



Canadian Hemophilia Society
Help Stop the Bleeding
Société canadienne de l'hémophilie
Arrêtons l'hémorragie

Case of Freeman vs. CBS & Attorney-General of Canada ends Decision expected in summer

The proceedings in the civil case of Freeman vs. Canadian Blood Services (CBS) and the Attorney-General have now ended in Ontario Superior Court after 35 days of expert and factual testimony, lasting from September to December. During the week of January 4-8, final legal arguments were presented by Canadian Blood Services, the Government of Canada, counsel for Mr. Kyle Freeman, the Canadian Hemophilia Society, Egale, a national organization committed to advancing equality and justice for lesbian, gay, bisexual and trans-identified people, and the Canadian AIDS Society. The judge in the case, the Honourable Madam Justice C. Aitken, has indicated a decision can be expected this summer.

The case originated in 2002. Kyle Freeman had donated blood on 18 occasions between 1990 and 2002; however, after the last occasion in June 2002, he informed Canadian Blood Services in an anonymous e-mail that he had lied when responding to the questionnaire, specifically with regard to Question #18, *Male donors: Have you had sex with a man, even one time, since 1977?* CBS was able to discover his identity and sued Freeman in civil court for negligent misrepresentation and damages. In subsequent discovery proceedings it was established that Freeman had lied to four questions of the blood donor questionnaire, including one related to his sexual history of having had sex with other men (MSM). According to Health Canada regulations, men who have had sex with other men, even once, since 1977 are permanently deferred from giving blood. Question #18 was introduced by the Canadian Red Cross in the 1980s to protect the recipients of blood and blood products against infection with HIV. Had Freeman replied honestly to these questions, he would have been ineligible to give blood.

Mr. Freeman countersued CBS and Health Canada on grounds that the question violated his right not to be discriminated against based on sexual orientation, a right guaranteed in Section 15 of the Canadian Charter of Rights and Freedoms. He asked the court to find that “he need not answer truthfully” and that the court should order a change to the MSM question.

Three key questions the judge must answer are:

- Is CBS, as a private not-for-profit corporation at arms-length from government, subject to the Charter of Rights and Freedoms?
- Does the question concerning men who have had sex with men violate charter provisions on equality (Section 15 of the Charter)?
- If the question does violate Charter rights, can this discrimination be justified for reasons of public health (Section 1 of the Charter)?

The Canadian Hemophilia Society argued that the deferral is justified in the interest of safeguarding the blood system. Current epidemiology shows that sexually transmitted diseases are many times more prevalent in the population of men who have had sex with men, compared to those who haven't. The CHS also contended that the MSM deferral protects the blood system against new and emerging pathogens that would be sexually transmitted.

The CHS' final written submission concludes as follows: "The MSM deferral serves to protect recipients from blood-borne pathogens that threaten to kill them or seriously impact their quality of life. The evidence is unequivocal that recipients of blood and blood products are particularly vulnerable and use blood products out of necessity. It is respectfully submitted that when the rights in this case are balanced, the rights of recipients must prevail. Ultimately, it must be remembered that the recipients bear 100% of the risk of blood-borne pathogens and the donors (whether MSM or otherwise) bear none... The CHS submits that if this court should find that the CBS is bound by the Charter and that the current MSM deferral is a violation of Mr. Freeman's section 15 rights, that such violation is justified under section 1 of the Charter."