File No. CI 20-01-28360

**THE KING'S BENCH**
**Winnipeg Centre**

BETWEEN:

**THE MANITOBA HUMAN RIGHTS COMMISSION**

Applicant,

- and -

**HARRIET SUMNER-PRUDEN AND**
**ALFRED "DEWEY" PRUDEN**

Respondents,

- and -

**THE GOVERNMENT OF MANITOBA**

Respondent.

| | |
|---|---|
| **APPLICATION UNDER:** | *The Court of Queen's Bench Act*, C.C.S.M. c. c280 and *The Court of Queen's Bench Rules*, M.R. 553/88, as amended; |
| **AND UNDER:** | *The Human Rights Code*, C.C.S.M., c. H175 |
| **IN THE MATTER OF:** | A complaint by Harriet Sumner-Pruden and Alfred "Dewey" Pruden against The Government of Manitoba alleging a breach of section 13 of *The Human Rights Code*; |
| **AND IN THE MATTER OF:** | A decision of an Adjudicator designated under subsection 32(1) of *The Human Rights Code*, issued August 17, 2020. |

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# BRIEF OF THE RESPONDENT THE GOVERNMENT OF MANITOBA

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## PART I – LIST OF AUTHORITIES AND DOCUMENTS RELIED UPON

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| *Manitoba High School Athletics Association Inc. v. Pasternak*, 2008 MBQB 24 | App BOA Tab 2 |
| *Rolling River School Division v. Rolling River Teachers' Assn. of the Manitoba Teachers' Society*, 2009 MBCA 38 | App BOA Tab 3 |
| *Cuff v. Edmonton School District No. 7*, 2009 ABCA 6 | App BOA Tab 5 |
| *Westcan Recyclers Ltd. v. Calgary (City)*, 2022 ABCA 60 | App BOA Tab 6 |
| *Canada (Minister of Immigration) v. Vavilov*, 2019 SCC 65 at 136 | MB BOA Tab 2 |
| *R v Sharma*, 2022 SCC 39 | MB BOA Tab 3 |
| *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342 | App BOA Tab 13 |
| *First Nations Child and Family Caring Society of Canada v. Canada (Minister of Indian Affairs and Northern Development)*, [2016] C.H.R.D. No. 2 | App BOA Tab 14 |
| *Northern Inter-Tribal Health Authority Inc. v Canada (Attorney General),* 2018 FC 1180 | MB BOA Tab 4 |
| *Canada (Attorney General) v. Northern Inter-Tribal Health Authority Inc.*, 2020 FCA 63 | MB BOA Tab 5 |
| Warren J. Newman, "The Promise and Limits of Cooperative Federalism as a Constitutional Principle" (2016) 76 SCLR (2d) | MB BOA Tab 6 |
| Peter Hogg, *Constitutional Law of Canada* (2016) | MB BOA Tab 7 |
| *Canadian National Railway v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 | App BOA Tab 11 |
| *Disability Rights Coalition v. Nova Scotia (Attorney General)*, 2021 NSCA 70 | App BOA Tab 17 |
| *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61 | App BOA Tab 13 |

| *Kelly v. Air Canada and Air Canada Pilots Association and Vilven v. Air Canada*, 2010 CHRT 27 | MB BOA Tab 8 |
|---|---|

| **Court Document** | **Court File No.** | **Court Doc. no.** |
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| Manitoba's Notice of Application for judicial review | CI20-01-28403 | 1 |
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## PART II – INTRODUCTION

1. This case concerns the delivery of service to a First Nation family, and Manitoba's reasonable reliance upon the Federal government's historic practice of delivering services on First Nation reserves. These issues were brought forward through a complaint to the Manitoba Human Rights Commission, and are now before this Court through an application for judicial review.

2. The complaint was filed by a resident of a Manitoba First Nation on her own behalf and on behalf of her son. The Complainants were not eligible for certain health and social services offered by programs within two departments of the Government of Manitoba because of provincial policies that were intended to avoid the duplication of services which were made available by other levels of government.

3. The Complainants alleged that the eligibility policies of the programs resulted in discrimination against the Complainants in the provision of services on the basis of disability and First Nation ancestry, and that no reasonable and bona fide cause existed for the discrimination.

4. The evidentiary record that was before the Adjudicator reflected the challenges faced by the complainants in obtaining services, but the record also highlighted that many of the services identified in the Complaint were not provided by Manitoba to any Manitoban, and that a number of the services identified in the Complaint were in fact received by the Complainants, albeit through a variety of public service providers – some provincial, some federal, and some through their First Nation community. Notwithstanding the volume of evidence that was before the Adjudicator, the record was lacking in regards to the types and levels of services that were provided to other neighbouring communities, whether First Nation or not.

5. The Adjudicator found that Manitoba had discriminated against the Complainants in the provision of services, and that there was no reasonable and bona fide cause

for the discrimination. He issued a remedial order requiring Manitoba to pay general damages to the Complainants, and to provide health services to them.

6. Manitoba and the Commission both applied for judicial review of the decision of the Adjudicator[1], although on substantially different grounds. In brief, Manitoba sought review on the grounds that the Adjudicator failed to meet the requisite standard of justification, transparency and intelligibility in his reasons for decision, to the extent that the decision was unreasonable. In contrast, the Commission's application sought review on the grounds that the Adjudicator failed to award a systemic remedy.

7. Following the exchange of application briefs on Manitoba's application for judicial review, the parties agreed that the decision of the Adjudicator was unreasonable and must be set aside. As a consequence, this Court must consider whether it should exercise its jurisdiction to hear this matter based upon the record that was before the Adjudicator, and if so, the Court then must adjudicate the dispute on the existing evidentiary record.

8. Manitoba says that this Court should exercise its discretion to hear the Complaint based upon the existing evidentiary record, and that a proper application of the law to the facts of this case should lead to a conclusion that Manitoba has not discriminated against the Complainants, and in the alternative, if it has discriminated, reasonable and bona fide grounds exists for the discrimination.

[1] Manitoba's application for judicial review: CI20-01-28403; Commission's application for judicial review: CI20-01-28360

## PART III – STATEMENT OF FACTS

*Background*

9. The Complaint in this matter was filed on April 8, 2010.

10. The Complaint identified the Complainant as Harriet Sumner-Pruden. The Complaint listed the Complainant's son Alfred "Dewey" Pruden ("Dewey") as a person who was also discriminated against.[2] Notably, the Complaint was filed on behalf of these two individuals, and does not identify the claim as being brought on behalf of a group or class of persons, as is possible under the Code[3].

11. Ms Sumner-Pruden and Dewey will be referred to collectively in this brief as "the Complainants," except where reference to one or the other of them is appropriate.

12. The Complainants resided on Pinaymootang First Nation ("PFN"). PFN is located on Highway 6 in the Interlake region of Manitoba, approximately 220 kilometers northwest of Winnipeg. As a First Nation community in Manitoba, the delivery of health and social services are provided for through multiple levels of government, including Manitoba, the Federal government, and PFN.

13. Dewey was seven years old when the Complaint was filed. Dewey has numerous physical and mental disabilities, including Sturge-Weber Syndrome, glaucoma, hemiparesis causing impaired motor skills, global developmental delay, autism spectrum disorder and attention deficit hyperactivity disorder.

14. The Complaint named four respondents. Three were departments of the Government of Manitoba – the Department of Family Services and Consumer Services ("Families"), the Department of Health ("Health") and the Department of Education and Training ("Education"). The fourth respondent was the Interlake

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[2] Record, Vol. 1, page 6, Amended Complaint

[3] *The Human Rights Code*, s. 1 definition of "Person" extends the meaning of "person" under *The Interpretation Act* to include "any group or class of persons" "), **Applicant's Book of Authorities ("App BOA") Tab 1**

Regional Health Authority. The Complaint was amended on December 10, 2013 to rename this respondent as the Interlake-Eastern Regional Health Authority ("the IERHA").[4]

15. Families operated the Children's Special Services program, later re-named Children's Disability Services, which provided a range of services to children with disabilities and their families. Health had established a Home Care program which, among other services, provided respite workers for families, including those with children with disabilities, although children only formed a small portion of home care clients, and generally children with disabilities would be referred to CDS.

16. The Complaint alleged that the Respondents had systemically discriminated against Dewey in the provision of services based on his disability (multiple complex/lifelong), and his ancestry (Status Indian living in a First Nation community), contrary to s. 13 of *The Human Rights Code*:[5]

> **Discrimination in service, accommodation, etc.**
> **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.

17. The Complaint was initially investigated by an investigator appointed by the Human Rights Commission. The investigator's report made separate recommendations to the Board of Commissioners on whether the complaint as against each of the four respondents should be dismissed or be referred to adjudication.

