

## ARE MEN WHO HAVE SEX WITH MEN SAFE BLOOD DONORS?

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**CITED:** (2007) 12 Appeal 73-89

Donating blood is an intimate act that exemplifies altruism. However, not everybody is privileged with the opportunity to save another's life in this manner. To maintain the safety and integrity of the blood system, the Public Health Agency of Canada has regulated the selection of donors by Canadian Blood Services ("CBS") and Héma-Québec ("HQ"). Individuals have been categorically disqualified from donating blood on the basis that they belong to groups that are at high risk of having transfusion-transmissible viral infections.<sup>1</sup> Since 1983, men who have had sex with men ("MSM") even once since 1977 have been deferred for life from donating their blood.<sup>2</sup> The extremely high prevalence of HIV/AIDS in the gay community in the 1980s and the lack of a test to detect the presence of the virus in donated blood justified the MSM policy. The lifetime deferral of MSM has remained intact despite enormous advances in HIV/AIDS testing and decreasing rates of HIV/AIDS infection in the gay community. The World Health Organization has recommended that blood collection agencies balance public health needs with human rights concerns.<sup>3</sup> Opponents of the MSM policy argue that gay men are being discriminated against on the basis of their sexual orientation. Calls have been made to change the lifetime ban to either a one or a five-year deferral period. Other critics, such as the Canadian AIDS Society, would rather have blood agencies screen donors through the lens of high-risk sexual behaviour.<sup>4</sup> While safety is CBS' and HQ's primary responsibility, there is undisputable evidence to show that the lifetime deferral of MSM is in breach of the equality rights of gay men under s. 15(1) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").<sup>5</sup> MSM donors are subject

- 1 Steven Salbu, "AIDS and the Blood Supply: An Analysis of Law, Regulation, and Public Policy" (1996) 74 Wash. U.L. Q. 913 at 947.
- 2 Michael Belli, "The Constitutionality of the 'Men Who Have Sex With Men' Blood Donor Exclusion Policy" (2003) 4 J.L. in Society 315 at 338; Canadian Blood Services, *Record of Donation*, online: Canadian Blood Services – Société canadienne du sang – Donor Questionnaire <[http://www.bloodservices.ca/centreapps/internet/uw\\_v502\\_mainengine.nsf/page/ROD%20Questionnaire](http://www.bloodservices.ca/centreapps/internet/uw_v502_mainengine.nsf/page/ROD%20Questionnaire)> [*Record of Donation*].
- 3 Francine A. Hochberg, "HIV/AIDS and Blood Donation Policies: A Comparative Study of Public Health Policies and Individual Rights Norms" (2002) 12 Duke J. Comp. & Int'l L. 231 at 236-37. I would like to extend a note of caution regarding this source. Even though the article was published in 2002, the author used data regarding HIV infection dating to 1988. These statistics, as will be shown later in this essay, have changed drastically.
- 4 Interview of Paul Lapierre, Executive Director of the Canadian AIDS Society (26 May 2005).
- 5 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), [*Charter*], 1982, c. 11.

to a “zero tolerance” policy. Compared to the lifetime deferral of MSM, people who have paid money or drugs for sex or had sex with someone whose sexual background they did not know are deferred for only one year.<sup>6</sup> This differential treatment places an increased burden on gay men and cannot be rationally justified. Like risks must be treated alike.<sup>7</sup>

## PAST NEGLIGENCE – A BRIEF BACKGROUND TO THE MSM BAN

On May 30, 2005, the Canadian Red Cross (“Red Cross”), the predecessor of CBS and HQ, publicly accepted responsibility for its role in distributing infected blood products in the 1980s and early 1990s.<sup>8</sup> Roughly 1,200 Canadians were infected with HIV and more than 25,000 with Hepatitis C through tainted blood.<sup>9</sup> This apology came eight years after Krever J., in the *Commission of Inquiry on the Blood System in Canada*, and Boirns J. in *Walker Estate v. York Finch General Hospital* concluded that the Red Cross had acted inappropriately compared to its American counterparts.<sup>10</sup> The Red Cross had asked prospective donors whether they were in good health. This did not effectively deter infected donors from giving blood.<sup>11</sup> In the US, where the Food and Drug Administration (“FDA”) regulates blood products, donor screening specifically targeted those who were at high risk of being HIV carriers even before the scientific community drew the link between HIV and AIDS, and understood that the virus was transmitted through blood.<sup>12</sup> An editorial in the *American Journal of Public Health* in May 1984 outlined the ideals behind the cautionary principle that would later be adopted by the Red Cross:

The incomplete state of our knowledge must not serve as an excuse for failure to take prudent action. Public health has never clung to the principle that complete knowledge about a potential health hazard is a prerequisite for action. Quite the contrary, the historical record shows that public health’s finest hours have often occurred when vigorous preventive action preceded the crossing of every scientific “t” and the dotting of every epidemiological “i.”<sup>13</sup>

Nevertheless, only once conclusive evidence existed would the Red Cross consider adopting similar measures to the FDA’s.<sup>14</sup>

In the 1980s, gay men were crucial to the donor pool. They were supportive of blood

6 Record of Donation, *supra* note 2.

7 Since 2002, the Public Health Agency of Canada has amended its previous ban on sperm donations from MSM and men over forty. The new regulations allow the use of a known donor’s semen provided it is subject to freezing and quarantine controls to reduce the risk of infection. It does not matter if the known donor is a MSM or over forty. Donations from known donors are now subject to the same tests as anonymous donations. *Jane Doe v. Canada (Attorney General)*, [2003] 68 O.R. (3d) 9 at paras. 10-11.).

8 Ken Kilpatrick & Colin Freeze, “Red Cross Pleads Guilty, Offers Apology in Blood Scandal” *The Globe and Mail* (31 May 2005), online: <http://www.theglobeandmail.com/servlet/story/LAC.20050531.BLOOD31/>.

9 David Harvey, “David, Goliath and HIV-Infected Blood” (1996) 2 Canadian HIV/AIDS Policy & Law Newsletter; CBC News, “Ontario Court Approves Hep-C Settlement” 10 November 2000, online: [Ontario court approves hep-C settlement <www.cbc.ca/story/canada/national/1999/09/22/blood990922.html>](http://www.cbc.ca/story/canada/national/1999/09/22/blood990922.html).

10 Clive Savage, “The Americans Had It Right” (1998) 8 Health Law.

11 John Jaffey, “Supreme Court of Canada Rejects Red Cross Appeals in Two Tainted-Blood Cases” (2001) 20 *The Lawyer’s Weekly*.

12 Savage, *supra* note 10; Belli, *supra* note 2 at 322; The 1983 exclusion of “sexually active homosexual or bisexual men with multiple partners” was changed by the Office of Biologics to “males who have had sex with more than one male since 1979, and males whose male partner has had sex with more than one male since 1979”. This revision meant to capture those men who did not consider themselves as being homosexual yet who engaged in high-risk sex with other males. The focus on prospective donors was to be placed on behaviour rather than on stereotypes. Salbu, *supra* note 1 at 949.

13 Horace Krever, *Commission of Inquiry on the Blood System in Canada: Final Report* (Ottawa: Minister of Public Works and Government Services Canada, 1997) at 295.

