[The Manitoba Human Rights Commission has replaced the name of the Co – Respondent in this document with "X" at the request of the individual concerned, solely for publication on this website.]

Date: 20111214
Docket: CI 09-01-62944
(Winnipeg Centre)
Indexed as: Canadian Blood Services v. The Manitoba Human Rights Commission and X
Cited as: 2011 MBQB 312

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	
	)	
CANADIAN BLOOD SERVICES,	)	COUNSEL
	)	
Applicant,	)	Applicant:
- and -	)	Mary Gleason, Mark Newman
	)	and J. Murray
	)	
THE MANITOBA HUMAN RIGHTS COMMISSION and X,	)	Respondent MHRC:
	)	Isha Khan
	)	
Respondents,	)	Intervener:
- and -	)	Michael Conner
	)	and Allison Pejovic
	)	
ATTORNEY GENERAL OF MANITOBA,	)	
	)	Judgment delivered:
Intervener.	)	December 14, 2011

KEYSER J.

[1] This case involves the jurisdiction of the Manitoba Human Rights Commission (MHRC) to entertain a complaint of discrimination against Canadian Blood Services (CBS) filed by X on November 10, 2008. By decision dated May 22, 2009, MHRC decided that it had jurisdiction to hear the complaint As a result of the objection filed by CBS, MHRC has stayed an inquiry into the complaint pending a decision on jurisdiction. CBS has applied for *certiorari* prohibition and a declaration that MHRC does not have jurisdiction to entertain this complaint. X has not filed a parallel complaint with the Canadian Human Rights Commission. For the reasons that follow, the relief sought by CBS will be granted.

[2] The applicable section of ***The Human Rights Code,*** R.S.M. 1987, cap. H170, is:

> **13(1)** No person shall discriminate with respect to any service, accommodation, facility, good, right, licence, benefit, program or privilege available or accessible to the public or to a section of the public, unless bona fide and reasonable cause exists for the discrimination.

There is a comparable section in the ***Canadian Human Rights Act****,* R.S.C. 1985, c. H-6, which also prohibits similar discrimination.

[3] CBS was created in 1998 as a result of the Krever Inquiry into the tainted blood scandal involving the Canadian Red Cross. A lengthy affidavit on the history of, and purpose for, the creation of the CBS was affirmed by Dr. Mindy Goldman, Executive Medical Director of Donor and Transplantation Services at CBS. In her affidavit, affirmed July 14, 2010, she deposes:

> 28. CBS is a not-for-profit, charitable organization whose mission includes managing the blood and blood component supply in all provinces and territories of Canada except for Quebec.

She goes on to state:

> 29. CBS, among other things, collects blood and blood components from volunteer donors, processes them into blood products, and distributes these products to hospitals and other facilities across Canada. The products are used in the treatment of a wide range of conditions, including serious trauma, cancer and burns. Blood-based products are also used to treat patients with congenital blood and bleeding disorders such as haemophilia.

I pause to note that neither the respondents nor the intervener have cross-examined Dr. Goldman on the contents of her affidavit. Therefore, the facts in her affidavit are deemed not to be disputed.

[4] A review of the legislative scheme involving the regulation of blood is in order. In Dr. Goldman's affidavit, at para. 30, she deposes that CBS was incorporated on February 9, 1998, under Part II of the ***Canada Corporations Act*** further to a Memorandum of Understanding (MOU) executed between the federal, provincial (other than Quebec) and territorial Ministers of Health in late 1997. A copy of the MOU was attached to the affidavit as exhibit S. In exhibit 5, at s. 3.0, the common policy objective of the new national blood system was articulated as based on the following key principles:

- the safety of the blood supply is paramount
- a fully integrated approach is essential;

• accountabilities must be clear; and
• the renewed blood supply system must be transparent.

[my emphasis]

[5] Pursuant to para. 4.3 of the MOU, the signatories agreed that the creation of the National Blood Authority (NBA) and its mandate to create its own standards related to health and safety would not constitute a regulatory power or otherwise result in any diminution of the responsibilities of the Minister of Health (Canada), (the Minister) pertaining to the administration and enforcement of the ***Food and Drugs Act****,* R.S., c. F-27, s. 1 (the ***FDA)*** and regulations. In case any ambiguity remained, it was further clarified at para. 5.1 that the Minister remained responsible for the administration of the ***FDA*** with respect to the national blood system. Pursuant to para. 5.2, the Minister remained responsible to ensure that Canada maintained an effective national system for the surveillance of blood-borne pathogens, and he/she was to use best efforts within his/her authority to co-operate with the NBA with regards to surveillance activities. Finally, at para. 5.3, the Minister remained responsible to maintain the capacity of the federal government with respect to the regulation of certain components of the national blood supply system pursuant to the ***FDA.*** There are other provisions in the MOU for the funding of the new national system, partly by the federal government.

[6] A copy of the ***FDA*** is found at tab 18 of the applicant's book of authorities, vol. III. On p. 2, the definition of "drug" is that it

> includes any substance or mixture of substances manufactured, sold or represented for use in
>
> > (a) the diagnosis, treatment, mitigation or prevention of a disease, disorder or abnormal physical state, or its symptoms, in human beings or animals,

> (b) restoring, correcting or modifying organic functions in human beings or animals, or
>
> (c) disinfection in premises in which food is manufactured, prepared or kept.

[7] At p. 28 of the ***FDA,*** a list of drugs under Schedule D, which includes blood and blood derivatives, except cord blood and peripheral blood that are a source of lymphohematopoietic cells for transplantation, is set out. Therefore, blood and blood derivatives are regulated as drugs pursuant to Schedule D of the ***FDA.***

[8] Section 12 of the ***FDA*** states:

> No person shall sell any drug described in Schedule C or D unless the Minister has, in prescribed form and manner, indicated that the premises in which the drug was manufactured and the process and conditions of manufacture therein are suitable to ensure that the drug will not be unsafe for use.

Section 22 of the ***FDA*** gives a broad power of inspection to the Minister, and s. 30 sets out the power of the Governor-in-Council to make regulations for carrying out the purposes and provisions of the ***FDA,*** including:

> (e) respecting the method of manufacture, preparation, preserving, packing, storing and testing of any food, drug, cosmetic or device in the interest of, or for the prevention of injury to, the health of the purchaser or consumer;
>
> (f) requiring persons who sell food, drugs, cosmetics or devices to maintain such books and records as the Governor in Council considers necessary for the proper enforcement and administration of this Act and the regulations;
>
> (g) respecting the form and manner of the Minister's indication under section 12, including the fees payable therefore, and prescribing what premises or what processes or conditions of manufacture, including qualifications of technical staff, shall or shall not be deemed to be suitable for the purposes of that section;

Finally, s. 31 of the ***FDA*** establishes that every person who contravenes a provision of the ***FDA*** or regulations is guilty of an offence and subject to punishment.