18. The Board of Commissioners directed that the complaint as against the respondents Families and Health should proceed to adjudication.[6] The Board of

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[4] Record, Vol. 1, page 6, Amended Complaint

[5] *The Human Rights Code*, C.C.S.M. c. H175 ("the Code"), **App BOA, Tab 1** at s. 13(1)

[6] Record, Vol. 18, page 6121, Reasons for Decision, where the Adjudicator at para. 15 ruled that the Complaint should have named "the Government of Manitoba" as the sole respondent. This brief will therefore refer to "the Respondent," except where reference to the particular departments of Families or Health is appropriate.

Commissioners dismissed the Complaint as against the other two respondents, Education and the IERHA, pursuant to s. 29(1)(c) of the Code.

19. The adjudication commenced on January 14, 2019.

20. At the outset of the adjudication, the Respondents accepted that the status of the Complainants as First Nations persons living on a First Nation fell within the characteristic of "ancestry" as contemplated by s. 9(2)(a) of the Code. The Respondents also accepted that Dewey had a disability as contemplated by s. 9(2)(l) of the Code.[7]

21. Manitoba's position at the adjudication can be summarized as follows:

    a. That the adjudication was constrained by the particulars of the Complaint; it was not and could not be an inquiry into the overall provision of health and social services for Indigenous children in Manitoba, whether on or off reserve. In particular, the Complaint was focused on the individual circumstances of the Complainants, and was not advanced as a class-based complaint;

    b. That Manitoba had not discriminated against the Complainants on the basis that the services at issue were either (1) not provided by Manitoba to anyone, whether on- or off-reserve (2) provided to the Complainants by Manitoba or another level of government or (3) not delayed or interrupted in comparison to any other person seeking those services;

    c. That if Manitoba had discriminated, it was for a bona fide and reasonable cause: namely, to avoid the duplication of services;

    d. Moreover, the fact that services are coordinated by different levels of government is reflective of the principle of cooperative federalism and Manitoba's reliance on the federal government's historic undertaking and ongoing practice of delivering or funding healthcare and other social services on reserve was reasonable and bona fide; and,

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[7] Record, Vol. 18, page 6123, Reasons for Decision, para. 20

e. That if the adjudicator found that Manitoba had discriminated without a bona fide and reasonable cause, then the appropriate remedy was an individual remedy, based on the particulars of the Complaint.

22. The adjudication proceeded on 17 days between January 14 and March 14, 2019. The Adjudicator heard evidence from 12 witnesses, and received over 2,800 pages of documentary evidence.

23. Manitoba's response to the Complaint relied, in part, upon the cooperative relationship with the Federal government. Evidence on the provision of services by different levels of government was led by multiple witnesses, including documentary and oral evidence was provided by a witness employed with the Federal government.

24. However, it should be noted that the Federal government is not, and cannot, be a party to the underlying Complaint owing to the provincial jurisdiction of *The Human Rights Code*. Rather, a separate proceeding has been initiated by the Complainants before the Federal Canadian Human Rights Tribunal as against the Attorney General of Canada[8]. Manitoba is not a party to that complaint.

25. On August 17, 2020, the Adjudicator issued his Reasons for Decision. He found that the Respondent had discriminated against the Complainants, and that no bona fide and reasonable cause existed for the discrimination. He issued a remedial order requiring Manitoba to pay general damages to the Complainants, and to provide health services to them. The Adjudicator expressly declined to consider a remedial order beyond one that would address the circumstances of the Complaints[9].

[8] Record, Vol. 10, page 2936
[9] Record, Vol. 18. Page 6129, Reasons for Decision, para. 30

*Procedural History*

26. Manitoba and the Commission both applied for judicial review of the Adjudicator's decision. Manitoba submitted that the Decision as a whole was unreasonable, that it failed to grapple with the evidence and key arguments raised by Manitoba, and that it was not justified based on a transparent, intelligible chain of analysis. The essence of the Commission's argument was that the Adjudicator erred in law and jurisdiction by not also making what the Commission refers to as a "systemic remedy."

27. Since the applications were filed, the parties agreed that the First Nations Caring Society and the First Nation Health and Social Secretariat of Manitoba should be granted intervener status in the judicial review applications. The parties proceeded to file the following materials:

    a. Record that was intended to be relied upon in both judicial review applications[10];
    b. Applications briefs by both Manitoba[11] and the Commission[12]; and
    c. Commission's responding brief to Manitoba's application[13].

28. The matter was requisitioned before the Court by the Commission to determine how the two applications should proceed, given the overlapping issues, the complexity of arguments, and the time required for argument.

29. Justice McKelvey granted a consent order that provided for a consolidation of the two judicial review applications, setting five days for hearing, and deadlines for the filing of the remaining submissions[14].

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[10] CI20-01-28403 docs. no. 3 - 20
[11] CI20-01-28403 docs. 21 and 22
[12] CI20-01-28360 doc. 6
[13] CI20-01-28403 docs. 23 and 24
[14] CI20-01-28360 doc. 26

30. Since the procedural order approved by Justice McKelvey, the parties have agreed that the Adjudicator's decision was unreasonable, having regard for the inadequate reasons for decision and the lack of justification, transparency and intelligibility. As such, there is mutual agreement that the Adjudicator's decision should be quashed, that is should be accorded no deference, and that complaint should be reheard based upon the existing evidentiary record[15].

31. Having regard for the issues underlying the judicial review applications, and agreement as to the inadequacy of the Adjudicator's reasons for decision, the issues for the Court to adjudicate have evolved since the applications were originally filed. The issues are set out below.

[15] Letter from S. Paul to Joyal CJ dated May 12, 2023, **Manitoba Book of Authorities and Documents in CI21-01-28360 ("MB BOA"), Tab 1**

## PART III – ISSUES

**Issue 1:** Should the Adjudicator's decision be quashed, and if so, does the court have jurisdiction to decide this matter rather than remit it to a new adjudicator, and if so, should the Court exercise that jurisdiction to hear this matter on the existing record?

**Issue 2**: If Issue 1 is answered in the affirmative, did Manitoba discriminate against the Complainants?

**Issue 3**: If Issue 2 is answered in the affirmative, was there a bona fide and reasonable cause for the discrimination?

**Issue 4**: If Issue 3 is answered in the negative, what is the appropriate remedy?

## PART IV – ARGUMENT

**Issue 1: Does this Court have jurisdiction to decide this matter rather than remit it to a new adjudicator, and if so, should that jurisdiction be exercised?**

32. The parties agree that the Court should not remit the matter to a new adjudicator.

33. The Code provides the Court with power to affirm, vary, or set aside a decision or order of an adjudicator where there is a loss of jurisdiction.[16]

34. Section 50(1) of the Code provides for a right of judicial review in certain circumstances:

> **Application for judicial review**
>
> **50(1)** Any party to an adjudication may apply to the court for a review of any decision or order made by the adjudicator with respect to the adjudication, solely on the ground that
> (a) the adjudicator committed an error of jurisdiction with respect to the adjudication; or
> (b) there was a breach of the principle of natural justice or the principle of fairness in the course of the adjudication; or
> (c) there is an error of law on the face of the record of the proceedings in respect of which the decision or order under review was made.

35. The application of s. 50(1) of the Code was reviewed in the Manitoba Court of Queen's Bench by McKelvey J. in *Pasternak v. Manitoba*.[17] That case, like the present matter, involved an adjudication of a complaint alleging discrimination in the provision of services contrary to s. 13(1) of the Code. McKelvey J. noted that section 49 of the Code stipulated that each decision and order made by an adjudicator is final and binding on the parties, except for the review provisions available under s. 50(1). She noted that these review provisions do not conclusively cover questions of fact or mixed fact and law. Consequently, she said,

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[16] The Code, **App BOA Tab 1**, section 50(5)
[17] *Manitoba High School Athletics Association Inc. v. Pasternak*, 2008 MBQB 24, [2008] M.J. No. 10 (QL) ("*Pasternak*"), **App BOA Tab 2**

what exists in the Code is a privative clause which somewhat circumscribes the right of review.[18]

36. However, McKelvey J. accepted the submission of the Human Rights Commission in that case that questions of fact or mixed fact and law are subject to judicial review if they are so unreasonable as to result in a loss of jurisdiction. She wrote:[19]

> **28** The *Code* does not provide for judicial review of errors of fact. However, the case law has determined that where the findings of fact of an administrative tribunal are unreasonable, there can be a loss of jurisdiction.

37. In *Rolling River School Division v. Rolling River Teachers' Assn. of the Manitoba Teachers' Society*, the Manitoba Court of Appeal stated that a finding by a decision-maker on a critical issue that is not supported on the evidence is unreasonable, and constitutes an error of jurisdiction. Chartier J.A. (as he then was) wrote:[20]

> **24** In my view, misapprehension of the record, such as in this case, gives rise to jurisdictional error. See *Blanchard v. Control Data Canada Ltd. et al.*, [1984] 2 S.C.R. 476 at 494-95, where the Supreme Court of Canada held that there would be jurisdictional error when a ruling is unreasonable in the sense that the decision-maker's finding on a critical issue is not supported on the evidence (see also *Cuff v. Edmonton School District No. 7*, 2009 ABCA 6 at para. 6, and *Mountain Creeks Ranch Inc. v. Yellowhead (County of) Subdivision and Development Appeal Board*, 2004 ABCA 177 at para. 14 (in chambers)).