14 *Ibid.* at 226.

drives to an extent unparalleled by other groups.<sup>15</sup> For this reason, the Red Cross hesitated to exclude them when AIDS was first recognized.<sup>16</sup> Not until March 10, 1983, did the organization ask gay and bisexual men, as well as Haitian immigrants, to abstain from giving blood. At the time, 61 per cent of AIDS cases were among homosexual men and 37 per cent in Haitian immigrants.<sup>17</sup> As the Red Cross had anticipated, the two communities were outraged. Human rights complaints were filed on behalf of both groups.<sup>18</sup> In addition to the Haitians who launched complaints with the Quebec Human Rights Commission, the Haitian Red Cross lodged a grievance on their behalf with the League of Red Cross Societies. Accusations of racism struck the Red Cross hard, as it prided itself on its humanitarian and non-discriminatory image.<sup>19</sup> Nevertheless, after consulting with the Red Cross, leaders of the gay community quietly endorsed its request for voluntary self-deferral of persons at high risk of infection. Haitian Canadians were placated after the Red Cross stressed that it was only Haitian *immigrants* who were asked not to donate.<sup>20</sup> Everybody recognized that AIDS was going to be a national and international epidemic for years to come. Since blood transfusion remained critical in saving lives and no cure or test existed for HIV/AIDS, banning high-risk groups of transfusion-transmissible viral infections was the only means available for maintaining the integrity of the blood supply.<sup>21</sup>

## CANADIAN BLOOD SERVICES AND HEMA-QUEBEC: SAFETY IS PARAMOUNT

Learning from the tragedy of the past, preserving a positive public image no longer takes precedence over the need for safe blood. CBS has pledged that: "Our primary objective is to ensure the safety of the blood system".<sup>22</sup> CBS' Public Relations Manager explained that the organization "approaches the issue of blood donors from the recipient's point of view. The recipient should have the right to the safest blood possible and that overrides any perceived entitlement to donate".<sup>23</sup> As the Canadian Hemophilia Society noted, it is the recipient who bears 100 per cent of any risk.<sup>24</sup>

Screening procedures implemented by CBS and HQ succeeded in reducing the possible spread of transfusion-transmissible viral infections. Dr. Mindy Goldman, Executive Medical Director responsible for donor and transplantation services at CBS, stated that: "The frequency of diseases in the general population is higher than it is in our donor pool".<sup>25</sup> It is uncertain which particular questions on the donor questionnaire are responsible for the current degree of risk in the blood system.<sup>26</sup> CBS and HQ ask prospective donors the following:

15 Hochberg, *supra* note 3 at n. 68 cited Melinda Tuhus, "Supplies of Blood Fall as Demand Increases" *N.Y. Times* (29 October 2000), 14CN at 3.

16 *Ibid.* at 244.

17 Andre Picard, *The Gift of Death: Confronting Canada's Tainted-Blood Tragedy* (Toronto: HarperCollins Publishers, 1995) at 73; Krever, *supra* note 13 at 231.

18 Picard, *supra* note 17 at 74.

19 Krever, *supra* note 13 at 233.

20 *Ibid.* at 234.

21 Kevin Hopkins, "Blood Sweat and Tears: Toward a New Paradigm for Protecting Donor Privacy" (2000) 7 Va. J. Soc. Pol'y & L. 141 at 143-44.

22 Interview of Elaine Ashfield, Legal Counsel for Canadian Blood Services (27 May 2005).

23 Interview of Derek Mellon, Public Relations Manager for Canadian Blood Services (24 May 2005).

24 Canadian Hemophilia Society, "CHS Policy on Blood, Blood Products and their Alternatives", online: Canadian Hemophilia Society Policy on Blood, Blood Products and their Alternatives <<http://www.hemophilia.ca/en/1.2.1.php#19>>; The American counterpart of the CHS, the National Hemophilia Foundation, stated that while screening procedures must err on the side of caution, there is currently no position regarding the MSM ban. Interview of Glenn Monas, VP Public Policy of the National Hemophilia Foundation, 13 May 2005.

25 Interview of Dr. Mindy Goldman, Canadian Blood Services, Executive Medical Director (31 May 2005) [Goldman]; See also A. Farrugia, "The Mantra of Blood Safety: Time for a New Tune?" (2004) 86 *Vox Sanguinis* 1 at 2.

26 *Ibid.*

**FIGURE 1**  
CANADIAN BLOOD SERVICES DONOR QUESTIONNAIRE

**RECORD OF DONATION**

ANSWER YES OR NO TO QUESTIONS 1 THROUGH 13

1.
  - a) Are you feeling well today?
  - b) Do you have a cold, flu, sore throat, fever, infection or allergy problem today?
2.
  - a) In the last 3 days have you taken any medicine or drugs (pills including Aspirin or shots), other than birth control pills and vitamins?
  - b) In the last 3 days have you had dental work?
3. In the past week, have you had a fever with headache?
4.
  - a) In the last 3 months have you had a vaccination?
  - b) In the last 3 months have you taken Accutane for skin problems?
5.
  - a) In the last 6 months have you been under a doctor's care, had surgery, taken Cyclofen (Danazol)?
  - b) If female, in the last 6 months have you been pregnant?
  - c) In the last 6 months have you taken Proscar, Avodart (Dutasteride), Propecia or Methotrexate?
6.
  - a) In the last 12 months have you had a tattoo, ear piercing, skin piercing, acupuncture, electrolysis, graft, injury from a needle, or come in contact with someone else's blood?
  - b) In the last 12 months have you had a rabies shot?
  - c) In the last 12 months have you had close contact with a person who has had hepatitis or yellow jaundice?
7.
  - a) Have you ever taken Tegison or Soriatane for skin problems?
  - b) Have you ever taken human pituitary growth hormone, human pituitary gonadotrophin hormone (sometimes used for treatment of infertility or to promote weight loss)?
  - c) Have you ever received a dura mater (brain covering) graft?
8. Have you ever had:
  - a) yellow jaundice (other than at birth), hepatitis or liver problems?
  - b) epilepsy, coma, stroke, convulsions or fainting?
  - c) heart or blood pressure problems or heart surgery?
  - d) cancer, diabetes, ulcerative colitis or Crohn's disease?
  - e) kidney, lung or blood problems?
  - f) Chagas' disease, babesiosis or leishmaniasis?
9.
  - a) Have you ever had malaria?
  - b) In the last 3 years, have you been outside Canada, other than the U.S.?
10.
  - a) Have you spent a total of 3 months or more in the United Kingdom (England, Northern Ireland, Scotland, Wales, the Isle of Man, or the Channel Islands) since January 1, 1980?
  - b) If you have been in the United Kingdom since 1980, did you receive a blood transfusion or any medical treatment with a product made from blood?
  - c) Have you spent a total of 3 months or more in France since January 1, 1980?
  - d) Have you spent a total of 5 years or more in Europe since January 1, 1980?
11. Are you aware of a diagnosis of Creutzfeldt-Jakob Disease among any of your blood relatives (parent, child, sibling)?
12. Have you ever had an AIDS (HIV) test other than for donating blood?
13. In the past 12 months, have you been in jail or prison?

**FIGURE 1, CONTINUED****CANADIAN BLOOD SERVICES DONOR QUESTIONNAIRE**

I have answered all questions truthfully. I understand that to make a false statement is a serious matter and could harm others. I understand the procedure and side effects and complications associated with my (whole blood), (plasmapheresis), (cytapheresis) donation. I have read and understand the information on how the AIDS

(HIV) virus may spread by donated blood and plasma. I agree not to make a donation if there is a chance this might spread the AIDS (HIV) virus. I agree to the testing of my blood for hepatitis, syphilis, AIDS (HIV), HTLV and other factors as required for the safety of the blood recipient. I understand that Canadian Blood Services (CBS) is currently evaluating a new, unlicensed test for the West Nile virus, called nucleic acid testing (NAT). I have been provided with and understand information regarding the use of these tests on my blood donation. I understand that my positive test results on any of these tests will be given to me in confidence, that they will be reported to Public Health if required by law. I agree to donate blood for use as decided by CBS. I agree to call CBS if after donating I decide my blood should not be used.