[9] Tab 19 of CBS's book of authorities (vol. III) reproduces the regulations relating to the ***FDA.*** Part C, Division 1A of the regulations, pertains to establishment licences. At p. 3 of Division 1A, it makes it clear that this part applies to the CBS since it applies to distributors of schedule D drugs, which include blood and blood products. Pursuant to s. C.01A.004 (1) at p. 4, "no person shall fabricate or distribute a drug except in accordance with an establishment licence." This would include providing evidence that CBS'S buildings, equipment and proposed practices and procedures meet applicable requirements of Divisions 2 to 4 (C.01A.005(l)). Pursuant to C.01A.006, if the practices are changed, the establishment licence must be amended. In addition to other requirements for an establishment licence, pursuant to C.01A.008 (3) and (4):

> (3) The Minister may indicate in an establishment licence a period for which records shall be retained under Division 2 that, based on the safety profile of the drug or materials, is sufficient to ensure the health of the consumer.
>
> (4) The Minister may, in addition to the requirements of subsection (2), set out in an establishment licence terms and conditions respecting
>
> > (a) the tests to be performed in respect of a drug, and the equipment to be used, to ensure that the drug is not unsafe for use; and
> >
> > (b) any other matters necessary to prevent injury to the health of consumers, including conditions under which drugs are fabricated, packaged/labelled or tested.

In the regulations, the Minister has the right to refuse to issue an establishment licence if there are reasonable grounds to believe that issuing such a licence would constitute a risk to the health of the consumer. Finally, any change to practice and procedure by a person who holds an establishment licence must be through notification to the Minister. The recurrent theme throughout the ***FDA*** and regulations is protection of the health of the consumer.

[10] Division 2 of the regulations sets out good manufacturing practices. Good manufacturing practices ("GMP") include written procedures for raw material testing. Under this division, written procedures are required to ensure that each lot or batch of the drug is produced in compliance with those procedures (C.02.O11 (2)). Division 4 of the regulations deals specifically with Schedule D drugs, which includes blood and blood products. According to this division of the regulations, no distributor shall sell a drug unless it has been produced in accordance with the requirements of this division. The packaging for whole blood and its components must contain the establishment licence number of the distributor as part of the packaging (C.04.019 (b)(ii)). At pp. 13 and 14 of this division, the regulations state that:

> **C.04.230.** Preparations from human sources shall be pooled blood plasma, or pooled blood serum, or fractions of either separated by a method satisfactory to the Minister.
>
> **C.04.231.** A fabricator shall obtain human serum, or human plasma, only from a person certified by a qualified medical practitioner to be healthy.
>
> **C.04.232.** A fabricator shall not use a person to serve as a donor of blood, placenta, or cord who has a history of a disease transmissible by blood transfusion including syphilis, infectious hepatitis, or malaria.
>
> **C.04.233.** The operation of drawing blood from a donor shall be under the supervision of a qualified medical practitioner, and shall be carried out in a suitable bleeding room under the control of the fabricator.
>
> **C.04.237.** A fabricator of preparations from human sources shall maintain complete records of all donors, which records shall include the medical certificate required by section C.04.231.

[11] There follows a number of requirements for a fabricator of blood products from human sources. In C.04.400, plasmapheresis is defined as a process during which:

> (a) blood is taken from a donor from which plasma is separated; and
>
> (b) red blood cells and formed elements from the blood are returned to the donor.

C.04.406 sets out conditions for a physician to determine if a donor is suitable to participate in plasmapheresis, and pursuant to subsection (3):

> If the donor is determined to be not suitable to participate in plasmapheresis for an indefinite period based on the exclusion criteria set out in Table 2 or any other medical reason justifying a determination of indefinite non-suitability, the fabricator shall cancel the session and inform the donor of the reason why they are not suitable to participate in plasmapheresis for an indefinite period.

Table 2, which is the exclusion criteria for "an indefinite period" includes, at No. 10, "risk of HIV infection based on sexual practices".

[12] Exhibit X to the affidavit of Dr. Goldman (vol. II, tab X) is an annex to the GMP Guidelines for Schedule D drugs. As the preface indicates, "The purpose to this document is to provide specific guidance for the application of good manufacturing practices to blood establishments." At p. 9, under the heading "Raw Material Testing," the practices include that:

> 2.1 All blood donors must be found acceptable each time they donate based on the approved health screening criteria. A document shall be available at each blood collection site that details the approved health screening criteria for acceptance/deferral of donors.

Section C.02.015 indicates that:

> 1. The donor screening criteria (see Raw Material Testing) and donor sample testing (Quality Control Department) are factors in determining the acceptable quality and safety of blood components. In process controls, as specified in approved OP's, provide specific GMP for Blood Component fabrication.

[13] The establishment licence for the Winnipeg site of CBS is set out at ex. W of Dr. Goldman's affidavit (vol. II, tab W). Any amendments to the establishment licence must be submitted pursuant to the ***FDA*** and be accepted before implementation. As further set out in the affidavit of Dr. Goldman, Health Canada has authority to inspect any facility being used in the manufacture of any drug. Health Canada inspects CBS'S

manufacturing facilities, including collection facilities, every year (aff., para. 43). During an inspection, Health Canada evaluates the activities observed and documentation available to assess if CBS is operating in accordance with the requirements of the ***FDA*** and regulations, including the requirement that CBS follow its standard operating procedures, (aff., para. 44). The specific donor screening policy, such as the one at issue in X's complaint, was approved by Health Canada. If CBS wants to make any change to its donor screening criteria, CBS must make a submission to Health Canada and obtain its approval for the change (aff., para. 45).

[14] Exhibit Y to Dr. Goldman's affidavit (vol. II, tab Y) is a document entitled "Guidance for Industry: Management of Blood Establishment Submissions". Its foreword indicates that it is meant to "provide assistance to industry and health care professionals on how to comply with governing statutes and regulations." Under Table 1 (p. 7 of this document), Category IV, which is labelled 'substantial risk,' new processes, new or revised work instructions requiring judgment, <u>revisions to donor's suitability,</u> deferral or identification are listed." (my emphasis). Thus, Health Canada considers suitability to fall under the category of substantial risk. As a result, donor suitability criteria cannot be changed without prior approval from Health Canada.

[15] The performance of the donor screening interview is governed by a specific CBS standard operation procedure. The standard operating procedures for the health interview, which outlines the donor screening process, is attached at ex. U to Dr. Goldman's affidavit (vol. II, tab U). Exhibit V to Dr. Goldman's affidavit (vol. II, tab V) is the donor selection criteria manual used by CBS, which includes, under Section C, the

HIV Exclusion Criteria. Under criteria 1, there is to be an indefinite deferral if a male had sex with another male even once since 1977. These criteria are to be applied under the SOP that is referred to in the establishment licence. As earlier stated, changes to the SOP are changes that require the approval of Health Canada. The present donor selection criteria would exclude X from donating blood.

[16] X takes issue with the indefinite deferral prescribed because of his sexual orientation and has filed the complaint in question with the MHRC.

POSITIONS OF THE PARTIES

[17] Because the issue in this motion is the jurisdiction of the MHRC to entertain X's complaint, all parties have agreed that the standard of review of the decision is one of correctness.