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[18] *Pasternak, ibid,* **(App BOA Tab 2)** at paras. 25-27

[19] *Pasternak, ibid,* **(App BOA Tab 2)** at para. 28; see also paras. 73 and 89

[20] *Rolling River School Division v. Rolling River Teachers' Assn. of the Manitoba Teachers' Society*, 2009 MBCA 38, [2009] M.J. No. 103 (QL) **(App BOA Tab 3)** at para. 24; see also *Blanchard v. Control Data Canada Ltd. et al.,* [1984] 2 S.C.R. 476 **(App BOA Tab 4)** at pages 19, 23 and 24; *Cuff v. Edmonton School District No. 7*, 2009 ABCA 6, [2009] A.J. No. 5 (QL) **(App BOA Tab 5)** at para. 6; *Westcan Recyclers Ltd. v. Calgary (City)*, 2022 ABCA 60, [2022] A.J. No. 219 (QL) **(App BOA Tab 6)** at paras. 25 and 30

38. In the present case, the Reasons for Decision made unreasonable findings of fact such that there was a loss of jurisdiction, bringing this application within s. 50(1) of the Code.

39. It is acknowledged that the typical remedy where an administrative decision has been quashed or set aside is for that matter to be remitted back to the original decision maker to be reconsidered[21].

40. In *Canada (Minister of Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] the Supreme Court of Canada ("SCC") recognized that in some circumstances remitting a matter to the first instance decision maker "would stymie the timely and effective resolution of matters in a manner that no legislature could have intended".[22]

41. The SCC went on:

> Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose.[23]

42. Factors to consider in the exercise of the Court's discretion are outlined:

> [C]oncern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter.[24]

43. It is clear that remitting this matter would serve no useful purpose. The factors identified by the SCC militate toward declining to remit the matter to a new adjudicator. Specifically:

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[21] *Canada (Minister of Immigration) v. Vavilov*, 2019 SCC 65 at 136, **MB BOA Tab 2**
[22] *Vavilov, ibid* at 142
[23] *Vavilov, ibid* at 142
[24] *Vavilov, ibid* at 142

a. <u>Delay, Fairness, Urgency, and Cost to the Parties.</u> Over thirteen years have passed since the Complaint was filed. The initial decision-maker is deceased. Dewey is now grown. If the matter is remitted it will cause further delay and costs to the parties.

b. <u>The Nature of the Regulatory Regime</u>. Two aspects of the regime are relevant. First, the Code holds quasi-constitutional status. It involves the application of fundamental human rights principles to a broad range of factual matrices. Adjudications under the Code may significantly impact legislation, policy, and governmental practice. The expertise required for the adjudication of human rights legislation is similar to the expertise held by a superior court judge.

   Second, section 50(5) of the Code allows the Court to decline to remit a matter and exercise the powers granted by the Code to an adjudicator. The Code signals the legislature's intent for complaints to be resolved in an expeditious and effective manner, including by the reviewing court.

c. <u>The Efficient Use of Public Resources</u>. The Record is established. It consists of over 2800 pages of documents and the evidence of 12 witnesses taken over the course of 17 days. The Record is before the court. Dates are set for argument on the merits of the complaint. Remitting the matter would cost public resources both in the context of the applications for judicial review and, subsequently, in the administrative forum.

44. It is submitted that given the above factors, this Court should exercise its jurisdiction to quash or set aside the Adjudicator's decision and rehear the complaint based upon the existing evidentiary record, and based upon the submissions presented by the parties.

**Issue 2: Did Manitoba discriminate against the Complainants?**

45. The Complaint alleged discrimination contrary to s. 13(1) of the Code:

> **Discrimination in service, accommodation, etc.**
> **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.

46. The Respondent accepted that Families and Health were providing services as contemplated in s. 13(1).

47. Discrimination is defined in s. 9(1) of the Code:

> **"Discrimination" defined**
> **9(1)** In this Code, **"discrimination"** means
> (a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or
> (b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or
> (c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or
> (d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

48. The Respondent accepted that the status of the Complainants as First Nations persons living on a First Nation fell within the characteristic of "ancestry" in s. 9(2)(a) of the Code, and that Dewey had a disability as contemplated in s. 9(2)(l) of the Code.[25]

[25] Record, Vol. 18, page 6123, Reasons for Decision, para. 20

49. The allegation of discrimination in the Complaint therefore fell within the scope of s. 9(1)(b) of the Code, being differential treatment of an individual or group on the basis of any characteristic referred to in s. 9(2) of the Code.

50. The eligibility policies of both the Children's Special Services program of Families (now known as Children's Disability Services or CDS) and the Home Care Program of Health contained provisions stating that persons living on First Nations were not eligible for services from the respective programs.

51. The Children's Special Services Eligibility Policy stated that children living in First Nations were not eligible for services, and should be referred to federally funded services and agencies.[26]

52. The Home Care Program Eligibility Policy stated that individuals whose health care services are the responsibility of another jurisdiction are not eligible, including First Nations people living on reserve.[27]

53. The Respondent accepted that these eligibility provisions, on their face, constituted differential treatment of an individual or group as contemplated by s. 9(1)(b) of the Code, on the basis of ancestry as contemplated by s. 9(2)(a) of the Code.

54. However, in order to constitute discrimination under the Code, differential treatment must have an adverse impact, and it must be without bona fide and reasonable cause.

55. The requirement for an adverse impact resulting from the differential treatment was noted in the Manitoba Court of Queen's Bench decision in *Manitoba High Schools Athletics Association Inc. v. Pasternak*. That case involved an application for judicial review of a finding of discrimination under s. 13 of the Code respecting

[26] Record, Vol. 2, page 445, Children's Special Services Eligibility Policy
[27] Record, Vol. 3, page 703, Home Care Program Eligibility Policy

females who were not permitted to play on a male hockey team. McKelvey J. found that there was *prima facie* discrimination, and that the discrimination was proven, on a balance of probabilities, on the basis that the Complainants were adversely treated. She stated:[28]

> **72** I find, in the circumstances, that the Adjudicator applied the correct legal test in finding that this was a case of *prima facie* discrimination. The discrimination was proven, on a balance of probabilities, on the basis that the Pasternaks were adversely treated. *(underlining added)*

56. To determine if discrimination in the provision of services contrary to s. 13(1) of the Code occurred in the present case, one must start by looking at the particulars of the Complaint.

57. Paragraph 5 of the Complaint set out 22 specific services which the Complainants alleged were not available to Dewey as a child with disabilities living on PFN, but which they alleged would have been available to persons with similar needs who were not living on a First Nation reserve. These services were:

1) Full-time Para-educator;
2) Half-time Health Assistant;
3) Specialized Transportation;
4) Building Modification;
5) Speech Language Pathologist – assessment (inadequate)
6) Speech Language Pathologist – Therapy Services
7) Computer Assisted Learning
8) Training for Staff (handling);
9) Occupational Therapy Assessment (inadequate);
10) Occupational Therapy;
11) Physiotherapy Assessment (inadequate);
12) Physiotherapy;
13) Home Supports/Health Care/Family Managed Care;

[28] *Pasternak, supra* **(App BOA Tab 2)** at para. 72

14) Respite;
15) Mobility Equipment/Bike;
16) Augmentative Communication Devices;
17) Autism Support Services/diagnostic programming & Follow-up;
18) SLP Therapy;
19) Augmentative/Alternative Communication Devices & Programming;
20) Vision Consultant;
21) Orthotics Supports & Equipment;
22) Child Development Specialist.

58. The Complaint took issue with a great number of different services, all of which were at issue during different periods of time. The Complaint was filed in 2010, when Dewey was seven years old. The adjudication occurred in 2019, when Dewey was 16 years old. The evidence speaks to the availability of the 22 services (and several others not cited in the Complaint), and about the services actually received by the Complainants, both in the years prior to the filing of the Complaint in 2010, as well as over the following nine years leading up to the adjudication. A number of these services[29] were never expressly requested by the Complainants of the Respondent, either after Dewey entered school in 2009, or at all.

59. The witnesses for the Complainants included Ms Sumner-Pruden herself, as well as representatives of PFN who managed and delivered health, social service, and education services on the First Nation. The witnesses for the Respondent included representatives from both the CDS and Home Care programs, as well as a representative of the First Nations and Inuit Health Branch of Indigenous Services Canada (i.e. a representative of the Federal government).