**STOP HERE**

14. a) Do you have AIDS?  
b) Have you ever had a positive test for HIV or AIDS?
15. Have you used cocaine within the last 12 months?
16. Have you ever taken illegal drugs or illegal steroids with a needle even one time?
17. At any time since 1977, have you taken money or drugs for sex?
18. Male donors: Have you had sex with a man, even one time since 1977?
19. Have you ever taken clotting factor concentrates for a bleeding disorder such as hemophilia?
20. Have you had sex with anyone who has AIDS or has tested positive for HIV or AIDS?
21. Female donors: In the last 12 months, have you had sex with a man who had sex, even one time since 1977 with another man?
22. Have you had sex in the last 12 months with anyone who has ever taken illegal drugs or illegal steroids with a needle?
23. At any time in the last 12 months, have you paid money or drugs for sex?
24. At any time in the last 12 months, have you had sex with anyone who has taken money or drugs for sex?
25. Have you had sex in the last 12 months with anyone who has taken clotting factor concentrates?
26. In the last 12 months, have you had or been treated for syphilis or gonorrhoea?
27. In the last 12 months, have you received blood or blood products by transfusion for any reason, such as an accident or surgery?
28. In the past 12 months, have you had sex with someone whose sexual background you don't know?
29. a) Were you born in or have you lived in any of the following countries since 1977: Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea, Gabon, Niger or Nigeria?  
b) If you have travelled to any of those countries since 1977, did you receive a blood transfusion or any medical treatment with a product made from blood?  
c) Have you had sexual contact with anyone who was born in or lived in these countries since 1977?

The Record of Donation closely follows the recommendations made by the Canadian Standards Association, which advocates deferring individuals as follows:<sup>27</sup>

**FIGURE 2**  
CANADIAN STANDARDS ASSOCIATION CRITERIA

**5.3.9.2** – Following persons shall be **indefinitely deferred**:

- a) persons who have taken illegal drugs by injection;
- b) persons who received money or drugs in exchange for sex at any time since 1977;
- c) men who have had sex with another male, even once, since 1977;
- d) persons who received plasma-derived clotting factors for a bleeding disorder;
- e) persons who have had sex with an HIV-infected person;
- f) persons who are at risk of having acquired HIV infection in countries where circulating strains are sometimes not detectable by current screening tests.

**5.3.9.4** – Following persons shall be **deferred for 12 months**:

- a) persons who have resided in the household of, or had sexual contact with, an individual with viral hepatitis unless there is proof of vaccination;
- b) persons who have been confined in a correctional facility for more than 48 successive hours;
- c) persons who have taken illegal steroids by injection;
- d) women who have had sex with a male who has had sex with another male, even once, since 1977;
- e) persons who have had sex with a person who has used illegal drugs or illegal steroids by injection;
- f) persons who have had sex with a prostitute.

**5.3.9.5** – Following persons shall be **deferred for 6 months**:

- a) persons who have had a tattoo;
- b) persons who have had body piercing;
- c) persons who have had acupuncture or electrolysis;
- d) persons who have had mucous membrane exposure to blood;
- e) persons whose skin has been penetrated with non-sterile instruments or equipment contaminated with blood or body fluids;
- f) persons who have used intra-nasal cocaine;
- g) persons who have had a sexual encounter with someone whose sexual background they are unsure of;
- h) persons who have had sex with an individual who has received plasma-derived clotting factor concentrates.

<sup>27</sup> Canadian Standards Association standards are minimal standards. CBS and HQ have at times implemented tougher criteria in selecting donors. For example, while the Canadian Standards Association suggests that persons who have a tattoo or have had body piercing be deferred for six months, CBS and HQ defer these individuals for twelve months. It is of also of interest to note that Health Canada representatives sit on the Canadian Standards Association committee in charge of blood procedures. Goldman, *supra* note 25.

## WHY MSM ARE DEEMED HIGH-RISK DONORS

According to Dr. Goldman, “HIV/AIDS, hepatitis, and syphilis are the main reasons justifying the exclusion of MSM”.<sup>28</sup> Window period donations and administrative mishandling of blood products are the two greatest threats to the safety of the blood system.<sup>29</sup> Window period donations are those made by individuals who carry infectious diseases yet do not display any signs or symptoms of an illness. Additionally, the transfusion-transmissible viral infection cannot be detected. The viral load is so small that no test is sensitive enough to be able to alert CBS or HQ of its presence.

Administrative errors occur when tested blood has been shown to carry a transfusion-transmissible viral infection, yet for some reason, the blood is not removed from the system and ends up transfused. These clerical mistakes occur more frequently in non-automated blood collection centres such as hospitals. Since HIV is transmitted with a 90 per cent success rate during blood transfusions, compared to 0.1 per cent to 1 per cent during vaginal or anal intercourse, preventive measures must be implemented.<sup>30</sup> To address these two sources of risk, categorical exclusion policies have been adopted.

Categorical exclusions are effective means of ensuring the safety of the blood supply so long as there are gaps in the process. The more accurate post-collection blood screening becomes, the lower the benefit of categorical exclusion. When there is a strong correlation between class membership and transfusion-transmissible viral infections, highly accurate stereotypes can be an efficient means of disqualifying donors. This approach is legitimate only when the risk of a targeted group exceeds the risk of the population at large. Small or illusory differences do not warrant the exclusion of a class of individuals particularly when the demand for blood products is barely being met with current supply. Deferring all sexually active gay men becomes less rational as the incidence of HIV among all other groups continues to increase more rapidly than the incidence of HIV among male homosexuals.<sup>31</sup>

As testing procedures have enjoyed enormous scientific advances, the window period for detecting HIV/AIDS has decreased. On March 2, 1985, the FDA approved an enzyme-linked immunosorbent assay test (“ELISA”) to detect AIDS.<sup>32</sup> ELISA was designed for maximum sensitivity to eliminate virtually all infected blood from the blood pool.<sup>33</sup> On April 30, 1987, the Western Blot test was combined with the ELISA test. When used together, the two tests were believed to be 99 per cent to 100 per cent effective.<sup>34</sup> Beginning in 1999, nucleic acid testing (“NAT”) has further reduced the risk of transfusion transmission of HIV to about one unit per 4.7 million donations. As a result, the window period has decreased from a period of six to eight-weeks to nine to eleven days.<sup>35</sup>

28 MSM is a population that is known to carry other viruses such as HHV-8, CMV, EBV, HHV-6, HSV-1/2 but it is not clear whether transfusion of blood from carriers will be transmitted to recipients of blood products. Goldman, *supra* note 25; Interview of Dr. Jeannie Callum, Sunnybrook and Women’s College Health Science Centre, 30 May 2005 [Callum]; John C. Flynn, *Essentials of Immunohematology* (Philadelphia: W.B. Saunders Company, 1998) at 168.

29 Krever, *supra* note 13 at 32; Ana Sanchez *et al.*, “The Impact of Male-To-Male Sexual Experience on Risk Profiles of Blood Donors” (2005) 45 *Transfusion* 404 at 405 [Sanchez]; John G. Culhane, “Sexual Orientation: Law & Policy: Bad Science, Worse Policy: The Exclusion of Gay Males from Donor Pools” (2005) 24 *St. Louis U. Pub. L. Rev.* 129 at 143.

30 Hochberg, *supra* note 3 at 235.

31 Salbu, *supra* note 1 at 952–53.

32 Hopkins, *supra* note 21 at 151.

33 Belli, *supra* note 2 at 355.

34 Hopkins, *supra* note 21 at 151; Hochberg, *supra* note 3 at n. 35; Belli, *supra* note 2 at 335 cited Kathryn W. Pipelow, “AIDS, Blood Banks and the Courts: The Legal Response to Transfusion-Acquired Disease” 38 *S.D.L. Rev.* at 13.