Position of Canadian Blood Services

[18) The position of CBS can be broken down into four points:

(i) The federal government has authority under its criminal law power to promulgate the ***FDA*** and regulations, which properly legislate in the area of blood safety. As was stated in ***In the Matter of a Reference as to the Validity of s. 5(a) of the Dairy Industry Act, R.S.C. 1927, Chapter 45,*** [1949] S.C.R. 1 (also known as the Margarine Reference) at p. 50:

> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law, …

Similarly, in ***R. v. Wetmore,*** [1983] 2 S.C.R. 284 at p. 288, the court stated:

> An examination of the various provisions of the *Food and Drugs Act* shows that it goes beyond mere prohibition to bring it solely within s. 91(27) but that it also involves a prescription of standards, including labelling and packaging as well as control of manufacture. The ramifications of the legislation, encompassing food, drugs, cosmetics and devices and the emphasis on marketing standards seem to me to subjoin a trade and commerce aspect beyond mere criminal law alone. There appear to be three categories of provisions in the *Food and Drugs Act.* Those that are in s. 8 are aimed at protecting the physical health and safety of the public. Those that are in s. 9 are aimed at marketing and those dealing with controlled drugs in Part III of the *Act* are aimed at protecting the moral health of the public. One may properly characterize the first and third categories as falling under the criminal law power but the second category certainly invites the application of the trade and commerce power.

None of the parties disputes that the ***FDA*** and its regulations, which include the distribution of blood and blood products, are properly passed pursuant to the federal government's criminal law power.

(ii) CBS contends, as well, that the jurisdiction in blood safety can also be founded under the aegis of peace, order and good government (POGG). POGG involves all matters not coming within areas assigned exclusively to provincial jurisdiction. As s. 91 of the ***Constitution Act of 1867*** states, the federal government has the jurisdiction:

> to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this *Act* assigned exclusively to the legislatures of the provinces.

As was stated in ***R. v. Crown Zellerbad, Canada Limited,*** [1988] S.C.J. No. 23 (QL), [1988] 1 S.C.R. 401, POGG includes jurisdiction over matters of "inherent national concern". In ***Crown Zellerbach,*** reference was made to Estey J. in ***Labatt Breweries v. Attorney General of Canada,*** [1980] 1 S.C.R. 914:

> 30 ... He summed up the doctrine with respect to that basis of federal legislative jurisdiction [POGG] as falling into three categories: (a) the cases "basing the federal competence on the existence of a national emergency"; (b) the cases in which "federal competence arose because the subject matter did not exist at the time of Confederation and clearly cannot be put into the class of matters of a merely local or private nature", of which aeronautics and radio were cited as examples; and (c) the cases in which "the subject matter 'goes beyond local or

> provincial concern or interest and must, from its inherent nature, be the concern of the Dominion as a whole", citing Canada Temperance Federation. Thus Estey J. saw the national concern doctrine enunciated in Canada Temperance Federation as covering the case, not of a new subject matter which did not exist at Confederation, but of one that may have begun as a matter of a local or provincial concern but had become one of national concern. He referred to that category as "a matter of national concern transcending the local authorities' power to meet and solve it by legislation", and quoted in support of this statement of the test a passage from Professor Hogg's *Constitutional Law of Canada* (1977), at p. 261, in which it was said that "the most important element of national dimension or national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it grave consequences for the residents of other provinces."

[19] To sum up, the CBS contends that:

1) the ***FDA*** and regulations are valid federal legislation, which is not disputed by any of the parties;

2) the legislation and regulations in question apply to the CBS, which is also not disputed by the parties;

3) to operate, CBS requires an establishment licence for each premises, it must operate within the terms of the licence and with the regulatory restrictions as set out in the regulations - the standard operating procedures encompass the criteria that are at issue in this case, and these criteria must have the approval of Health Canada before they can be changed; and

4) MHRC does not have jurisdiction over Health Canada.

(iiI) CBS also asserts that the federal government has a priority in this matter because of the concept of interjurisdictional immunity. This relates to the very narrow issue of jurisdiction over the "activity" of the blood screening process for purposes of ensuring

blood safety. CBS relies on ***Canada (Attorney General) v. PHS Community Services,*** [2011] S.C.J. No. 44 (QL), 2011 SCC 44 (the ***"Insite"*** case), where the court confirmed that the activity of drug control is federally regulated pursuant to the ***Controlled Drugs and Substances Act,*** S.C. 1996, c. 19 and that federal permission was needed to operate these injection sites. In ***Insite,*** the court distinguished the case of ***Attorney-General of Canada v. Law Society of British Columbia,*** [1982] 2 S.C.R. 307 ***("Jabour").*** At para. 54 of ***Insite,*** the court said that "Jabour does not establish that federal criminal laws cease to apply if their application is inconsistent with the public interest, as defined by a province." Further, although stressing the restraint with which interjurisdictional immunity is to be applied, the court clearly established at para. 65 that, "[w]hile the doctrine of interjurisdictional immunity has been narrowed, it has not been abolished." CBS also relies on ***Canada Mortgage and Housing Corporation v. Iness et al.,*** [2004] O.J. No. 771 (QL), 70 O.R. (3d) 148 (C.A), which counsel contends is on all fours with the case at bar. The case involved a housing co-operative, which was provincially regulated, but funded by CMHC. Money was lent to the co-operative, and an agreement was signed with terms set out therein regulating the amount of rent payable. The complainant, Iness, was paying more rent than others who were not on welfare. The court, in dealing with Iness's complaint, held that the Canadian Human Rights Commission (federal) had jurisdiction to hear the complaint because of the concept of interjurisdictional immunity, stating:

> [34] In this case, I am satisfied that the impugned condition in s. 2(9) of the Operating Agreement is a valid exercise of the federal government's exclusive power to spend its own money. It was not, in substance, an attempt to regulate in the provincial areas of housing or human rights relating to housing.

The court went on to say:

> [41] The doctrine of interjurisdictional immunity protects the core content of an exclusive federal power from provincial regulation. If a provincial law affects a vital or essential aspect of the exercise of a federal power, then the otherwise valid provincial law must be read down so as not to apply to the exercise of the federal power: *Bell Canada v. Québec (Commission de Ia sante et de Ia sécurité du travail du Québec)*, [1988] 1 S.C.R. 749, 51 D.L.R. (4th) 161 at pp. 816-17 S.C.R.; *Greater Toronto Airports Authority*, *supra*, at pp. 653-54 O.R.; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, 166 D.L.R. (4th) 193 at pp. 496-97 S.C.R.; *Canada v. Lewis* (1997), 36 O.R. (3d) 688, 155 D.L.R. (4th) 442 (C.A.) at pp. 696-98 O.R., pp. 452-53 D.L.R.
>
> …..
>
> [43] In my view, the doctrine of interjurisdictional immunity applies as much to Parliament's exclusive authority to spend its money as it does to any other exercise of federal powers. Parliament's power to spend its money, like other powers found in s. 91 of the Constitution Act, 1867, is exclusive. Moreover, if the doctrine of interjurisdictional immunity did not apply to protect the federal spending power, provincial legislation could, in effect, determine the terms and conditions upon which federal funds are expended. That would be untenable. In the same way that Parliament is not constitutionally permitted to use its spending power to regulate matters of provincial jurisdiction, provincial legislatures are not permitted to use their legislative authority to dictate the unassailable core of the federal spending power. To do so would trench upon Parliament's exclusive authority to spend federal money.

CBS contends, therefore, that the attempt by X to file a complaint with the MHRC is an attack on the core exercise of controlling blood safety.