60. The record does not support a finding of discrimination based on adverse treatment, for several reasons. First, the evidence shows that Families and Health

[29] Including: para-educator; medical transport, building modification, SLP therapy, respite, bike, augmentative communication device, autism support service, vision consultant.

did not provide some of the services listed in the Complaint to <u>anyone</u>, whether residing on a First Nation or not. Second, the evidence shows that Ms Sumner-Pruden and Dewey <u>did</u> receive many of the services listed, either from CDS or from other service providers, such that they did not suffer adverse treatment from policies or practices of Families or Health respecting these services. Third, the evidence tends to show that, to the extent that delays, denials, and disruptions of services did occur, they also impacted other rural communities, including non-First Nation communities, and that the causes of delays, denials, and disruptions of service were not the result of adverse treatment of the complainants based on Manitoba's policies or practices.

61. On this basis, the Adjudicator erred in his original findings of discrimination, and that such a finding should be rejected by this Court following a review of the evidentiary record.

62. Each of these three areas will be addressed in turn below.

*a) <u>Services not provided by the Respondents to anyone</u>*

63. Some of the services alleged in paragraph 5 of the Complaint as not being available to Dewey while he was living on a First Nation were in fact not provided by CDS or Health to any child in Manitoba with disabilities, whether residing on a First Nation or not. Of the 22 services identified in paragraph 5 of the Complaint, nine (9) were not available to any Manitoban after they reach school age.

64. The Complaint alleged at paragraph 5(1) that a full-time para-educator was not available to Dewey while he lived on a First Nation, and at paragraph 5(2) that a half-time health assistant was not available while Dewey lived on a First Nation. Lori Neustadter, the acting Executive Director of CDS, testified that CDS did not provide either para-educators or health assistants to any children with

disabilities,[30] regardless of race or residency. No evidence was led by the Complainants to the contrary.

65. The Complainants alleged at paragraphs 5(5), (6), (9), (10), (11), (12) and (18) of the Complaint that occupational therapy, physical therapy, and speech language pathology services were not available to Dewey while he lived on a First Nation. Ms Neustadter testified that CDS only provided these therapies until a child enters school, after which these services would provided by the school.[31] Further, Ms Sumner-Pruden testified that, despite the CDS eligibility policy excluding children residing on First Nations, CDS did in fact provide occupational therapy and physical therapy to Dewey in Gypsumville before he entered school.[32] There was no evidence that the therapies provided to Dewey before he entered school were lesser than those that a child not residing on a First Nation would have received.

*b) Services received by the Complainants*

66. The Complaint alleges that Complainants did not receive respite workers, transportation services, supplies, and home renovations. However, the evidence shows that these, and other, services were available and provided to Ms Sumner-Pruden on PFN, such that there was no adverse treatment arising from policies of the Respondent. Following is discussion on each of these services.

i) Respite services

67. The Complaint at paragraph 5(14) alleged that respite services were not made available to Dewey while he was living in any First Nation community.

68. Ms Sumner-Pruden testified that she did in fact receive respite services, albeit not the level of services she hoped for or required. She agreed that when she applied for respite from the Health Centre in the summer of 2010, she began receiving

[30] Record, Vol. 14, page 4528, transcript of evidence of Lori Neustaedter
[31] Record, Vol. 14, page 4633, transcript of evidence of Lori Neustaedter
[32] Record, Vol. 10, pages 3197-3198, transcript of evidence of Harriet Sumner-Pruden

respite. Prior to that application, she suggested that she "didn't know anything about respite".[33] Following that application she received two or three hours per week and an additional $230.00 per month weekend respite.[34]

69. Ms Sumner-Pruden from time to time made requests to various entities in PFN for additional respite services, and some of these requests were granted. For instance, she said that, in 2016, she started receiving 20 hours per week of respite from Anishinaabe Child and Family Services,[35] as well as eight hours every second weekend through the Jordan's Principle initiative,[36] and she later received 48 hours of respite every two weeks from the band office.[37] Notably, Ms. Neustaedter testified that respite needs tend to increase as children with disabilities age, which is broadly consistent with the increased in services provided to the Complainants.[38]

70. In contrast to this specific evidence given at the adjudication of the respite services available to Ms Sumner-Pruden on PFN, the Complainants provided no evidence of the availability of respite services in neighbouring communities. At the time, CDS funded respite services out of the Family Support Fund, a global annual allocation used to provide a variety of services, including respite, in each service region.[39] Respite was provided on a discretionary and time-limited basis and was not intended to replace or supplant other care arrangements, such as nursery, school or day-care programs.[40]

71. In particular, there was no evidence that the amount of respite that Ms Sumner-Pruden actually received on PFN was less than a family with Dewey's needs in a

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[33] Record, Vol. 11, page 3354, transcript of evidence of Harriet Sumner-Pruden; see also, page 962, Letter from First Nations and Inuit Health Branch dated July 20, 2010
[34] Record, Vol. 5, page 1586, Personal Care / Home Support Plan and Vol. 3, page 964, Respite Care Program for Doweessaga (Dewey) Pruden, both suggest it was two hours per week; Ms. Sumner-Pruden suggested it was three: page 3147, transcript of evidence of Harriet Sumner-Pruden
[35] Record, Vol. 11, page 3382, transcript of evidence of Harriet Sumner-Pruden
[36] Record, Vol. 10, pages 3165-66, transcript of evidence of Harriet Sumner-Pruden
[37] Record, Vol. 10, page 3192, transcript of evidence of Harriet Sumner-Pruden
[38] Record, Vol. 14, page 4502, transcript of evidence of Lori Neustaedter
[39] Record, Vol. 1, page 254, Children's Special Services Programs, August 1, 1994 & Vol. 14, page 4500, transcript of evidence of Lori Neustaedter
[40] Record, Vol. 1, page 255, Children's Special Services Programs, August 1, 1994

neighbouring community might have received from either CDS or Home Care. To the contrary, Ms. Neustaedter testified that CDS had difficulties in recruiting respite workers in non-urban areas.[41]

ii) Transportation Services

72. The Complaint at paragraph 5(3) alleged that specialized transportation was not available to Dewey while he was living in a First Nation community.

73. Jodi Spornitz, the Program Manager of CDS for the Interlake Region, testified that that CDS provided mileage to families to take children to appointments with specialists related to the child's disability.[42] Ms Sumner-Pruden gave evidence that she received mileage for transporting Dewey to appointments through agencies at PFN, including the costs of another person to accompany her.[43]

74. Further, and importantly for the analysis of adverse treatment, the Complainants provided no evidence that the amount of mileage or other transportation services she actually received from agencies at PFN was less than a family with Dewey's needs in a neighbouring community might have received from CDS.

iii) Home Renovations/Building Modifications

75. The Complaint alleged at paragraph 5(4) that building modifications were not available to Dewey while he was living in a First Nation community.

76. However, Ms Sumner-Pruden testified that the Health Centre on PFN funded the construction of a ramp at her home for Dewey's wheelchair.[44] She further testified that, following the flood of the community in 2011, a new home was built for the

[41] Record, Vol. 14, pages 4502-4503, transcript of evidence of Lori Neustaedter
[42] Record, Vol. 15, pages 4908-4910, transcript of evidence of Jodi Spornitz; see also: Record, Vol. 14, pages 4516-4518, transcript of evidence of Lori Neustaedter
[43] Record, Vol. 11, pages 3350-3353, transcript of evidence of Harriet Sumner-Pruden
[44] Record, Vol. 11, page 3367, transcript of evidence of Harriet Sumner-Pruden

family that specifically accommodated Dewey's needs, including a ramp and extra-wide doors.[45]

77. Ms Neustaedter testified that CDS' policy on Home Modification was restricted to providing "basic and adequate" support to families of children with disabilities.[46] Funding for modifications and support devices came from a capped budget that was never adequate to meet the all the needs of children in the program.[47] Again, the Complainants provided no evidence that families with Dewey's needs in neighbouring communities would have received greater funding for building modifications than what the Complainants actually received.

iv) Child Development Specialist

78. The Complaint alleged at paragraph 5(22) that a child development specialist was not available to Dewey while he was living in a First Nation community.

79. Documents submitted into evidence and testimony from Ms. Sumner-Pruden herself showed that, despite the CDS eligibility policy, CDS did provide a child development specialist for Dewey before he entered school.[48] And again, there was no evidence that the families in neighbouring communities with Dewey's needs would have received superior services from a child development specialist.

v) Mobility Equipment/Bike

80. The Complaint at paragraph 5(15) alleged that mobility equipment/bike was not made available to Dewey while he lived on a First Nation community.

81. However, Ms. Sumner-Pruden testified that, in fact, she did obtain funding while living on PFN for a specialized tricycle for Dewey when he was seven years old.