35 Hopkins, *supra* note 21 at 151; Christopher D. Pilcher *et al.*, “Acute HIV Revisited: New Opportunities for Treatment and Prevention,” (2004) 113 *J. Clinical Investigation* 937 at 937; Belli, *supra* note 2 at 337; Salbu, *supra* note 1 at 931; CBS estimated that the window period decreased from forty-two days in the 1980s to thirteen days through NAT. Canadian Blood Services, “Nucleic Acid Amplification Testing for HIV”, online: <[http://www.bloodservices.ca/CentreApps/Internet/UW\\_V502\\_MainEngine.nsf/resources/PDF/\\$file/scientific\\_document.pdf](http://www.bloodservices.ca/CentreApps/Internet/UW_V502_MainEngine.nsf/resources/PDF/$file/scientific_document.pdf)>.

To date, MSM represent the largest category of individuals who have been diagnosed with AIDS on a cumulative basis. Seventy per cent of all reported AIDS cases since 1979 have been in MSM.<sup>36</sup> However, the trend in yearly infection rates has changed drastically since AIDS first emerged. From a high of 78 per cent prior to 1994, MSM represented 34.6 per cent of AIDS diagnoses in 2003. Over the same period of time, heterosexual exposure increased from 10.6 per cent to 44.7 per cent respectively.<sup>37</sup> The use of cumulative statistics skews the risk presented by MSM to the blood supply. Since ELISA, Western Blot, and NAT can now detect HIV antibodies nine to eleven days after infection, there is no need to consider those who were infected in the past. The risk of window period donations relates solely to those who have recently contracted HIV. As for administrative errors, as more and more blood collection centres become automated, the risk of accidental release will also be greatly reduced.<sup>38</sup>

### PAST ATTEMPTS TO MODIFY THE LIFETIME DEFERRAL OF MSM

The closing of the window period with the implementation of NAT, as well as new research by the FDA into blood-bank error rates, prompted the American Association of Blood Banks and the America's Blood Centers to favour a one-year deferral for MSM in a September, 2000 FDA Blood Advisory Committee meeting.<sup>39</sup> The American Red Cross opposed the American Association of Blood Bank's joint proposal with the America's Blood Centers. Dr. Dayton, on behalf of the American Association of Blood Banks, argued that should MSM be deferred for a period of five years, the deferral would be so far outside the window period of false negative tests that the change would not introduce any new cases of infection.<sup>40</sup> Nevertheless, the Blood Advisory Committee voted 7–6 against the implementation of a five-year deferral period for MSM.<sup>41</sup> The American Red Cross stood firm on its zero tolerance approach and insisted that it would not support introducing any risk, however small, to the blood supply.<sup>42</sup> Dr. Farrugia of the Australian Commonwealth Department of Health and Ageing lamented this decision, citing compelling research suggesting the risk was minimal and the change was desirable in terms of increasing the number of blood donors.<sup>43</sup>

Even though it is not clear whether the FDA vote generated any reaction in Canada, the razor-thin margin revealed that consensus is absent on the issue of MSM donors.<sup>44</sup> The division in the U.S. was replicated in Canada at a public meeting organized by CBS and HQ in 2002. After various stakeholders in blood products met to discuss the current policies of CBS and HQ, the expert panel failed to recommend any changes since no agreement for modifications could be reached. Dr. Goldman believes that blood policy "is not carved in stone. It should be revisited every once in a while because there is no absolute scientific proof".<sup>45</sup>

36 Public Health Agency of Canada, *HIV and AIDS in Canada: Surveillance Report to June 30, 2004*, online: Public Health Agency of Canada <[www.phac-aspc.gc.ca/publicat/aids-sida/haic-vsac0604/pdf/haic-vsac0604.pdf](http://www.phac-aspc.gc.ca/publicat/aids-sida/haic-vsac0604/pdf/haic-vsac0604.pdf)> [PHAC].

37 *Ibid.* at 4.

38 Belli, *supra* note 2 at n. 147ff.

39 Sanchez, *supra* note 30 at 405; Belli, *supra* note 3 at 343; J.P. Brooks, "The Rights of Blood Recipients Should Supersede Any Asserted Rights of Blood Donors" (2004) 87 *Vox Sanguinis* 280 at 281.

40 Culhane, *supra* note 30 at 135.

41 Belli, *supra* note 2 at 343.

42 Culhane, *supra* note 30 at 135; Belli, *supra* note 2 at 346 cited U.S., Food and Drug Administration, Blood Products Advisory Committee 67<sup>th</sup> Meeting, Section II, *Deferral, as Blood or Plasma Donors, of Males Who Have Had Sex With Males* (14 September 2000), online: Blood Products Advisory Committee <<http://www.fda.gov/OHRMS/DOCKETS/AC/00/backgrd/3649b1.htm>> at 226.

43 Farrugia, *supra* note 25 at 2.

44 Goldman, *supra* note 25.

45 *Ibid.*

## SCIENTIFIC UNCERTAINTY REGARDING MSM RISK

A review of scientific journal articles regarding the risk posed by MSM donors reveals scant data and much doubt. Professor Culhane of the Widener University School of Law contends that the MSM ban is far too broad and cannot be justified by any reasonable reading of the scientific literature.<sup>46</sup> The latest article on the subject, published in March 2005, admitted that: "The paucity of data on [MSM] ... has made it difficult to assess the implications for the blood supply of changing this policy".<sup>47</sup> The study, however, found a higher prevalence of unreported deferrable risks<sup>48</sup> in MSM donors than those who did not disclose having had sex with another man. The authors relied on an anonymous mail survey sent to individuals who donated blood from April through October of 1998. Unfortunately, the wording of the questionnaire prevented the authors from determining whether the higher prevalence of unreported deferrable risks found among donors disclosing past MSM activity represented ongoing risk activities that would increase the probability of disease transmission or whether those unreported deferrable risks occurred a long time ago and would no longer affect the health of the donor. Moreover, it was not possible to compare the sample of MSM donors in the survey (who had lied when donating blood) with the general MSM population because the general MSM population did not donate due to the deferral policy.<sup>49</sup> Dr. Sanchez concluded that "no evidence supported changing the current MSM policy to permit donations from [MSM] within the past 5 years. For donors with a more remote history of [MSM], the findings were equivocal. A better understanding of the association between male-to-male sex and other unreported deferrable risks appears needed".<sup>50</sup> The inherent flaws in Dr. Sanchez's study suggest that the only undisputable finding made is that those who lie about their MSM status are significantly more likely to lie about other unreported deferrable risks when they donate blood.

Research used by the FDA in its Blood Advisory Committee meeting held in 2000 had estimated that introducing a five-year deferral period for MSM would lead to an additional 1.78 HIV-infected units released in the blood system each year.<sup>51</sup> The source of these 1.78 units were as follows: 1.3 units would come from small, non-automated blood collection systems that erroneously release tainted blood, 0.4 units would come from highly automated blood centres, and the remaining 0.08 units would come from pipetting related errors. Hospitals that processed roughly 10 per cent of transfused blood produced over 80 per cent of mistakes caused through mishandling.<sup>52</sup> The mistakes made on the part of the blood collection agencies that have tested blood for HIV/AIDS, received a positive result, yet failed to prevent the release of the infected blood, are used as justification for excluding all MSM donors.<sup>53</sup>

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46 Culhane, *supra* note 30 at 130.