[20] Another case in which interjurisdictional immunity was applied was the case of ***Quebec (Attorney General) v. Canadian Owners and Pilots Association****,* 2010 SCC 39, [2010] 2 S.C.R. 536 (the ***"COPA"*** case), where the court held that interjurisdictional immunity applied and that a provincial zoning law did not apply to an aerodrome. The test was set out as follows:

> [43] After a period of inconsistency, it is now settled that the test is whether the provincial law impairs the federal exercise of the core competence: Canadian Western Bank, per Binnie and LeBel JJ. This decision resolved a debate about whether the provincial law must "sterilize" the essential content of a federal power (the language used in Dick v. The Queen, [1985] 2 S.C.R. 309, at pp. 323-24), or whether it is sufficient that the provincial law "affect" a vital part of the management and operation of the undertaking (Commission duSalaireminimum v. Bell Telephone Co. of Canada, [1966] S.C.R. 767, at p. 774; Bell Canada, at pp. 859-

> 60). See also Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at p. 955, per Dickson C.J., Lamer 3. (as he then was) and Wilson J.

The court held at para. 47 that the prohibition by the Province impaired the federal power to decide when and where aerodromes should be built and that the effect of that might prevent the establishment of a new aerodrome or require the demolition of an existing one, concluding: “This is not a minor effect on the federal power to determine where aerodromes are built.” Similarly, CBS contends that in this situation the federal government has legislated specifically as to what is necessary to protect the integrity of the blood system.

(iv) Finally, CBS contends that the concept of paramountcy is also engaged in this case. Paramountcy can be invoked in two circumstances: firstly, where there is an operational incompatibility between the regimes, giving rise to the impossibility of dual compliance; and secondly, where a provincial enactment frustrates the purpose of a federal law or is incompatible with the purpose of a federal law. In ***Canadian Western Bank v Alberta,*** [2007] 2 S.C.R. 3, the court stated:

> **69** According to the doctrine of federal paramountcy, when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility. The doctrine applies not only to cases in which the provincial legislature has legislated pursuant to its ancillary power to trench on an area of federal jurisdiction, but also to situations in which the provincial legislature acts within its primary powers, and Parliament pursuant to its ancillary powers.

CBS asserts that both branches are met in this case. Firstly, there is operational incompatibility in that, should the MHRC find discrimination in, and order a change to, the standard operating procedures, CBS could not follow any directive to change the SOPs without approval of Health Canada. This would secondarily frustrate the federal purpose to regulate the overall national safety of the blood supply.

Position of the Manitoba Human Rights Commission

[21] Counsel for the MHRC accepts the characterization of the issue as to who has jurisdiction over the narrow activity of blood donor criteria. Their position is that MHRC correctly accepted jurisdiction in this situation. Counsel agrees that the ***FDA*** is validly enacted federal law and that blood safety is the paramount consideration in this matter and further agrees with the pronouncements in ***Wetmore, supra****,* that the ***FDA*** falls under the criminal law power to protect the health of the public plus that any change to the blood donor criteria would have to be pre-approved by Health Canada. Notwithstanding this, the position of the MHRC is that:

(i) CBS activities involving donor screening fall primarily under the provincial administration of health;

(ii) CBS activities are a service and do not impair the ***FDA*** power to regulate blood safety issues;

(iii) responsibility for any changes may ultimately need to be approved by Health Canada, but the MHRC can and may consider whether any discriminatory practice might present a lesser discriminatory option.

[22] With respect to the first point, counsel refers to the case of ***Northern Telecom Ltd. v. Communications Workers of Canada,*** [1980] 1 S.C.R. 115, in which the court refers to its decision in ***Construction Montcalm Inc., v. Minimum Wage Commission,*** [1979] 1 S.C.R. 754, setting out principles, including:

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of a “going concern”, without regard

> for exceptional or casual factors; otherwise, the constitution could not be applied with any degree of continuity and regularity.

The court stated further on the same page:

> In the case at bar, the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, i.e., the installation department of Telecom, to look at the "normal or habitual activities" of that department as "a going concern' and the practical and functional relationship of those activities to the core federal undertaking.

[23] MHRC maintains that donor recruitment, management and storage of blood products are part of the normal and habitual activities of the Province in obtaining blood products. Safety is, of course, an end to which everyone aspires, but it is not part of the habitual activity of CBS. MHRC referred to the ***Insite*** case, *supra**,*** at para. 19, in which the Supreme Court discussed the interplay between legislatures and the importance of co-operative federalism. The court determined, in that case, that interjurisdictional immunity and paramountcy were not applicable and that a federal undertaking may be involved in a provincial area, and a provincial undertaking may be involved in a federal area. MHRC referred, as well, to ***NIL/TU,O Child*** & ***Family Services Society v. B.C.G.E.U.,*** [2010] S.C.J. No. 45 (QL), [2010] 2 S.C.R. 696, which is a labour relations case. Although not binding in the case at bar, there was a presumption in favour of provincial jurisdiction in labour relations cases. Counsel asserts that there should not be a distinction drawn in this case between labour and services, particularly when the functional test is applied.

[24] The second point raised by counsel for the MHRC is whether or not the blood screening criteria are part of the core of the federal power under the ***FDA.*** She distinguished the ***CMHC*** case, *supra,* and stressed that the complaint that X wishes to

bring forward does not go to the core of the federal power. Further, paramountcy is not applicable because there is no operational conflict between s. 13 of the Manitoba ***Human Rights Code*** and the ***FDA,*** and s. 13 does not frustrate the purpose of the ***FDA.*** Important points were made in ***Canadian Western Bank,*** *supra,* where, at para. 43, the court commented:

> 43 Excessive reliance on the doctrine of interjurisdictional immunity would create serious uncertainty. It is based on the attribution to every legislative head of power of a "core" of indeterminate scope -- difficult to define, except over time by means of judicial interpretations triggered serendipitously on a case-by-case basis. The requirement to develop an abstract definition of a 'core" is not compatible, generally speaking, with the tradition of Canadian constitutional interpretation, which favours an incremental approach. While it is true that the enumerations of ss. 91 and 92 contain a number of powers that are precise and not really open to discussion, other powers are far less precise, such as those relating to the criminal law, trade and commerce and matters of a local or private nature in a province.

Counsel asserts there is no evidentiary basis or facts to establish a conflict between the purposes of the MHRC code and the ***FDA.*** She further asserts that, when the MHRC accepted jurisdiction, it looked at this very question and determined that a s. 13 commission could look at the *bona fides* of a complaint and whether or not accommodation was possible.

[25] Thirdly, if the MHRC reviews the complaint, an adjudicator may be able to order Manitoba to look at whether there are less discriminatory ways in which to proceed with blood screening criteria. Counsel asserts that CBS relies unduly on not renewing the establishment licence as a reason not to give jurisdiction to the Province, Instead, the purpose of human rights legislation is to investigate issues and work for change where discrimination exists. Further, there are aspects of CBS activities that fall squarely within the jurisdiction of the Province, for example, the screening process and interview that each potential blood donor candidate must go through.

Position of the Province of Manitoba as Intervener

[26] Counsel for the Province of Manitoba ("the Province") approached the issue in a three-pronged fashion:

(i) identifying the test to be used to determine jurisdiction;

(ii) how that test is to be applied to the claim brought in this case, with particular reference to interjurisdictional immunity; and

(iii) whether or not the issue of paramountcy applies in the case at bar.