[45] Record, Vol. 11, page 3368-3369, transcript of evidence of Harriet Sumner-Pruden
[46] Record, Vol. 14, page 4507-4508, transcript of evidence of Lori Neustaedter; see also Record, Vol. 2, page 423, Home Modification Policy
[47] Record, Vol. 14, 4509-4510, transcript of evidence of Lori Neustaedter
[48] Record, Vol. 3, page 694, Direct Service Worker Agreement; Record, Vol. 10, pages 3044-46, transcript of evidence of Harriet Sumner-Pruden

She stated that she first received funding in 2010 from several sources including the Elks Foundation and agencies on PFN for a specialized tricycle costing over $3,800.00.[49] Later, when Dewey outgrew that tricycle, she received funding for another one in 2018.[50]

82. And, once again, there was no evidence that the families with Dewey's needs in neighbouring communities would have received greater, or any, funding from CDS for a specialized tricycle. In fact, Ms Neustaedter testified that limited budgets meant that, while CDS was able to meet critical or high needs, it could not always meet medium or low needs. Families would therefore often be referred to other sources of funding, such as the Rehabilitation Centre for Children Foundation or the President's Choice Foundation, or businesses' Christmas parties. Ms. Neustaedter testified that bicycles were a good example of an item for which families would be encouraged to seek funding from such outside sources.[51]

c) *The Level of Services in Neighbouring Communities*

83. Ms. Spornitz, the Program Manager for the Interlake Region of CDS, where PFN is located, testified that the Interlake Region included the communities of Selkirk, Gimli, Ashern, Riverton, Stonewall and Winnipeg Beach.[52] Ms Sumner-Pruden testified that the community of Gypsumville was approximately 15 minutes drive from her home, and the community of Ashern was approximately 30 minutes drive from her home.[53]

84. Ms. Neustaedter testified that the budget for CDS services for all of Manitoba was capped at $31 million.[54] When asked if the capped budget of CDS was ever

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[49] Record, Vol. 10, page 3055, transcript of evidence of Harriet Sumner-Pruden
[50] Record, Vol. 10, page 3173, transcript of evidence of Harriet Sumner-Pruden
[51] Record, Vol. 16, pages 5410-11, transcript of evidence of Lori Neustaedter
[52] Record, Vol. 15, page 4864, transcript of evidence of Jodi Spornitz
[53] Record, Vol. 10, page 3028, transcript of evidence of Harriet Sumner-Pruden
[54] Record, Vol. 14, pages 4467-4468, transcript of evidence of Lori Neustaedter

enough to meet all the needs of all the children in the CDS program, she answered that it was not.[55]

85. The practical effect of the capped budget of CDS on services in communities in the Interlake Region was described by Ms Spornitz, the program manager for the region. When asked whether all CDS services were available at all times in all communities in the Interlake Region, she said that they were not:[56]

> Q: Okay. We're going to go through those in a little more detail in a moment, but can you say, broadly speaking, whether all of these services are available at all times in all communities in the Interlake region of CDS?
>
> A: No, they aren't. Certain of these services, we have children waiting to receive them. Examples might be the therapies, because basically the demand is great. Some of these service -- respite as well too, we might have some children waiting for services because we do not have the staff to accommodate the requests. Some of these services have been reduced in scope to deal with some limitations that we currently have with regard to staffing. An example would be the autism service. And currently in Interlake we do not have a behavioural specialist on staff, so we would have limited access to this regionally.

86. Speech language pathology services in the Interlake Region provided an example of CDS services which were sometimes subject to delay or interruption. Documentary evidence was submitted showing that, while these services were provided for a time at a clinic in Gypsumville, services availability issues resulted in these services ceasing to be provided there.[57]

[55] Record, Vol. 14, pages 4510-4511, transcript of evidence of Lori Neustaedter
[56] Record, Vol. 15, pages 4867-4868, transcript of evidence of Jodi Spornitz
[57] Record, Vol. 3, page 845, Case Summary dated Nov. 26, 2008; Record, Vol. 11, pages 3309-10, transcript of evidence of Harriet Sumner-Pruden

87. With respect to child development workers, Ms. Spornitz testified that it was “not uncommon” to have problems assigning a child development worker for children in the Interlake Region.[58]

88. The reality that not all services from CDS were available at all times to all persons in all non-First Nation communities was further exemplified by the fact that CDS had a Waitlist Policy.[59] Ms. Neustaedter testified that the fact that a child was eligible for CDS services did not mean that services would always be available.[60] She said that the purpose of the Waitlist Policy was to ensure that CDS could use its capped budget in the best way possible to meet as many of the needs that come forward as possible.[61]

89. In a similar vein, Ms. Spornitz testified that the purpose of the Waitlist Policy was to assist staff in categorizing need in situations where there were delays in provision of services for reasons such as the unavailability of funds or any other inability to deliver that service.[62]

90. On the whole, the evidence showed that, to the extent the services identified in the Complaint were provided by Manitoba to anyone, there were delays and denials of service across the Interlake Region and in rural locations generally. Those delays and denials were unrelated to the Complainants’ protected characteristics under the Code.

*Comparison versus Comparator Groups*

91. One of the arguments raised by the Commission relates to the proper legal analysis to be applied in the determination of whether or not Manitoba discriminated against the Complainants. The Commission, beginning at para. 35

[58] Record, Vol. 15, page 4924, transcript of evidence of Jodi Spornitz
[59] Record, Vol. 3, pages 721-31, Waitlist Policy
[60] Record, Vol. 14, page 4467, transcript of evidence of Lori Neustaedter
[61] Record, Vol. 14, pages 4468-69, transcript of evidence of Lori Neustaedter
[62] Record, Vol. 15, page 4868, transcript of evidence of Jodi Spornitz

of its Brief,[63] suggests that Manitoba relies on an outdated application of a "mirror comparator group" analysis. Manitoba has suggested no such analysis.

92. The leading and latest case on section 15 of the Charter is *R v Sharma,* 2022 SCC 39 (CanLII). In *Sharma*, the SCC confirmed that, though a mirror comparator is not required, discrimination cases under section 15 of the Charter necessarily involve some comparison:

> [Equality] is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises" (p. 164; see also *Fraser*, at para. 55).[64]

93. The Complaint itself introduces and invites a comparison to non-First Nations rural communities: "If he [Dewey] resided in a rural community that was not a First Nation Community, he would have access to resources to assist him in his day-to-day living."[65] In effect, the underlying complaint invites a level of comparison between services on- and off-reserve in order to support the allegation of discriminatory conduct.

94. Further, during the adjudication, the Commission advanced precisely this argument to justify evincing certain evidence, stating: "comparability and context is important to understand, even outside of remedy, whether or not there has been adverse treatment"[66].

95. In order to establish discrimination under the Code, the Complainants must demonstrate that any adverse impact (i.e. not receiving a particular service) was the result of differential treatment or a distinction based on a protected characteristic. Evidence that services were not offered by Manitoba, unavailable or subject to delays due to resource related issues, or required similar efforts to

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[63] Commission's Responding brief in CI20-01-28360, Kings Bench doc. no. 25, at para. 35 to 74.
[64] *R v Sharma*, 2022 SCC 39 at para 41, citing Withler, **MB BOA Tab 3**
[65] Record, Vol. 1, page 7, Amended Complaint Under the Human Rights Code (Manitoba)
[66] Record, Vol. 14, page 4392, Counsel for the Commission to the Adjudicator,

access by persons not subject to the applicable characteristics under the Code, is relevant to that analysis.

96. Simply put, evidence that services were not issued in neighbouring or other communities supports the proposition that Manitoba did not discriminate against the Complainants by not offering them those services. Likewise, evidence that there was a common delay in receiving services (i.e. comparable delay experienced both on- and off-reserve) is relevant, if not dispositive, of the allegation that Manitoba discriminated against the Complainants.

97. Based upon the foregoing, it is submitted that the Complainants have not established that Manitoba has discriminated against them as alleged.

**Issue 3: If discrimination occurred, was there a bona fide and reasonable cause for the discrimination?**

*Manitoba reasonably relied upon the Federal government's assumption of responsibility to provide health and related services to First Nations people residing on reserve*

98. Section 13 of the Code provides that no person shall discriminate with respect to any service unless bona fide and reasonable cause exists for the discrimination:

> **Discrimination in service, accommodation, etc.**
> **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. (underlining added)

99. There has been an historic and ongoing assumption of responsibility by the Federal government in the role of providing health and related services to First Nations people residing on reserves such as PFN. It was therefore reasonable for the Respondent to rely on this assumption of responsibility by the federal

government in deciding not to provide certain services on First Nations in order to avoid duplication of services.[67]

100. The evidence put forward by the Complainants themselves confirmed the historic and current assumption of responsibility as a matter of policy by the federal government to provide or fund health and social services on reserves, including on PFN, and suggested a variety of possible explanations for this assumption of responsibility.

101. Chief Garnet Woodhouse of PFN testified that the federal government has a "fiduciary responsibility" for First Nations people.[68] When asked whether that fiduciary responsibility covered things like education and health services and social services, Chief Woodhouse replied that it did.[69]

102. Dr. Vandna Sinha, an academic who had conducted studies of health and social services on PFN over a number of years, was retained by the Complainants to provide an expert report. Dr. Sinha took the view that health and social services on First Nations were the "purview" of the federal government, based on "a body of legal documents." She wrote in her report:[70]

> "The anchoring framework for this discrimination is a body of legal documents governing the relationship between the Canadian government and First Nations. These documents (which include, but are not limited to, the Constitution Act of 1867 and the Indian Act) establish that medical, social, and educational services for First Nations children living on reserve are the purview of the federal government, even when programs are administered by First Nations governments."