47 Sanchez, *supra* note 30 at 405.

48 Unreported deferrable risks were defined as transfusion-transmissible viral infection risk behaviours that would have deferred a prospective donor from giving blood if reported during the screening process. Unreported deferrable risks for men included: having a positive HIV test, been diagnosed with AIDS, used injected drugs or illegal steroids [IDU], was born in a country where HIV-1 Group O viruses are endemic; since 1977, had sex with a man or has taken money or drugs for sex; in the past year had sex, with a prostitute, with an IDU, or with a recipient of clotting factor concentrates; or in the past year, had a positive test for syphilis, was treated for syphilis/gonorrhoea, had a blood transfusion, received a transplant, was struck by a sharp instrument or a needle that contained someone else's blood, or was jailed for seventy-two continuous hours. Sanchez, *supra* note 30 at 406.

49 *Ibid.* at 404-405, 410-11.

50 Sanchez, *ibid.* at 404. Dr. Sanchez wrote: "Unlike men with recent male-to-male sex experiences, screening tests results for donors who last engaged in male-to-male sex more than five years ago were comparable to those of male donors not reporting male-to-male sex although the prevalence of UDRs was significantly higher". *Ibid.* at 409-10. They were two to six times more likely to report other UDRs than men who did not acknowledge a prior male-to-male sexual encounter. *Ibid.*, at 410.

51 Belli, *supra* note 2 at 345-6, n. 147; Culhane, *supra* note 30 at 135.

52 Belli, *supra* note 2 at 345-6.

53 *Ibid.* at 346.

While nobody would like an additional 1.78 individuals to be infected with HIV, these infections must be compared to the current rate of transfusion-transmitted HIV. Each year, there are over 12 million blood transfusions in the U.S.<sup>54</sup> According to the Center for Disease Control, 134 individuals were infected with HIV in 2003 from blood transfusions—donations overwhelmingly made by non-MSM donors.<sup>55</sup> It is not clear whether these transfusions took place in the U.S. or elsewhere.<sup>56</sup> According to Dr. Germain, the risk that HIV-positive blood would be released if a one-year deferral of MSM were implemented was found to be one unit every sixty-nine years in Quebec, one unit every sixteen years in the rest of Canada, and one unit every 1.1 years in the United States.<sup>57</sup> He concluded that “the incremental risk of a revised deferral policy for MSM would be very low, although not zero”.<sup>58</sup> Dr. Callum from the University of Toronto stated: “A one-year deferral period for MSM will protect [recipients of blood products] from HIV”.<sup>59</sup> The current donor deferral policy tolerates a wide range of risks associated with heterosexual sex while it imposes a zero-tolerance attitude towards MSM regardless of the risk associated with individual behaviour.<sup>60</sup>

### THE QUESTIONNAIRE – HOW EFFECTIVE IS IT?

Dr. Farrugia believes that “the sensitivity and specificity of the current donor selection processes are relatively poor”.<sup>61</sup> Not even Dr. Goldman knows which questions are responsible for the reduced rate of transfusion-transmissible viral infections in the donor pool compared to the rate of infection in the general population.<sup>62</sup> The current questionnaire, in particular the MSM question, is deficient in three ways. First, it does not screen for the precise behaviours that increase the likelihood that an individual will have a transfusion-transmissible viral infection. Second, data shows that donors are lying when answering the questionnaire. Third, leaving “sex” undefined is not sound policy.

Paul Lapierre, Executive Director of the Canadian AIDS Society, has opposed the MSM deferral policy and would rather have blood collection agencies screen donors on the basis of safe sexual practices.<sup>63</sup> At the Blood Advisory Committee meeting, Dr. Valleroy stressed that current practices provide false comfort. HIV-infected blood donors are giving blood. The use of broad classifications based on irrelevant categories ought to be reformulated to ask individuals about their behaviour in a private and supportive setting. Then, if a sufficiently specific risk exists, potential donors should be encouraged to return if and when the window of infection has closed.<sup>64</sup> However, the FDA, CBS, and HQ oppose departing from categorical exclusions and moving towards an assessment of a prospective donor’s sexual behaviour. The FDA wrote, “Although a potential individual donor may practice safe sex, persons who have participated in high-risk behaviours are, as a group, still considered to be at increased risk of transmitting

54 Hopkins, *supra* note 21 at 156.

55 Center for Disease Control, HIV/AIDS Surveillance Report: Cases of HIV Infection & AIDS in the US (2003), online: Centre for Disease Control and Prevention <<http://www.cdc.gov/hiv/topics/surveillance/resources/reports/2003report/pdf/2003SurveillanceReport.pdf>> at 35-36.

56 Interview of Dr. Heather Hume, Executive Medical Director, Canadian Blood Services (3 June 2005).

57 M. Germain *et al.*, “The Risks and Benefits of Accepting Men Who Have Sex With Men as Blood Donors” (2003) 43 *Transfusion* 25 at 28.

58 *Ibid.*, at 29.

59 Callum, *supra* note 29. Dr. Callum also noted that a one-year deferral period for MSM would not protect recipients from “all the other viruses [other than HIV]”. However, Dr. Goldman’s comment at *supra*. note 29, conflicts with Dr. Callum’s statement.

60 Culhane, *supra* note 30 at 135.

61 Farrugia, *supra* note 25 at 2.

62 Goldman, *supra* note 25.

63 Lapierre, *supra* note 4.

64 Culhane, *supra* note 30 at 146–7.

HIV".<sup>65</sup> When confronted with the possibility of screening donors on an individual basis, for example by screening for high-risk sexual behaviour, Dr. Goldman responded as follows:

The screening process of donors is not the same thing as an individual risk assessment of the person. The screening process is done on 850,000 people a year with CBS and 250,000 with HQ. It is meant to be as standardized as possible because donors already tell us the questionnaire is too long. ... As a result, what you end up with are questions that are trying to get at a simple answer. You are not refining your approach to an individual assessment of risk. Obviously there is a huge difference between people who have experimented with MSM or were intravenous-drug users once, 20 years ago, versus somebody who shot up yesterday. But we are not trying to assess individual risk but to have a streamlined approach so that we can say an individual is in a high-risk category and defer them. And that's that.<sup>66</sup>

In countries such as France, where donors are interviewed by medical doctors, Dr. Goldman conceded that in such a situation, it is appropriate to gauge the true risk posed by an individual.<sup>67</sup> The length and complexity of the current questionnaire, as well as the fact that nurses in Canada do not receive training as extensive as that given to doctors, yet are involved in screening donors, mitigates against refining the deferral categories.

Even more troubling than the existence of irrelevant categories is the fact that some donors are intentionally, others unintentionally, answering the questionnaire falsely.<sup>68</sup> Intentional errors may arise from individuals wishing to avoid the stigma associated with AIDS and homosexuality. Some respondents may worry that the information being collected will not be kept confidential and may be used in a discriminatory way against them in the future.<sup>69</sup> Others, like Kyle Freeman, allegedly make negligent misrepresentations because they believe the question is irrational, hurtful, and unconstitutional.<sup>70</sup> Anecdotal reports of donors being encouraged to lie about their sexual background in the context of blood drives abound.<sup>71</sup> Despite the finding by Dr. Sanchez and Dr. Soldan that 2.4 per cent to 5 per cent of donors lie about their MSM status, Dr. Callum doubts that "we have an accurate assessment of the number of donors who lie at the time of donation".<sup>72</sup>

The vagueness of the MSM question: "Male donors: Have you had sex with a man, even one time since 1977?" leaves it up to the donor to determine what "sex" means. It is foreseeable that some donors would assume that the question is concerned with only the riskiest behaviour—unprotected (perhaps passive) anal intercourse.<sup>73</sup> The 1970 Kinsey Institute Survey found that 20 per cent of American men have had male-to-male sex, but that only 7 per cent engaged in gay sex after age nineteen.<sup>74</sup> Perhaps those who had sex as adolescents do not consider, or would be ashamed to believe, that their previous experience constitutes "sex". Ultimately, different sexual activities carry different risks. Leaving "sex" undefined renders the usefulness of the question doubtful. As Dr. Goldman noted, "The questionnaire is a relationship of trust between the donor and the blood supplier. It is only as good if the donor understands

65 *Ibid.* at 132 n. 17.