(i) the test to be used to determine jurisdiction

[27] Counsel asserts that the proper test is **a** functional test as set out in ***Scowby v. Saskatchewan (Board of Inquiry),*** [1986] S.C.J. No. 57 (QL), [1986] 2 S.C.R. 226 at para. 3, in which the court affirmed that human rights are not a free-standing programme and that provincial legislation protecting human rights is constitutionally valid only to the extent that it is independently valid under s. 92.

[28] The court, however, went on to say:

> 4 Let it be said at once that one does not approach a provincial human rights code on the basis that it is constitutionally presumptively suspect. The great bulk of the protections granted by such codes would appear to be beyond challenge as being legislation in relation to property and civil rights, or to matters of merely local or private nature. They deal, for example, with questions of discrimination in housing and employment, and equal access to goods and services. These legislative protections are valid not because they affirm interests such as liberty, or human dignity, but because the activities legislated, that is for example housing, employment, and education, are themselves legitimate areas of provincial concern under ss. 92 and 93. …

The court, at para. 7, adopted the comments of Prof. Laskin (as he then was) in a review published in (1959), 37 Can. Bar Rev. 77, at p. 104:

> An assessment of the civil liberty classifications in terms of legislative power leads to the conviction that, by and large, economic liberty and liberty in the human rights or egalitarian sense are, respectively, subject either to federal or to provincial legislative power or to both concurrently, according to whether the industries, undertakings or activities involved or with which these liberties are connected, are themselves within the legislative power of Parliament or a provincial legislature.

[29] Thus, according to counsel, whether the issue of any potential discrimination in this case is governed by a federal or provincial human rights commission or both depends on the heading under which the undertakings or activities would fall. Counsel asserts that blood safety is important and covered by both provincial and federal jurisdictions. He agrees that the ***FDA*** is validly enacted federal legislation pursuant to s. 9 1(27) of the Constitution, but that this is not a valid exercise of POGG. He agrees with CBS that ***Wetmore,*** *supra,* and ***Crown Zeilerbach,*** *supra,* govern the explanation of the POGG power as outlined in para. 18 of this decision. In addition, he refers to Beetz 3. in *The* ***Reference re Anti-Inflation*** *Act,* [1976] 2 S.C.R. 373, as saying:

> …the peace, order and good government power should be confined to justifying (i) temporary legislation dealing with a national emergency (p. 459) and (ii) legislation dealing with "distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern".... (p. 457)

[30] Counsel for the Province asserts that the fact that blood safety is regulated under the ***FDA*** is not determinative of human rights jurisdiction. Rather, the question is whether the undertaking and activity is within the provincial or federal jurisdiction or both. He asserts that the blood system is integral to the provincial health care system. He refers to ***Schneider v. British Columbia,*** [1982] 2 S.C.R. 3 at pp 15-16, where the court said:

> This view that the general jurisdiction over health matters is provincial (allowing for a limited federal jurisdiction either ancillary to the express heads of power in s. 91 or the emergency power under peace, order and good government) has prevailed and is now not seriously questioned …

[31] In the Reference re ***Assisted Human Reproduction Act,*** [2010] S.C.J. No. 61 (QL), [2010] 3 S.C.R. 457, the court reaffirmed the shared jurisdiction in matters of health. The court, in discussing the prohibition on certain cloning practices, said:

> 24 The text of the Act suggests that its dominant purpose is to prohibit inappropriate practices, rather than to promote beneficial ones. It is true that the Act establishes a scheme to control assisted reproduction on a national level, and this initiative necessarily touches on provincial jurisdiction over medical research and practice. However, the dominant thrust of the Act is prohibitory, and the aspects that concern the provision of health services do not rise to the level of pith and substance.

And, later:

> 226 We concluded above that the purpose of the impugned provisions was to establish mandatory national standards for assisted human reproduction. A review of the practical consequences of these provisions shows that they have a significant impact on the practice of medicine. We therefore cannot agree with the Attorney General of Canada that the impugned provisions have nothing to do with the quality of services or the management of health-care institutions.

As in the case at bar, a federal licence was required by provincial clinics, and it was held that such institutions were hospitals within the definitions established by the provinces. The court concluded that there was a need to constrain federal use of the criminal law power regarding health issues.

[32] Counsel also referred to ***The Persona! Health Information Act,*** C.C.S.M., c. P33.5, which dealt with how medical information is collected, and the regulations, which established that CBS is a health care facility. Section 13 of ***The Personal Health Information Act*** refers to the collection of information under ***The Privacy Act,*** C.C.S.M., c. P125. Counsel asserts that these sections directly relate to the CBS, including the donor screening questionnaires collected at the time of a blood donation.

[33] In ***Canadian Blood Services v. Freeman,*** [2010] O.J. No. 3811 (QL), 2010 ONSC 4885, the MOU used to establish the CBS is described as follows:

> 363 Under the MOU, the provinces and territories assumed responsibility for funding the bulk of the NBA's operations as an integral component of the provincial/territorial health care delivery systems. In doing so, they reaffirmed the principle that the cost of providing blood and blood products to Canadians should be covered under the insured health services provided in each province and territory. They committed to provide adequate funding to the NBA to cover its operational budget and any necessary response to health and safety emergencies. This commitment has been realized through the funding formulas in place for CBS. It is further evidence that CBS's mandate is linked with a government program; namely, the delivery of health care in that province or territory.

[34] Counsel points, as well, to extracts from ***Constitutional Law of Canada*** by Peter Hogg, 5k" ed. Supp., Vol. 1 (Toronto: Carswell, 2007), in which Prof. Hogg stated:

> 32.2 Federal power over health
>
> The federal Parliament's power over the peace, order and good government of Canada, which is in the opening words of s. 91 of the ***Constitution*** *Act, 1867,* is the national analogue of the provincial power over local or private matters in s. 92(16). The peace, order and good government power extends to public health matters that have attained national dimensions, either under the national concern branch of the power or under the emergency branch of the power. The Privy Council contemplated the emergency branch as the source of authority to deal with "an epidemic of pestilence".
>
> …
>
> The federal power over criminal law in s. 91(27) authorizes laws to punish or regulate conduct that is dangerous to health, such as the use of narcotics and tobacco and the regulation of hazardous products. …

However, the criminal law power does not mean that blood safety is only a federal concern. He points to the fact that, although Quebec has opted out of the federal system, it is still subject to federal regulation, as are the other provinces, but deals with its blood services on a provincial basis.