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[67] Record, Vol. 18, page 6011, transcript of closing submission of the Respondent
[68] Record, Vol. 12, pages 3704-3705, transcript of evidence of Chief Garnet Woodhouse
[69] Record, Vol. 12, pages 3739, transcript of evidence of Chief Garnet Woodhouse
[70] Record, Vol. 8, page 2283, Dr. Vandna Sinha et al., "Honouring Jordan's Principle: Obstacles to Accessing Equitable Health and Social Services for First Nations Children with Special Healthcare Needs living in Pinaymootang, Manitoba" dated July 15, 2017 at page 58

103. As a further example, in the field of education, the Complainants entered into evidence a report by the federal Office of the Parliamentary Budgetary Office entitled *Federal Spending on Primary and Secondary Spending on First Nations Reserves*. The Executive Summary stated that responsibility for education on reserve "falls squarely" with the federal government:[71]

> "In Canada, education is largely a provincial domain. The notable exception is education for First Nations students living on reserve. This responsibility falls squarely with the Crown [the federal Crown], specifically the Minister of Indigenous and Northern Affairs (INAC)."

104. Pamela Smith, Regional Executive Officer of First Nations and Inuit Health Branch ("FNIHB") for the Manitoba region of Indigenous Services Canada, was called by Manitoba and gave evidence on federal funding for health services on First Nations. She explained that the federal government utilized multiple funding mechanisms, including health funding contributions between the federal government and First Nations to deliver programs and services on reserve, non-insured services provided by the federal government both on and off-reserve, and, beginning in 2016, significant additional funding for health and related social services for children on reserve *via* the Jordan's Principle Child First Initiative ("JP-CFI").[72]

105. JP-CFI included a service access fund that was available to provide services on First Nations as needs were identified.[73] Funded services and programs included therapies and respite, including speech language therapy, occupational therapy, physiotherapy, and other supports for children with disabilities.[74] Ms. Smith identified several service providers that received funding directly from the federal government in order to provide services on First Nation communities, including

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[71] Record, Vol. 6, page 1777, "Federal Spending on Primary and Secondary Spending on First Nations Reserves," Office of the Parliamentary Budgetary Office, Dec 6, 2016, Executive Summary, first paragraph

[72] Record, Vol. 16, pages 5450, 5464-5466, transcript of evidence of Pamela Smith

[73] Record, Vol. 16, page 5475, transcript of evidence of Pamela Smith

[74] Record, Vol. 16, page 5476, transcript of evidence of Pamela Smith; see also Record, Vol. 12, pages 3952-3953, transcript of evidence of Dr. Vandna Sinha

Children's Rehabilitation Centre, St. Amant Centre, and Manitoba Adolescent Treatment Centre.[75] At that time the federal government had provided $44 million dollars in funding through JP-CFI for First Nation community respite services alone, covering sixty three First Nations in Manitoba.[76] In addition, the federal government worked with First Nations by funding service coordination positions in First Nations to insure children's needs would be met.[77]

106. The case law submitted by the Complainants at the adjudication supported the conclusion that the federal government had assumed responsibility for funding the delivery of services for children with disabilities on First Nations. In *Pictou Landing v. Nova Scotia*, Mandamin J. of the Federal Court concluded that the federal government had assumed responsibility for funding services on reserves as a matter of policy:[78]

> **78** The Applicants submit Canadian children with disabilities and their families rely on continuing care generally provided by provincial governments according to provincial legislation. Provincial governments do not provide the same services to First Nations children who live on reserves. The federal government assumed responsibility for funding delivery of continuing care programs and services on reserve at levels reasonably comparable to those offered in the province of residence. Such services have been historically funded and provided by the federal government through AANDC and Health Canada as a matter of policy. (underlining added)

107. The Complainants also submitted the decision of the Canadian Human Rights Tribunal in *First Nations Child and Family Caring Society of Canada v. Canada*. There, the CHRT suggested that a legal obligation of the federal government to

[75] Record, Vol. 16, page 5477; see also Record, Vol. 7, page 2205, letter from FNIHB to Manitoba First Nations Chiefs and Councils, Health Directors, Tribal Councils, "Jordan's Principle – Child First Initiative Service Coordinators and Service Providers Update", dated June 5, 2017

[76] Record, Vol. 16, page 5489, transcript of evidence of Pamela Smith

[77] Record, Vol. 16, page 5464, transcript of evidence of Pamela Smith

[78] *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342, [2013] F.C.J. 367 (QL) **(App BOA Tab 13)** at para. 78

provide services on First Nations arose from s. 91(24) of the *Constitution Act, 1867* and/or the fiduciary duty owed by the federal Crown to First Nations.[79]

108. The intervener, First Nations Health and Social Secretariat of Manitoba ("FNHSSM"), similarly identifies the unique relationship between Canada and First Nations, noting that "no other individual or group of Canadians but Indigenous people have constitutionally entrenched rights to health."[80] FNHSSM says that Canada's fiduciary duty includes a Treaty right to health, "flowing from an exchange of promises" that include oral undertakings to provide health care that did not make it into the text of all but one of the numbered treaties.[81]

109. That analysis was confirmed by Mandamin J. in *Northern Inter-Tribal Health Authority Inc. v Canada (Attorney General),* 2018 FC 1180 (CanLII), [2019] 2 FCR 714 (*Northern)*. In that case, the applicants sought judicial review of decisions by the Superintendent of Financial Institutions of Canada that their employee pension plans were provincially regulated. The applicants had taken over the administration of health services on reserve by way of agreements with the federal government. They were primarily funded by the federal government, but subject to provincial administration and regulation.

110. Mandamin J. reviewed the historic background concerning the provision of health services by the federal government on reserve, focussing in particular on the Treaties and Treaty Commissioners' reports. He made the following significant observations:

> [T]he federal Crown undertook to provide health services to the Indians on Indian reserves. This federal undertaking of providing health services to the

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[79] *First Nations Child and Family Caring Society of Canada v. Canada (Minister of Indian Affairs and Northern Development)*, [2016] C.H.R.D. No. 2, **App BOA Tab 14,** at paras. 78 to 86 respecting s. 91(24) and paras. 87 to 112 respecting fiduciary duties

[80] Supplemental Brief of FNHSSM, King's Bench doc. no. 27, para 12, citing Yvonne Boyer & Sheyenne Spence, "Identifying and Advancing the Treaty Rights to Health . . . Signed from 1871 to 1906 in Manitoba" (2015)

[81] Supplemental Brief of FNHSSM King's Bench doc. no. 27, para. 13, citing Yvonne Boyer & Sheyenne Spence, "Identifying and Advancing the Treaty Rights to Health . . . Signed from 1871 to 1906 in Manitoba" (2015)

Indians rests on the aforesaid historic federal Crown treaty promises and assurances of medical aid as well as the federal jurisdiction for Indians on the Indian reserves that were provided for in the Treaties.[82] [. . .]

"[T]he delivery of health services on Indian reserves by the federal government is closely connected to the rights of Indians whose First Nations entered into treaty in reliance of the treaty promises and oral assurances given to them by the Federal Crown."[83] [. . .]

The applicant First Nations and their members have a right to expect the federal government to honour its treaty promises and oral assurances to deliver health services. To alter the jurisdiction for such delivery to provincial jurisdiction is an impermissible abandonment of the federal treaty promises and assurances to provide health services. The Agreements maintain the treaty relationship which is made explicitly clear by the recitals that state the Agreements do not alter the treaty or fiduciary rights of the First Nations. Such rights continue notwithstanding the change in the method of delivery of health services.

In my view the nature of the health services now being delivered by the applicants are those health services promised in treaty and realized through the century-long federal government undertaking to provide of health services in keeping with its treaty relationship with the applicant First Nations.[84]

111. *Northern* was overturned at the Federal Court of Appeal on the basis that Mandamin J. had erred by departing from a strict analysis of whether the applicants were federally or provincially regulated.[85] However, the FCA did not take issue with his analysis of the federal government's historic undertaking to provide health care on reserve, stating "the Treaties obligate the federal government to ensure that health care is provided to the relevant Indigenous peoples."[86] In fact, the Attorney General of Canada conceded the obligation.[87]

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[82] *Northern Inter-Tribal Health Authority Inc. v Canada (Attorney General),* 2018 FC 1180, at para 112, **MB BOA Tab 4**
[83] *Northern, ibid* at para 137
[84] *Northern, ibid* at paras 138-139
[85] *Canada (Attorney General) v. Northern Inter-Tribal Health Authority Inc.*, 2020 FCA 63 (CanLII), [2020] 3 FCR 231 FCA (*Northern 2*) at para 29, **MB BOA Tab 5**
[86] *Northern 2, ibid* at para 32
[87] *Northern 2, ibid* at para 14

112. The Complainants themselves in their Complaint suggested that the federal government, through the *Indian Act,* was the "governing body" in regards to status Indians living on reserve. The Complaint stated:[88]

> "Historically, the Gov't of Canada, though the Indian Act, the main federal legislation governing status Indians and the reserve system in Canada, has been the 'governing body' in regards to status Indians living on reserve."