66 Goldman, *supra* note 25.

67 *Ibid.*

68 Salbu, *supra* note 1 at 954.

69 *Ibid.* at 955.

70 *Canadian Blood Services v. Freeman* (4 November 2004), Ottawa 02-CV-20980 (Ont. Sup. Ct.).\*

71 Brooks, *supra* note 40 at 282.

72 Sanchez, *supra* note 30 at 406; Callum, *supra* note 70; K. Soldan and K. Sinka, "Evaluation of the De-Selection of Men Who Have Had Sex With Men From Blood Donation in England" (2004) 84 *Vox Sanguinis* 265 at 265.

73 Culhane, *supra* note 30 at 136-7.

74 Sanchez, *supra* note 30 at 410.

what they are answering about and giving truthful responses".<sup>75</sup>

### WHAT IS THE HARM IN EXCLUDING INDIVIDUALS WHO POSE LITTLE IF ANY RISK?

In the twentieth century alone, homosexuals were worked to death in concentration camps, driven to suicide by psychiatric treatments, endured medical experimentation, and have been, and continue to be, imprisoned in various parts of the world.<sup>76</sup> Although being excluded from the donor pool pales in comparison to these horrors, given the current state of knowledge on the risks of transfusion-transmissible viral infections, the decreased length of the window-period, and the increasing automation of blood testing, the deferral of MSM for life can only be explained by apathy, homophobia, and misconceptions regarding the role of MSM in Canada's tainted blood scandal.

Homophobia is the root cause of chronic stress associated with having to cope with social stigmatization.<sup>77</sup> The physical and psychological harassment against homosexuals has been documented extensively.<sup>78</sup> More than 25 per cent of gay males have been verbally abused, a further 20 per cent have been physically assaulted, 17 per cent reported property damage, 12 per cent have had objects thrown at them and 5 per cent have been spat upon. All of these actions were motivated because of the perpetrators' hatred of homosexuality.<sup>79</sup> Additional studies show that homosexuals are more likely to resort to drugs and suffer from increased rates of depression.<sup>80</sup> For instance, 25 per cent of the Canadian population smokes compared to 40 per cent of homosexuals.<sup>81</sup> In Ontario, 1.3 per cent of the population used crack/cocaine over the past year and 12.4 per cent used cannabis. Of gay men, 4.8 per cent and 45.6 per cent used these drugs respectively.<sup>82</sup> In light of the heated debate regarding same-sex marriage, it may seem that attitudes towards homosexuality have improved. However, in a poll conducted by Leger Marketing in May 2005, half of all Canadians surveyed agreed that homosexuality is "an abnormal condition".<sup>83</sup>

Equality for Gays and Lesbians Everywhere asserted that the current practices of CBS and HQ promotes homophobia and undermines the confidence of Canadians in the equity, effectiveness, and safety of the blood system.<sup>84</sup> Heterosexuality has been designated as "safe" while homosexual acts have been depicted as carrying "dangerous" risks.<sup>85</sup> This stereotyping has been consistent with art, mainstream media, and biomedical discourse that blame gay men

75 Goldman, *supra* note 25.

76 Vanessa Baird, *Sex, Love & Homophobia: Lesbian, Gay, Bisexual and Transgender Lives* (London: Amnesty International, 2004) at 13.

77 Christopher Banks, *The Cost of Homophobia: Literature Review of the Economic Impact of Homophobia on Canada* (Saskatoon, Saskatchewan: Gay and Lesbian Health Services, 2001) at 17.

78 Bruce Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990) 9 Can. J. Fam. L. 39 at para. 5 cited Report of the Parliamentary Committee on Equality Rights, *Equality for All* (Ottawa: Queen's Printer, 1985) at 26; Jurgens at note 44.

79 Jeffrey Keller, "On Becoming a Fag" (1994) 58 Sask. L. Rev. 191 at nn. 32-35.

80 Banks, *supra* note 78 at 18.

81 *Ibid.*, at 26.

82 Ted Myers & Dan Allman, "Ontario Men's Survey" online: Ontario Men's Survey <[www.mens-survey.ca](http://www.mens-survey.ca)> at 61 [OMS]; Canadian Centre on Substance Abuse, *Canadian Addiction Survey: A National Survey of Canadians' Use of Alcohol and Other Drugs – Prevalence of Use and Related Harms* (Ottawa: Canadian Centre on Substance Abuse, 2004), online: Canadian Centre on Substance Abuse <<http://www.ccsa.ca/NR/rdonlyres/B2C820A2-C987-4F08-8605-2BE999FE4DFC/0/ccsa0048042004.pdf>> at 3.

83 Ben Thompson, "Canadian Gay Marriage Bill Heads to Summer Vote" (2 June 2005), online: Gay News From 365Gay.com <<http://www.365gay.com/newscon05/06/060205canadaMarry.htm>>.

84 David Garmaise, "Blood Donor Screening Practices Criticized" (2002) 6 Canadian HIV/AIDS Policy & Law Review.

85 Joe Rollins, "AIDS, Law, and the Rhetoric of Sexuality" (2002) 36 Law & Soc'y Rev. 161 at 177; Belli, *supra* note 2 at 329.

as both the source and carriers of AIDS.<sup>86</sup> Krever J. noted that AIDS has been described as the “gay plague”.<sup>87</sup> The stigma, shame, and marginalization of both AIDS and homosexuality have prevented the implementation of rational policies. Behaviours, which can transmit diseases, have been confused with identity categories, which are irrelevant.<sup>88</sup>

The public perception of AIDS has not been well served by the current MSM policy. Thirty per cent of individuals surveyed by EKOS Research Associations believed that HIV/AIDS is mostly a gay person’s disease. Twenty-five per cent believed it is mostly a drug user’s disease, and a further 38 per cent believed it is mostly a third world disease.<sup>89</sup> Even more lamentable is the unfortunate division of HIV-positive individuals as “guilty” or “innocent”. Liberal Member of Parliament Roseanne Skoke viscerally stated in 1994 that “[T]here are those innocent victims that are dying from AIDS ... and then there are those homosexuals that are promoting and advancing the homosexual movement and that are spreading AIDS”.<sup>90</sup>

## THE LIFETIME DEFERRAL OF MSM IS UNCONSTITUTIONAL

The most serious allegation made against the MSM policy is that, as it stands, it is contrary to the principles of the Canadian Constitution. A constitutional analysis of the validity of the MSM ban will proceed in three steps. First, it must be determined whether CBS and HQ fall under the jurisdiction of the *Charter*. Second, a violation of s. 15(1) of the *Charter* must be proven. Third, provided that a *Charter* right has been breached, the infringement must shown to be unreasonable and not justifiable in a free and democratic society under s. 1 analysis.

*Section 32 of the Charter states:*

This Charter applies to the Parliament and government of Canada in respect of all matters within the authority of Parliament.<sup>91</sup>

In *McKinney v. University of Guelph*,<sup>92</sup> the Supreme Court of Canada (“SCC”) outlined a test used to identify if the *Charter* applies to a non-governmental body. If an entity acts pursuant to statutory authority, furthers a government objective, and promotes a broad public interest, or if the legislative, executive, or administrative branch of government exercises general control over the entity, then the actions of that body are subject to *Charter* review. Since donated blood is a drug pursuant to the regulations established under the federal *Food and Drugs Act*,<sup>93</sup> CBS and HQ must acquire an Establishment Licence issued by the Health Products and Food Branch Inspectorate of the Public Health Agency of Canada. To qualify for a licence, certain regulations must be followed. The organization of CBS and HQ is such that there is ample government oversight in terms of the classification of appropriate donors. Moreover, CBS and HQ, by running Canada’s blood system, fulfil a mandate that promotes the broad public interest. For these reasons, the two organizations are subject to the provisions of the *Charter*.