[35] Stressing that there is concurrent jurisdiction in matters of blood safety, counsel refers to the affidavit of Dr. Goldman, and specifically ex. S, the MOU. At p. 21 of the MOU, the functions and responsibilities of the NBA are:

> in ensuring access to a safe, secure and affordable blood supply, the NBA will provide for the following four operational functions in a fully integrated fashion
>
> • donor recruitment and management;
> • whole blood and plasma collection;
> • testing and laboratory work;
> • processing;
> • storage and distribution; and
> • inventory management

[36] Annex B at p. 24 of the MOU is the governance model for ensuring the overall integrity of the blood system. At p. 25 of the MOU, it is noted that the NBA is the vehicle by which provincial and territorial governments can deliver a national blood supply programme effectively and efficiently and achieve donor to patient integration and transparency for consumers and the public. And finally, at p. 27 of the MOU, it is specifically articulated that provincial health ministers are responsible for:

- the effectiveness of the blood supply system as an integral component of the P/T health care delivery systems
- funding requirements of the NBA as approved by its Members
- recommending to the Minister of Health (Canada) any proposed changes to the NBA legislation.

ii) interjurisdictional immunity

[37] Thus, counsel asserts that there is clearly a double aspect to the provision of a safe blood supply and disputes that interjurisdictional immunity is at play. Counsel distinguishes a number of cases relied on by CBS and takes the position that the test in this case is whether or not applying the provincial human rights law to blood donor criteria impairs the unassailable core of exclusive federal jurisdiction over criminal law as set out in s. 91(27) and asserts that it does not, as there is concurrent jurisdiction over the issue of blood safety. Counsel submits that the cases relied on by CBS are

situations where specific jurisdiction has been given to the federal government, such as in the area of postal regulation and inter-provincial works such as canals. ***Canadian Western Bank,*** *supra****,*** discusses at length the issue of interjurisdictional immunity. In that case, the court stated:

> 42 While the text and logic of our federal structure justifies the application of interjurisdictional immunity to certain federal "activities", nevertheless, a broad application of the doctrine to "activities" creates practical problems of application much greater than in the case of works or undertakings, things or persons, whose limits are more readily defined. A broad application also appears inconsistent, as stated, with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote.

At para. 67, the court affirmed that the doctrine of interjurisdictional immunity has and should be applied with great restraint. In fact, as the ***Insite*** case, *supra,* indicates, at para. 60, the doctrine is never applied to a broad and amorphous area of jurisdiction. In that case, the doctrine of interjurisdictional immunity was again quoted as applying in a narrow fashion:

> 61 Recent jurisprudence has tended to confine the doctrine of intedurisdictional immunity. In *Canadian Western Bank,* the majority stated that "although the doctrine of interjurisdictional immunity has a proper part to play in appropriate circumstances, we intend now to make it clear that the Court does not favour an intensive reliance on the doctrine, nor should we accept the invitation of the appellants to turn it into a doctrine of first recourse in a division of powers dispute" (para. 47). More recently, in *COPA,* the majority held that the doctrine "has not been removed from the federalism analysis", but rather remains "in a form constrained by principle and precedent" (para. 58).
>
> 62 This caution reflects three related concerns. First, the doctrine of interjurisdictional immunity is in tension with the dominant approach that permits concurrent federal and provincial legislation with respect to a matter, provided the legislation is directed at a legitimate federal or provincial aspect, as the case may be. This model of federalism recognizes that in practice there is significant overlap between the federal and provincial areas of jurisdiction, and provides that both governments should be permitted to legislate for their own valid purposes in these areas of overlap.
>
> 63 Second, the doctrine is in tension with the emergent practice of cooperative federalism, which increasingly features interlocking federal and provincial legislative schemes. In the spirit of cooperative federalism, courts "should avoid

> blocking the application of measures which are taken to be enacted in furtherance of the public interest": *Canadian Western Bank,* at para. 37. Where possible, courts should allow both levels of government to jointly regulate areas that fall within their jurisdiction: *Canadian Western Bank,* at para 37.
>
> 64 Third, the doctrine of interjurisdictional immunity may overshoot the federal or provincial power in which it is grounded and create legislative "no go" zones where neither level of government regulates. Since it is not necessary for the government benefiting from the immunity to actually regulate in the field in question, extension of the doctrine of interjurisdictional Immunity risks creating "legal vacuums": *Canadian Western Bank,* at para. 44.

[38] Counsel stresses that the core of criminal law is just as amorphous as that of health; in overlapping areas, concurrent jurisdiction is permitted unless there is a need to use the doctrine of paramountcy in a restrained fashion. He distinguishes the ***COPA*** case, *supra,* and the case of ***Ordon Estate v. Grail,*** [1998] 3 S.C.R. 437, 166 D.L.R. (4th) 193, relied on by CBS as dealing with aviation and navigation, which are federal undertakings and easily distinguishable. He says that the CBS is not a federal undertaking and that we are dealing with the application of criminal law. Further, the ***CMHC*** case, *supra,* is not analogous to the case at bar as it has to do with the spending powers of the federal government, and in any event, was heard before ***Canadian Western Bank,*** *supra****,*** and ***Insite.***

(iii) applicability of the principle of paramountcy

[39] Counsel for the intervener lastly dealt with the issue of paramountcy in which a provincial law is rendered inoperative to the extent of any legislative conflict. In ***Canadian Western Bank,*** the court described the necessity for a restrained approach to this doctrine and the necessity for either an actual conflict or frustration of a valid federal purpose (para. 71). Counsel referred to the ***COPA*** case, *supra,* in which the court explained at para. 64 that federal paramountcy may arise where dual compliance

is impossible or provincial legislation frustrates a federal purpose. Counsel for the intervener submits, therefore, that, in the case at bar as well, there is no operational conflict between the ***FDA*** and Manitoba ***Human Rights Code.***

[40] As the ***Freeman*** case, *supra,* suggests at para. 358, CBS's donor screening policies are not prescribed in the ***FDA*** or in the establishment licence; nor are they prescribed in any guidelines published by Health Canada. It is only the Canadian Standards Association (CSA) standard that states that men who have had sex with another male, even once, since 1977, shall be indefinitely deferred. Although CBS's "Men who have Sex with Men" (MSM) deferral policy is consistent with the CSA standard, CBS is not required by law to follow that standard. CBS in Manitoba has chosen its policy to comply with Health Canada policy, but there is, in fact, no operational conflict.

[41] And finally, counsel submits there is not a frustration of the federal purpose. Unlike in ***Law Society of British Columbia v Mangat,*** 2001 SCC 67, [2001] 3 S.C.R. 113, referenced in ***COPA,*** *supra,* the distinction is made from a situation where it is possible to comply with both federal and provincial purposes, but the operation of the provincial regulation undermines the purpose of the federal authority. In ***Mangat,*** there was an express federal regulation allowing non-lawyers to appear before the Immigration and Refugee Board. A provincial act that purported to disallow non-lawyers from making such appearances obviously frustrated the federal law if let prevail.

[42] Counsel points out that the ***FDA*** purpose is to criminalize unsafe blood practice, and the Manitoba human rights law is not inconsistent with that purpose. He submits, as

well, that CBS and the ***FDA*** have not occupied the field in blood safety. As was stated in ***Canadian Western Bank,*** *supra,* at para. 74, to occupy the field, there has to be a presumption to eliminate provincial action in a particular area. Thus, counsel says that the test for paramountcy is not satisfied regardless of the tests used. Any practical problems down the road do not go to paramountcy and are hypothetical and certainly are not basis enough to deny jurisdiction to Manitoba to investigate a human rights complaint. As was stated in para. 46 of ***Canadian Western Bank,*** Parliament could always pass specific legislation regarding the MSM policy if it felt that such was critical to blood safety. Thus, the position of counsel for the intervener is that there is no reason to deny jurisdiction on any basis to MHRC at least to consider the complaint of X.

ANALYSIS

[43] Pursuant to s. 91(27) of the ***Constitution Act, 1867,*** the federal government has authority to legislate in the area of criminal law, and pursuant to s. 91 generally, for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces ("POGG"). Provinces generally have authority over matters involving health pursuant to s. 92(7) involving the establishment, maintenance and management of hospitals; pursuant to s. 92(13), property and civil rights; and pursuant to s. 92(16), generally all matters of a merely local or private nature in the province.