113. It is important to note that Manitoba does not rely on a simplistic division of powers argument to suggest that it has no responsibility to provide funding or services on First Nations reserves[89]. Rather, Manitoba relies on the undisputed existence of the assumption of responsibility by the Federal government, and the desire to maximize the benefit of public funds through avoiding the duplication of services. Having regard for the nature of cooperative federalism, relying upon the Federal government's assumption of responsibility in providing these services, whether directly or by funding the same through PFN, is a bona fide and reasonable basis for Manitoba to decline to provide the service.

114. The reality of governance in Canada is that delivery of health and social services is complex, and often reflects the principle of cooperative federalism, where matters of overlapping jurisdiction or responsibility require a coordination of service delivery. While this may manifest by way of agreements and formal structures, it is also recognized that such practices may be guided by informal or institutional arrangements.

115. "The Promise and Limits of Cooperative Federalism as a Constitutional Principle" describes the concept of cooperative federalism as follows[90]:

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[88] Record, Vol 1, page 6, Amended Complaint, para 4

[89] In fact, this was an error in the Adjudicator's reasons for decision that was identified in Manitoba's Notice of Application at grounds 2(c)(vi – viii)

[90] Warren J. Newman, "The Promise and Limits of Cooperative Federalism as a Constitutional Principle" (2016) 76 SCLR (2d) 67 at page 71, **MB BOA Tab 6**

> Cooperative federalism is predicated largely on a web of more or less informal, ongoing intergovernmental relationships and institutional arrangements that seek to adapt the formal structure of the Constitution to the economic and social needs and fiscal realities of a modern federal state. Taken in that light, it is perhaps less a principle than a practice, and more political than legal in its nature and substance, even if it had developed partly in reaction to the formal constraints of legal federalism that had been imposed by the jurisprudence of the Judicial Committee of the Privy Council prior to the Second World War. Professor Peter Russell called post-war cooperative federalism "less a litigious struggle between Ottawa and the provinces to defend and expand their own enclaves of power than a matter of political compromise and administrative pragmatism." Political scientist Donald Smiley stated that "[c]ooperative federalism is in essence a series of pragmatic and piecemeal responses by the federal and provincial governments to the circumstances of their mutual interdependence." As Professor Peter Hogg described it, the "related demands of interdependence of governmental policies, equalization of regional disparities, and constitutional adaptation" have produced "a network of relationships between the executives of the central and regional governments", through which "mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process". These relationships have also been "the means by which consultations occur on the many issues of interest to both federal and provincial governments".

116. There is a recognized limit to the role the Courts can play in resolving matters of policy as between the provincial and federal executive levels of government, and cooperative federalism acts to coordinate the delivery of health and social services, even where such coordination is informal[91].

> The formal structure of the Constitution carries a suggestion of eleven legislative bodies each confined to its own jurisdiction, and each acting independently of the others. In some fields, that is exactly what happens. However, in many fields, effective policies

[91] Peter Hogg, *Constitutional Law of Canada* (2016) at 5-45, **MB BOA Tab 7**

> require the joint, or at least complementary, action of more than one legislative body. Particularly is this so where humanitarian and egalitarian sentiments have called for nation-wide minimum standards of health, education, income maintenance and other public services, most of which are within the territorially-limited jurisdiction of the provinces.
>
> …
>
> No federal nation could survive and flourish through war and peace, depression and inflation – to say nothing of shifting popular values – without the means of adapting its constitution to change. But the formal institutions lack the capacity to respond. Major change does not come through the courts: judicial interpretation accomplishes only incremental changes in the Constitution, and the changes do not necessarily reflect the needs of the day. Nor does change typically occur through the amending process. The amending procedures of the Constitution Act, 1982 require such broad consensus for most amendments that they cannot be a regular form of adaption.
>
> The related demands of interdependence of governmental policies, equalization of regional disparities, and constitutional adaptation have combined to produce what is generally described as "cooperative federalism". The essence of cooperative federalism is a network of relationships between the executives of the central and regional governments. Through these relationships mechanisms are developed, especially fiscal mechanisms, which allow for a continuous redistribution of powers and resources without recourse to the courts or the amending process. These relationships are also the means by which consultations occur on the many issues of interest to both federal and provincial governments. …

117. The application of the principle of informally coordinating service delivery in order to compliment the efforts of other levels of government. As a witness for the Respondent, Ms. Neustaedter, the acting Executive Director of CDS, testified that CDS was a capped program with a budget of $31 million annually, and that this amount was never enough to meet all the needs of all the children in the CDS

program.[92] Therefore, she said, the program tried to avoid duplication with other service providers:[93]

> "Because we are a non-mandated, non-legislated program and we have a capped budget, which means we have limits, we try and work with as many other providers as possible to avoid duplication of services, to kind of stretch everybody's dollars as far as they can go."

118. Specific to First Nations communities, the CDS policy expressly contemplated that service needs for same would be referred to federally funded services and agencies[94].

119. Lorraine Dacombe Dewar, Executive Director of Quality and Citizen Experience at Manitoba Health, Seniors, and Active Living testified that regional health authorities have delivered home care services since the late 1990s.[95] Home care services would only be provided by a regional health authority based on a needs assessments that considered whether services were available through other sources. Other sources included, but were not limited to, the federal government.[96]

120. For the Complainants, Amanda Meawasige, the Director of Community Engagement and Inter-governmental Relations at the First Nations Health and Social Secretariat of Manitoba, gave evidence. She was a member of the Terms of Reference Officials Working Group (or TOROWG), a committee that included representatives of the federal government, the provincial government, and First Nations groups and was tasked with implementing Jordan's Principle. Ms. Meawasige said that the committee tried to avoid duplication of services where possible, and she noted in particular that health care services on reserve were seen as the responsibility of the federal government:[97]

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[92] Record, Vol. 14, pages 4510-4511, transcript of evidence of Lori Neustaedter
[93] Record, Vol. 14, pages 4473-4474, transcript of evidence of Lori Neustaedter
[94] Record, Vol. 2, page 445
[95] Record, Vol. 15, page 5075, transcript of evidence of Lorraine Dacombe Dewar
[96] Record, Vol. 15, page 5095, transcript of evidence of Lorraine Dacombe Dewar
[97] Record, Vol. 14, page 4393, transcript of evidence of Amanda Meawasige

> "I know at the TOROWG table we tried to avoid duplication where possible, and generally the approach has been that any healthcare provision on reserve was the responsibility of the federal government."

121. Notably, at the time of the adjudication, TOROWG had ended their last meeting, on April 13, 2017, on the understanding that the First Nations would lead the process going forward. It was an agreed fact at the adjudication that the First Nations, *via* the Assembly of Manitoba Chiefs, did not contact Manitoba about re-structuring TOROWG following that meeting.[98] Lori Neustaedter, who participated in TOROWG, confirmed that neither the First Nations nor federal government attempted to engage Manitoba with the implementation of Jordan's Principle undertaken by the federal government following the *Caring Society* decision.[99]

122. The evidence demonstrates Manitoba's willingness to engage stakeholders regarding its role in service and program delivery on reserve. However, both historically, and at the time of the adjudication, the evidence also clearly demonstrates that the Federal government had undertaken the provision of health services to children on reserve. Manitoba's reliance on that undertaking, in order to maximize the benefits of limited provincial resources, was bona fide and reasonable.

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[98] Record, Vol. 14, page 4447, transcript of evidence of Amanda Meawasige; Also see Record, Vol. 7, page 2153

[99] Record, Vol. 14, 4544-45, transcript of evidence of Lori Neustaedter

**Issue 4: If Manitoba did discriminate without a bona fide and reasonable cause, what is the appropriate remedy?**

*Systemic Discrimination*

123. The Commission argues that if the Court makes a finding of "systemic discrimination," it must grant what the Commission describes as a "systemic remedy."

124. The Commission's Brief suggests that it interprets the term "systemic discrimination" as meaning discrimination that affects a large number of persons besides the Complainants. "Systemic discrimination," as the concept is put forward by the Commission, is a question of numbers affected by discrimination, not the nature of the discrimination.