*Section 15(1) of the Charter states:*

86 Rollins, *supra* note 86 at 177; Martin Schwartz, “Gay Men and the Health Care System,” *Health Care for Lesbians and Gay Men: Confronting Homophobia and Heterosexism*” ed. by K. Jean Peterson (New York: Harrington Park Press, 1996) at 25.

87 Krever, *supra* note 13 at 202.

88 Rollins, *supra* note 86 at 169.

89 Public Health Agency of Canada, *HIV/AIDS: An Attitudinal Survey – Perceptions of Risk* (2003), online: Public Health Agency of Canada <[www.phac-aspc.gc.ca/aids-sida/hiv\\_aids/attitudinal\\_survey/3\\_risk.html](http://www.phac-aspc.gc.ca/aids-sida/hiv_aids/attitudinal_survey/3_risk.html)>.

90 Ralf Jurgens, “Legal and Ethical Issues Raised by HIV/AIDS: Literature Review and Annotated Bibliography” (1995) Canadian AIDS Society at n. 47.

91 *Charter*, *supra* note 5, s. 32.

92 *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

93 Food and Drugs Act, R.S., c.F-27.

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.<sup>94</sup>

The purpose of s. 15(1) is to prevent discrimination against groups suffering social, political, and legal disadvantage.<sup>95</sup> In *R. v. Turpin*, Wilson J. wrote, “the guarantee of equality before the law is designed to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others”.<sup>96</sup> Any law that imposes a stricter standard on one group of individuals than on another will violate the principle of equality.<sup>97</sup>

Iacobucci J. outlined the SCC’s s. 15(1) equality analysis in *Law v. Canada*. To find a breach of s. 15(1), a purposive and contextual, rather than a mechanical and formulaic, approach towards equality was adopted. A claimant must first establish that a law or policy imposes differential treatment either in purpose or effect. Second, this differential treatment must be based either on an enumerated or analogous ground. Third, a claimant has the burden of proving that the differential treatment is discriminatory in that it imposes a burden or withdraws a benefit. This has the effect of demeaning the claimant’s human dignity.<sup>98</sup>

In the framework of blood donations, MSM satisfy all three criteria to establish a breach of equality. An affirmative response to Question 18<sup>99</sup> on the Record of Donation leads to a lifetime deferral for MSM. The justification for this policy is that they are a high-risk group for the transmission of HIV/AIDS, hepatitis, and syphilis. These are the same reasons for the one-year deferral of female donors who have had sex with a man who has had sex, even one time since 1977 with another man, of individuals who have paid money or drugs for sex, or people who have had sex with someone whose sexual background they did not know. Presumably, a heterosexual female can have unsafe sex with hundreds of people and still donate. Perhaps she will have to wait a year. MSM, however, are barred from donating for their entire lives. The policy enforced by CBS and HQ imposes differential treatment on MSM.

The differential treatment between MSM and non-MSM donors is based on the analogous ground of sexual orientation. Courts have recognized the historic disadvantages endured by homosexuals in cases such as *Vriend v. Alberta*,<sup>100</sup> *Halpern v. Canada*<sup>101</sup> and *Egan v. Canada*.<sup>102</sup>

94 *Charter, supra* note 5, s. 15(1). Note that the *Canadian Human Rights Act*, R.S. 1985, c. H6 also applies to the screening policies implemented by CBS. The Canadian Human Rights Commission has not yet dealt with the MSM issue however, the Commission des droits de la personne in Quebec, the British Columbia Council of Human Rights, and the Ontario Human Rights Commission have. In 1995, the Quebec Commission held in *J.R., M.N. v. Canadian Red Cross Society* (21 June 1995), Montreal MTL 7482/MTL 7483 (Commission des droits de la personne et des droits de la jeunesse), that donating blood was a juridical act under CCQ 1806, that blood drives were a service ordinarily offered to the public, and that the MSM policy discriminated on the basis of sexual orientation. Nevertheless, the fact that the rate of HIV infection in MSM in 1994 was 69.4 per cent, justified their exclusion. Likewise, the British Columbia Council of Human Rights found in *Robb Stewart v. Canadian Red Cross Society* (10 May 1995), Victoria 940467 (British Columbia Council of Human Rights), that because MSM was a reported risk factor in 77 per cent of adults AIDS cases in Canada in 1994, and that there was a forty-five day window period, their exclusion was legitimate. In *Cloutier v. Canadian Blood Services* (17 December 2003), Toronto GSEA-566SX5 (Ontario Human Rights Commission), the Ontario Human Rights Commission refused to deal with the MSM issue since it deemed it did not have the proper jurisdiction.

95 Ryder, *supra* note 79 at para. 80.

96 *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1329.

97 Ryder, *supra* note 79 at para. 80.

98 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [Law]; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950.

99 Record of Donation, *supra* note 2, Question 18 states: Male donors: Have you had sex with a man, even one time since 1977?

100 *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [Vriend].

101 *Halpern v. Toronto (City)*, (2003) 65 O.R. (3d) 161 [Halpern].

102 *Egan v. Canada*, [1995] 2 S.C.R. 513 [Egan].

In these SCC judgments, to hold sexual orientation as an analogous ground meant that an individual's choice of a partner, be it heterosexual or homosexual, along with any lawful activity within that relationship, was protected. The first case to find discrimination on the basis of sexual orientation was *Veysey v. Commissioner of Correctional Services*.<sup>103</sup> Dubé J. held that persons who deviated from sexual norms "have been victimized and stigmatized throughout history because of prejudice, mostly based on fear and ignorance".<sup>104</sup> Question 18 specifically targets male homosexuals by deferring any men who have had homosexual sex from the donor pool.

The MSM policy has the effect of infringing on the dignity of MSM by perpetuating homophobic beliefs and burdening gay men with the stigma of HIV/AIDS. Dignity has been defined by the SCC as encompassing notions of self-respect and self-worth. It is concerned with both physical and psychological integrity and empowerment. Dignity does not relate to the status of an individual in society, rather it is concerned with the manner in which a person legitimately feels when confronted with a particular law. Unfair treatment founded on personal traits which do not relate to individual needs, capacities or merits derogates from the principle of dignity. The marginalization of people is to be avoided.<sup>105</sup> In *Halpern*, the Ontario Court of Appeal recognized that denying homosexual couples the right to marry propagated the view that same-sex couples were unable to form lasting and loving relationships. For this reason gay partnerships were not worthy of the recognition and benefits enjoyed by married couples. In the same vein, the exclusion of MSM from the donor pool helps foster the distorted image of HIV/AIDS held by Canadians as not being a disease that affects heterosexuals. After being bombarded with ads meant to raise awareness of blood drives and encourage people to donate blood, gay men are turned away and asked never to come back. Gay men are not worthy of having the privilege of saving the life of another in need.

