never going to happen" for Ms. Dewan, was symptomatic of CBS' failure to procedurally accommodate and/or explore alternative accommodations.

[112] I disagree. The Commission correctly applied the Federal Court of Appeal's decision in *Cruden*, which held there is no independent procedural component to the duty to accommodate (at para 16). That decision is binding on this Court. The paragraph from *Meiorin* which was relied upon to make this procedural argument in *Cruden*, at para 18, reads as follows:

> 66 Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard…
>
> [*Meiorin*, above at para 66; emphasis added]

[113] This paragraph is simply commentary related to the third step of *Meiorin*, which did not intend to create a separate procedural right to accommodate (*Cruden* at para 21). The process followed by the respondent in determining whether accommodation is possible is simply a relevant consideration at the third step, where the onus is on the respondent. This is further reflected by one of the considerations suggested by the SCC in *Meiorin* at para 65: "Has the

employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?"

[114] Having concluded that the Commission made no legal error, Ms. Soullière's complaint underlying this argument – that CBS and then the Commission did not consider all of the alternative, possible accommodations – has already been raised and addressed above. This is yet another variation of that argument, and I have already outlined above my finding that CBS actively seeks to accommodate Ms. Dewan and those with similar characteristics.

[115] Finally, in making this argument, Ms. Soullière referenced that Ms. Dewan has been told that blood donation will "never" happen for her. According to the Report, Ms. Dewan is "indefinitely deferred" by CBS, which it confirmed, post-hearing, means that Ms. Dewan may donate blood in the future should the circumstances change and she be able to pass the screening. The Record suggests that, although Ms. Dewan is intellectually disabled, she continues to develop. In this spirit, it is my sincere hope that in the future Ms. Dewan's will have developed sufficiently to enable her to pass the screening requirement and be able to realize her admirable hope of giving blood.

F. *Did the Commission err in accepting that the Complaint pertained to a "service" under the Act?*

[116] Prior to this section 44 Decision under review, CBS had asked the Commission not to deal with the Complaint at the preliminary screening stage, pursuant to section 41 of the Act. At that stage, the Commission decided that it was not "plain and obvious" that the activity in

question is not a service, and therefore proceeded with the Complaint. When CBS again raised this argument at the section 44 stage, it was dismissed in the Report on the basis that the Commission had already considered this issue.

[117] CBS thus argued that even if this Court should find that the Commission erred in making its decision to dismiss the Complaint based on the evidence, no inquiry is warranted because blood collection is not a "service" to donors within the meaning of section 5 of the Act.

[118] The Commission, which intervened in this matter, took the position that the Court does not need to determine this "service" issue in order to dispose of the present application. Rather, the Commission submits that the Court need only decide whether the Commission's Decision to dismiss the Complaint under section 44 of the Act was reasonable. In any event, the Commission took the view that had CBS wished to challenge the December 18, 2013 section 41 decision to deal with the Complaint, it should have judicially reviewed that decision at the time.

[119] On the latter point, I agree with CBS – and the jurisprudence – that it could properly wait until the section 44 decision (that which is now under review) to challenge the service issue.

[120] However, given that I have found that the Commission made no reviewable error in dismissing the Complaint against CBS under section 44, there is no reason to review the Commission's determination on the "service" issue. To be clear, my position is not an endorsement or rejection of the Commission's determination on the "service" issue.

VII. Conclusion

[121] For all of the reasons provided above, this application for judicial review is dismissed. I find no basis upon which to determine that the decision was incorrect or unreasonable. As a result, there is no reason to address CBS' argument that it does not provide a "service" within the meaning of the Act.

[122] The parties agreed that there will be no award of costs.

JUDGMENT in T-690-15

THIS COURT'S JUDGMENT is that:

1. This judicial review is dismissed.

2. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-690-15
STYLE OF CAUSE:	YVONNE SOULLIÈRE v CANADA BLOOD SERVICES, HEALTH CANADA AND THE CANADIAN HUMAN RIGHTS COMMISSION
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APPEARANCES:

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