[44] All parties have agreed that the federal government has the authority under s. 91(27) to pass the ***FDA*** and the regulations and that it is validly enacted federal criminal law. Further, the distribution and control of blood and blood products is properly

included in this legislation, and the CBS is mandated to follow the ***FDA*** and the regulations. Pursuant to those regulations, the CBS must have an establishment licence for each of the premises it operates. Any changes to the establishment licence must be pre-approved by Health Canada.

[45] CBS has also maintained that jurisdiction in the area of blood safety is founded in the POGG power. This was disputed by the intervener in oral argument, citing the dissent in ***Wetmore, supra.*** Interestingly, the intervener, in his brief, seems to concede the applicability of POCG. He says in his brief:

> 33. The source of validity for the federal jurisdiction of health typically lies in criminal law or in P0CC, both of which are relied on by the Applicant in this case.

He then goes on to quote from Hogg, ***supra,*** as follows:

> **32.2** The federal Parliament's power over the peace, order and good government of Canada, which is in the opening words of s. 91 of the ***Constitution*** *Act,* ***1867,*** is the national analogue of the provincial power over local and private matters in s. 92(16). The peace, order and good government power extends to public health matters that have attained national dimensions, either under the national concern branch of the power, or under the emergency branch of the power. The Privy Council contemplated the emergency branch as the source of authority to deal with an "epidemic of pestilence".
>
> …..
>
> The federal power over criminal law in s. 91(27) authorizes laws to punish or regulate conduct that is dangerous to health, such as the use of narcotics and tobacco, and the regulation of hazardous products. …

[46] I am satisfied that the legislation involving the safety of blood and blood products is properly passed pursuant to the POGG power of Parliament, as well as the criminal law power. The POGG power was clearly articulated in ***Crown Zellerbach*** as follows:

> **33** From this survey of the opinion expressed in this Court concerning the national concern doctrine of the federal peace, order and good government power I draw the following conclusions as to what now appears to be firmly established:

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;

2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;

3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;

4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra- provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.

> **34** This last factor, generally referred to as the "provincial inability" test and noted with apparent approval in this Court in Labatt, Schneider and Wetmore, was suggested, as Professor Hogg acknowledges, by Professor Gibson in his article, "Measuring 'National Dimensions" (1976), 7 Man. Li. 15, as the most satisfactory rationale of the cases in which the national concern doctrine of the peace, order and good government power has been applied as a basis of federal jurisdiction. As expounded by Professor Gibson, the test would appear to involve a limited or qualified application of federal jurisdiction. As put by Professor Gibson at pp. 34-35, "By this approach, a national dimension would exist whenever a significant aspect of a problem is beyond provincial reach because it falls within the jurisdiction of another province or of the federal Parliament. It is important to emphasize however that the entire problem would not fall within federal competence in such circumstances. Only that aspect of the problem that is beyond provincial control would do so. Since the "P.O. & G.G." clause bestows only residual powers, the existence of a national dimension justifies no more federal legislation than is necessary to fill the gap in provincial powers. …

In my opinion, paints 3 and 4 and para. 34 are determinative of federal jurisdiction pursuant to POGG. Thus, it is clear that both the provinces and the federal government have concurrent jurisdiction in matters of health -- the provinces, pursuant to s. 92(7), s

92(13) and the residual clause, and the federal government pursuant to s. 91(27) and POGG.

[47] I am further satisfied that the ***Scowby,*** *supra,* test as promulgated by counsel for the intervener has no applicability to the case at bar. Provincial human rights legislation is not applicable to federal activities, and such activities cannot be reviewed by a provincial agency. Although para. 4 of ***Scowby*** refers to the possibility of concurrent jurisdiction in matters of human rights legislation, no case was cited for the proposition that concurrent jurisdiction had ever been applied. For example, in ***CMHC,*** *supra,* the co-op in question was generally subject to provincial laws, but the activity in question was subject to federal legislation. In the case at bar, the activity is the insuring of the safety of the blood supply. It is important not to forget that the CBS was set up in response to the Krever Inquiry and the earlier shortfalls in ensuring the safety of a national blood system.

[48] The federal government has no jurisdiction to control the day-to-day running of a CBS establishment in a particular province except to the extent that safety issues are engaged. It is obvious that both the provincial and the federal governments are invested in ensuring the safety of the blood supply. No one is suggesting that the province is disinterested in blood safety, but the federal government has specifically legislated in this area, which is valid legislation. That being the case, where does the Manitoba human rights legislation enter into the picture?

[49] CBS has maintained that the principle of interjurisdictional immunity is called into play. Both MHRC and the intervener dispute this and say that the principle has no

applicability, since both the provincial and the federal governments have jurisdiction in this particular area. I am in agreement that the principle of interjurisdictional immunity is not engaged in this case. Not only is there concurrent jurisdiction in the health area, it is inconsistent with the flexible federalism that has been confirmed in ***Canadian Western Bank,*** *supra.* In that case, the court stated:

> **43** Excessive reliance on the doctrine of interjurisdictional immunity would create serious uncertainty. It is based on the attribution to every legislative head of power of a "core" of indeterminate scope -- difficult to define, except over time by means of judicial interpretations triggered serendipitously on a case-by-case basis. The requirement to develop an abstract definition of a "core" is not compatible, generally speaking, with the tradition of Canadian constitutional interpretation, which favours an incremental approach. While it is true that the enumerations of ss. 91 and 92 contain a number of powers that are precise and not really open to discussion, other powers are far less precise, such as those relating to the criminal law, trade and commerce and matters of a local or private nature in a province.

The court concluded by saying:

> **67** In our view, the above review of the case law cited by the appellants, the respondent and interveners shows that not only *should* the doctrine of interjurisdictional immunity be applied with restraint, but with rare exceptions it *has* been so applied. Although the doctrine is in principle applicable to all federal and provincial heads of legislative authority, the case law demonstrates that its natural area of operation is in relation to those heads of legislative authority that confer on Parliament power over enumerated federal things, people, works or undertakings. In most cases, a pith and substance analysis and the application of the doctrine of paramountcy have resolved difficulties in a satisfactory manner.

Indeed, this position has been strengthened in subsequent cases such as ***Insite*** (see paras. 61-64, *supra,* at para. 37 hereof). The court has clearly and consistently indicated that interjurisdictional immunity is to be used in a very constrained fashion. I am not convinced that its use is therefore engaged in the situation at bar.

[50] That leaves the issue of paramountcy and whether or not there is an operational conflict between the Manitoba ***Human Rights Code*** and the federal ***FDA*** and regulations, or a frustration of purpose.