*Section 1 of the Charter states:*

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>106</sup>

Provided that a breach of s. 15(1) is found by a court, the state has the burden of justifying the infringement through s.1. In *R v. Oakes*,<sup>107</sup> a two-part test was developed to help the court determine whether a violation of a right is constitutional. First, the state must prove that the purpose of the law is pressing and substantial. Second, the means of achieving that goal must be reasonable and demonstrably justified, and in proportion to the importance of the objective. This criterion is met if the measure is rationally connected to the objective, if the least restrictive means were used, and if there is proportionality between the effects of the measures and the objective attained. The more severe the deleterious effects, the more important the objective and positive effects must be.<sup>108</sup>

The state could easily justify an equality breach on the first prong of the *Oakes* test but the MSM policy would not pass judicial scrutiny under the second prong. The MSM deferral is not rationally connected to the objective, the least restrictive means are not used, nor is there proportionality between the effects of the ban and the objective attained. Having collectively suffered through the tainted blood scandal, it is clear that the purpose of the Record of Dona-

103 *Veysey v. Canada (Commissioner of Correctional Services)*, (1990) 29 F.T.R. 74 [Veysey].

104 *Ryder*, *supra* note 79 at para. 126 cited *Veysey* at 78.

105 *Law*, *supra* note 99.

106 *Charter*, *supra* note 5 at s. 1.

107 *R. v. Oakes* [1986] 1 S.C.R. 103.

108 *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835.

tion is to ensure a safe blood supply. Since there is no cure for HIV/AIDS or for hepatitis, this purpose is both pressing and substantial. It is extremely questionable whether the MSM ban is rationally connected to the objective of a safe blood supply. MSM are not any more susceptible to contracting or transmitting HIV than heterosexuals, nor is HIV infected blood any more dangerous to the blood pool if it comes from a MSM or from a heterosexual. HIV tests do not more accurately detect HIV in heterosexuals than in MSM.<sup>109</sup> With new rates of HIV in MSM falling to 34.6 per cent and rising to 44.7 per cent in heterosexuals in 2003,<sup>110</sup> the evidence strongly suggests that the lifetime deferral of MSM is an artifact of a policy that was too exclusionary to begin with, but is now being used to justify the status quo.<sup>111</sup> The current donor selection process discriminates against MSM because of improper handling of blood products by hospitals, not because of HIV rates or the nine to eleven day window period. Rather than addressing the origin of the error in negligent handling, the FDA, CBS, and HQ choose to instead ostracize MSM.<sup>112</sup>

In the event that a court finds a rational connection between the MSM ban and the objective of ensuring a safe blood supply, the MSM ban also suffers from the fact that the least restrictive means are not used nor do the advantages gained outweigh the deleterious effects. Status-based stereotypes suffer from the inevitable possibility that exceptions to the generalizations made will occur. HIV is transmitted through high-risk sexual practices. Banning donations from all MSM presumes that the majority of gay men practice unsafe sex.<sup>113</sup> Homophobia and the mistaken beliefs regarding HIV/AIDS by the Canadian public are fuelled by the irrational stance adopted by blood collection agencies. Moreover, the policy prevents gay men from demonstrating that even though they may have had sex once since 1977, that they pose no additional risk to the blood supply than heterosexual donors because they practice safe sex, are in a monogamous relationship, etc.<sup>114</sup>

The use of irrelevant categorical exclusions by CBS and HQ is contrary to the holding of the SCC in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* ("*Grismer*").<sup>115</sup> The Government of British Columbia had previously banned all persons with homonymous hemianopia from driving, through a blanket prohibition. This particular medical condition results in a lack of peripheral vision. In *Grismer*, the issue was not about whether unsafe drivers should be permitted to drive. Rather, it was about giving those who pose a potential risk an opportunity to prove through an individual assessment that they can drive. False assumptions regarding the effects of disability on individual abilities must not be allowed to prevail.<sup>116</sup> Governments are permitted to regulate an activity on the basis of risk, but they cannot deny a license to an individual because of discriminatory assumptions founded on stereotypes of disability.<sup>117</sup> The blanket exclusion of people with homonymous hemianopia, just as the lifetime deferral of MSM, imposed a standard of perfection which is not the standard applied to people without a disability or, in the context of the blood supply, heterosexuals.<sup>118</sup>

109 Belli, *supra* note 2 at 372.

110 PHAC, *supra* note 37 at 32.

111 Culhane, *supra* note 30 at 136.

112 Belli, *supra* note 2 at 374.

113 Salbu, *supra* note 1 at 954.

114 *Ibid.* at 40; According to the OMS, *supra* note 83 at 12, the rates of MSM having unprotected sex is increasing. These findings were based on a survey of roughly 5,000 gay and bisexual men, 70 per cent of whom were recruited in bars and 10 per cent of whom were recruited in bathhouses. These statistics should not be used against MSM because of the biased sample.

115 *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [*Grismer*].

116 *Ibid.* at para. 2.

117 *Ibid.* at para. 1.

118 *Ibid.* at para. 35.

McLachlin J. held that “Evidence that a particular group is being treated more harshly than others without apparent justification may indicate that the standard applied to that group is not reasonably necessary”.<sup>119</sup> Dr. Callum, Dr. Farrugia, and Dr. Germain, all agree that a one-year deferral of MSM would pose very little risk to the blood supply.<sup>120</sup> Dr. Sanchez was more vague, and said that a five-year deferral of MSM would likely be safe.<sup>121</sup> Given the current leniency given to heterosexual donors, it is time that CBS and HQ treat like risks alike.

## TIME FOR CHANGE

The lifetime deferral of MSM contrasted against other categories of heterosexual donors is irrational, harmful, and unconstitutional. While a right to donate blood has not been recognized by courts or legislatures in the United States<sup>122</sup> or in Canada such a right has been upheld by the Human Rights Commission in South Africa, where heterosexual transmission of HIV is more common than homosexual transmission.<sup>123</sup> In no way does this essay argue that a right to donate blood exists. Safety must be the top priority. However, CBS and HQ cannot legitimately continue to enforce a standard of perfection on gay men and a dramatically lower standard for heterosexuals.

When the AIDS crisis first erupted, the FDA was right to permanently exclude all sexually active gay men from donating blood since AIDS disproportionately affected that community. With the enormous advances made in HIV testing, the increasing automation of blood processing and the epidemiological data on the spread of HIV in communities other than MSM, the lifetime deferral of MSM is nothing short of discrimination. Unsupported by convincing research, the MSM policy is based on unfounded assumptions and continues to stigmatize the gay community.<sup>124</sup> Gay men are not all dangerous carriers of HIV/AIDS. Moreover, the policy serves only to exacerbate the critical shortage of blood available for transfusions.<sup>125</sup>

If CBS and HQ desire to serve their mandate legally, they would at the very least modify the lifetime deferral of MSM to a one-year deferral period. The blood supply would be better served, however, with a screening process that assesses the true risk posed by an individual by determining whether they practice safer sex.

## ACKNOWLEDGEMENTS

This research would not have been possible without the help and support of numerous individuals. Prof. Colleen Sheppard graciously agreed to supervise and provide comments on my work. Dr. Jeannie Callum and Dr. Mark Lomaga dedicated much of their time to explain and give their insights into the scientific literature. Mr. Nick Peters researched the internal structures of CBS, HQ and the Public Health Agency of Canada. Last and most important, I must thank my loving friends and family. It was they who stood by me as I struggled to come to terms with my homosexuality.

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119 *Ibid.* at para. 31. Provided that a court found a rational connection between the MSM ban and the safety of the blood supply, moving to the least restrictive means analysis, the maintenance of the status quo would be contingent on CBS and HQ showing that accommodating blood donations from MSM would amount to undue hardship.

120 Callum, *supra* note 60; Farrugia, *supra* note 25 at 2; Germain, *supra* note 58 at 25.

121 Sanchez, *supra* note 30 at 404.

122 *Raso v. Moran*, 551 F. Supp. 294, 297 (D.R.I. 1982).

123 Brooks, *supra* note 40 at 284.

124 Culhane, *supra* note 30 at 130.

125 *Ibid.*