[51] In ***Canadian Western Bank,*** the Supreme Court of Canada has proceeded cautiously in the area of paramountcy, stating:

> **71** In developing its approach, this Court, despite the problems occasionally caused by certain relevant aspects of its case law, has shown a prudent measure of restraint in proposing strict tests: *General Motors,* at p. 669. In ***Multiple Access Ltd. v. McCutcheon,*** [1982] 2 S.C.R. 161, the Court defined the fundamental test for determining whether there is sufficient incompatibility to trigger the application of the doctrine of federal paramountcy. Dickson J. stated:
>
> > In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [p. 191]
>
> **72** Thus, according to this test, the mere existence of a duplication of norms at the federal and provincial levels does not in itself constitute a degree of incompatibility capable of triggering the application of the doctrine. Moreover, a provincial law may in principle add requirements that supplement the requirements of federal legislation *(Spraytech).* In both cases, the laws can apply concurrently, and citizens can comply with either of them without violating the other.
>
> **73** Nevertheless, there will be cases in which imposing an obligation to comply with provincial legislation would in effect frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions. The Court recognized this in *Bank of Montreal v. Hall,* [1990] 1 S.C.R. 121, in noting that Parliament's "intent" must also be taken into account in the analysis of incompatibility. The Court thus acknowledged that the impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also be sufficient to trigger the application of the doctrine of federal paramountcy. This point was recently reaffirmed in *Mangat* and in *Rothmans, Benson & Hedges Inc. v. Saskatchewan,* [2005] 1 S.C.R. 188, 2005 SCC 13.

This was further explained in the later ***COPA*** decision, *supra,* where the court said:

> **64** Claims in paramountcy may arise from two different forms of conflict. The first is operational conflict between federal and provincial laws, where one enactment says "yes" and the other says "no", such that "compliance with one is

> defiance of the other": *Multiple Access Ltd. v. McCutcheon,* [1982] 2 S.C.R. 161, at p. 191, *per* Dickson J. In *Bank of Montreal v*. *Hall,* [1990] 1 S.C.R. 121, at p. 155, La Forest J. identified a second branch of paramountcy, in which dual compliance is possible, but the provincial law is incompatible with the purpose of federal legislation: see also *Law Sodely of British Columbia v. Mangat,* 2001 SCC 67, [2001] 3 S.C.R. 113, at para. 72; *Lafarge Canada,* at para. 84. Federal paramountcy may thus arise from either the impossibility of dual compliance or the frustration of a federal purpose: *Rothmans,* at para. 14.

[52] Is there an operational conflict in the case at bar? The DSM is not found in the ***FDA*** or its regulations. It is not found in the establishment licence or in the guidelines published by Health Canada. Health Canada policies have been set up to be consistent with the CSA standard, and CBS has chosen its policy to comply with the Health Canada policy, although this is permissive to the extent that the *Act* and regulations do not specifically require these guidelines to be followed.

[53] Counsel for the intervener, during oral argument, took the position that the principle of paramountcy was not engaged unless conduct was specifically prohibited by a federal law that would otherwise be allowed by a provincial piece of legislation. Counsel for CBS was permitted to respond to this proposition, which was raised for the first time in oral argument, by way of later written material. Although not prescribed in the ***FDA*** or its regulations, counsel contends that the establishment licence requirements and the MSN criteria are not permissive. CBS would require a specific change to any criteria to be authorized by Health Canada before being allowed to operate without the MSM criteria. Because of this, I agree that the federal legislation involving donor selection criteria is not, in essence, permissive. Although the ***FDA*** and regulations do not expressly mandate that the MSM criteria be followed, CBS must comply with its licence requirements. I agree with CBS that, once the MSM criteria have been incorporated into the SOP as approved by Health Canada, compliance with those

procedures, including the application of the donor selection criteria, becomes mandatory. This is because the criteria cannot be changed without the approval of Health Canada, and without Health Canada's approval, the CBS is not allowed to collect blood from any male who has had sex with a male since 1977. To do so would put the CBS in violation of its establishment licence and the ***FDA*** and its regulations.

[54] The second application of paramountcy I find is also engaged in that the federal purpose would be frustrated to allow the MHRC to entertain this complaint An analogy is provided in ***COPA*** where the court distinguished between a federal purpose that would engage paramountcy and one that would not, as follows:

> **69** The distinction between a federal purpose sufficient to attract the doctrine of federal paramountcy on the one hand, and absence of specific purpose on the other, is illustrated by a comparison of this Court's decisions in *Spraytech* and *Mangat.* In *Spraytech,* the federal pesticide legislation was permissive, allowing the manufacture and use of the pesticides. In this sense, the federal scheme resembled the *Aeronautics Act* which permits the construction of aerodromes wherever their construction is not expressly restricted. The impugned municipal by-law prevented the use of pesticides that would have been permitted under the federal scheme. L'Heureux-Dubé J. held that the second branch of the doctrine of federal paramountcy was not engaged:
>
> > Analogies to motor vehicles or cigarettes that have been approved federally, but the use of which can nevertheless be restricted municipally, well illustrate this conclusion. There is, moreover, no concern in this case that application of By-law 270 displaces or frustrates "the legislative purpose of Parliament". [para. 35]
>
> **70** In *Mangat* by contrast, federal legislation provided for "other counsel", who were not members of a provincial bar, to appear before the Immigration and Refugee Board ("IRB") for a fee. However, the provincial statute required agents appearing before the IRB to be members of a provincial bar association or else refrain from charging a fee. Though it was possible to comply with both the federal and provincial enactments (non-lawyers could appear without charging a fee), Gonthier J. concluded that the provincial law undermined the *purpose* of the federal legislation (para. 72). Parliament had specifically provided that non-lawyers could appear before the IRB. This express purpose prevailed over the Province's conflicting legislation.

[55] ***Mangat,*** *supra****,*** was recently quoted with approval by the Supreme Court in ***(Quebec) Attorney General v Canada (Human Resources and Social Development),*** 2011 SCC 60. This case concerned the interplay of federal employment insurance benefits and recovery of some of those benefits to which the payee was not entitled that conflicted with provincial legislation creating specific exemptions from seizure. The court found no operational conflict between the laws, stating:

> **20** ... what must be determined in the case at bar is whether there is a conflict of purposes. In some cases, it can be seen from the legislative context that a permissive or restrictive provision of a federal statute has a purpose that is compatible with the purpose of the provincial legislation, but in others the opposite is true. …

The court, in that case, found a conflict of purpose and decided the case on the ground of federal paramountcy.

[56] I conclude that allowing the complaint of X to go forward to the MHRC would frustrate the real purpose of regulating blood safety. Although the question I am being asked to deal with is jurisdictional and does not go to the heart of the complaint, in determining whether the federal purpose would be frustrated, one cannot ignore the practical workings of the inter-related schemes. To that end, I will hypothetically assume that the MHRC finds discrimination in the adoption of the MSM criteria and orders less restrictive criteria to be implemented. The end result plays out as follows:

(i) Health Canada is not bound to comply with that decision, as the MHRC has no jurisdiction over Health Canada;

(ii) CBS cannot comply with the decision of the MHRC without getting prior Health Canada approval. Its functioning thus becomes paralyzed or impossible; and

(iii) other provinces receive similar complaints on the same issue, which result in potentially inconsistent decisions and multiple complaints.

All of this is illustrative of the point that to allow the MHRC to proceed in this case would frustrate the federal purpose in controlling blood safety, and I thus find that the principle of paramountcy is engaged.

[57] For the above reasons, CBS's application for *certiorari* and prohibition are granted, and it is also entitled to a declaration that the MHRC does not have the jurisdiction to proceed with this complaint I note that X is not without a remedy for any perceived discrimination on the basis of his sexual orientation, as he has the right to apply to the Canadian Human Rights Commission to deal with the same issue.

"Original Signed by"

_____

J.