125. In fact, the Code references "systemic discrimination" differently. Section 9(3), entitled "Systemic discrimination," looked at the nature of the discrimination, not the numbers. It refers not to acts which affects a large number of people, but rather to the combined operation of a number of interrelated actions, policies or procedures that result in discrimination:

> **Systemic discrimination**
> **9(3)** Interrelated actions, policies or procedures of a person that do not have a discriminatory effect when considered individually can constitute discrimination under this Code if the combined operation of those actions, policies or procedures results in discrimination within the meaning of subsection (1).

126. It is noted that Manitoba is the only province whose human rights legislation has a section entitled "systemic discrimination."

127. It is also noted that the current reference in the Code to "systemic discrimination" only came into effect through amendments in 2012. Before that, systemic discrimination was described as including:

> **Systemic discrimination**

> **9(3)** In this Code, **"discrimination"** includes any act or omission that results in discrimination within the meaning of subsection (1), regardless of the form that the act or omission takes and regardless of whether the person responsible for the act or omission intended to discriminate.

128. This was the reference to "systemic discrimination" in effect when the Complaint was filed in April 2010. Both in its current and previous form, it referred to a form of conduct by a respondent, rather than reflecting a class or group of persons on whose behalf a complaint is initiated.

129. In 2012, in *The Human Rights Code Amendment Act*, the new language of s. 9(3) was inserted, and the content of the former s. 9(3) was moved to a new s. 9(1.1) of the Code, where it still remains in slightly re-worded form:[100]

> **Interpretation**
> **9(1.1)** In this Code, "discrimination" includes any act or omission that results in discrimination within the meaning of subsection (1), regardless of
> (a) the form of the act or omission; and
> (b) whether the person responsible for the act or omission intended to discriminate.

130. Neither the former nor the current definition of "systemic discrimination" in s. 9(3) is the same as the term is used by the Commission in its Brief. Neither of these definitions reflect the concept of discrimination that might affect many more people than just the individual Complainants.

131. To the extent that the Commission is relying up the concept of "systemic discrimination" as a replacement for a class-based complaint (that is, a complaint brought on behalf of group of persons who share a similar characteristic), it is submitted that such a complaint is antithetical to what was in fact pursued by way of the Complaint. This will be discussed in the section on systemic discrimination in this case below.

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[100] *The Human Rights Code*, **App BOA Tab 1**

### A) **Individual Remedies**

132. While the focus of the arguments between the parties has been the systemic remedies sought by the Complainant and the Commission, it should be noted that the Adjudicator awarded individual damages in the aggregate amount of $42,500 to the Complainants, and that Manitoba shall provide healthcare and related services to the Complainants.

133. Manitoba has satisfied the Order, and given the passage of time, the service delivery aspect of the Order is moot. As a consequence, while Manitoba seeks a declaration that would set aside the Adjudicator's decision and asks the Court to arrive at a conclusion that it did not discriminate against the Complainants, it does not seek to disturb the individual remedy issued to the Complainants.

### B) **"Systemic Discrimination" in the Present Case**

134. The nature of the claim as an individual complaint was an issue raised by the Adjudicator early, and repeatedly, throughout proceedings. Following opening submissions, the Adjudicator expressed concern that Complainants' counsel was referencing 'other first nation children':

> Adjudicator: [. . . ] I noted, Ms. Fenske, in your opening comments, you would frequently conjoin, by saying Dewey and other first nation children. And let's remember that the function of this hearing is to address the complaint that has been made by the complainant on behalf of her son.[101]

135. Using language reflective of *Moore,* the Adjudicator reminded the parties that the complaint alleged that Manitoba "systemically discriminated against Dewey" and that an "individual complaint" could address a "broader issue".[102] This reference to systemic discrimination against an individual, and not to a group or a class, seems closer to the definition of "systemic definition" in s. 9(3) of the Code than to the broad concept suggested by the Commission in its Brief.

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[101] Record, Vol. 10, page 2952
[102] Record, Vol. 10, page 2959

136. The Commission in their Brief at para. 42 cite one of the decisions in the *Caring Society* case at the federal Canadian Human Rights Tribunal for the proposition that a finding of systemic discrimination does not require direct evidence that every individual in similar circumstances has been or will be adversely affect by certain policies or practices. While that proposition may be true, there is a fundamental difference between the *Caring Society* case and this one that makes that proposition of no relevance in the present matter.

137. The complainants in *Caring Society* were organizations – the First Nations Child and Caring Society of Canada and Assembly of First Nations – and not individuals as in the present case. The complaint in *Caring Society* was focused on discrimination against a group or class, not on individuals. That complaint specifically alleged that the provision of child and family services to all persons in on-reserve First Nations communities and in the Yukon by the Government of Canada was discriminatory. By contrast, in the present case the Complaint alleges denial or delay of particular services only to two particular individuals, in a single community, with its own unique circumstances.

138. Similarly, the Commission at para. 66 of its Brief cites the *Canadian National Railway v. Canada (Canadian Human Rights Commission),* [1987] 1 SCR 1114 for further support the proposition that systemic remedies are required to prevent systemic discrimination. However, the sole complainant in that case was Action Travail des Femmes, which was described by the court as a public interest pressure group, and the issue in the complaint was described as "the problem of 'systemic discrimination' in the hiring and promotion of a disadvantaged group, in this case women."[103] That complaint was not made by individuals, as in the present case, and was not based on delay or denial of specific services to those two individuals, as in the present case.

[103] *Canadian National Railway v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at paras. 1 and 2, **App BOA Tab 11**

139. Further, the Commission at para. 46 of its Brief cites the Nova Scotia Court of Appeal decision in *Disability Rights Coalition v. Nova Scotia (Attorney General)*[104] for the proposition that, for a complaint of systemic discrimination to succeed, it is not necessary to establish everyone with the protected characteristic was adversely affected in a direct sense. However, once again, the Commission does not acknowledge the very different nature of that complaint as compared to the present one. In *Disability Rights*, there were three individual complainants alleging discrimination against them, like in the present case. However, there was also a separate complaint by the Disability Rights Coalition, described as an alliance of disability advocacy groups and individuals, alleging that the discrimination experienced by the individual complainants <u>and others</u> was a product of systemic discrimination. In the present case, there is no separate complaint alleging systemic discrimination against a class or group of persons – there is only the individual complaint.

140. The fact that the Complaint in this case only named two persons who were allegedly discriminated against, in the context of a single unique First Nation community, without also identifying a class of persons who also suffered discrimination. The fact that this approach might limit the scope of a potential remedy if discrimination was found, was specifically discussed by the Adjudicator and the parties at the outset of the adjudication.

141. In that discussion, the Adjudicator stated that he agreed with the Respondent that the adjudication should be confined to resolution of the complaint of the particular Complainants, and "is not somehow a broad-ranging inquiry into the provision of health services to all First Nations children in Manitoba."[105]

142. The Adjudicator noted that there is a place on the complaint form which says "Name and address of any person or class of persons discriminated against in

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[104] *Disability Rights Coalition v. Nova Scotia (Attorney General)*, 2021 NSCA 70 at paras. 1 and 2, **App BOA Tab 17**
[105] Record, Vol. 10, page 2951

addition to or other than the complainant(s)," but that the Complainant Ms Sumner-Pruden had listed only her son Dewey, and not "all other children."[106]

143. The Adjudicator, several times during the adjudication, repeated the point that the Complaint had been drafted as an allegation of discrimination only against Ms. Sumner-Pruden and Dewey, and not as against any other First Nation children, and in fact he addressed the *Caring Society* case. For instance, during direct examination by counsel for the Complainant of an expert witness, Dr. Vanda Sinha, counsel for the Complainants and the Adjudicator discussed the *Caring Society* case:[107]

> THE ADJUDICATOR: And also remember that the Caring Society case, in that particular case, the complainants were classes and groups. And in this particular instance we have an individual complainant. So what I mean, and I see the puzzlement on your face, is the Canadian Human Rights Commission was addressing a concern brought to it by, I'm going from memory here and I think it was the Assembly of First Nations and there was another group.
>
> MS. PASTORA SALA: Caring Society.
>
> THE ADJUDICATOR: The Caring Society itself, indeed. And they were advancing broad systemic interests and concerns. In this case, we don't have a broad systemic complainant. We have a specific complainant.

144. Counsel for the Complainant suggested that, at page 4 of the complaint itself, there was a specific allegation around systemic discrimination.[108] However, the Adjudicator correctly pointed out that that reference in the Complaint to systemic discrimination was narrower than suggested by counsel – the Complaint actually stated that the Respondent had "systemically discriminated against Dewey," and

[106] Record, Vol. 10, page 2952
[107] Record, Vol. 12, page 3941, transcript of evidence of Dr. Vanda Sinha
[108] Record, Vol. 10, page 2959; and see page 4 of the Complaint at the Record, page 9

the Adjudicator therefore described this allegation as "a suggestion that the system has failed Dewey, as opposed to other children" (underlining added).[109]

145. That language on page 4 of the Complaint is in fact consistent with the naming in the Complaint itself that the Complainant was Ms Sumner-Pruden, and that the only other person she named as having suffered discrimination was her son Dewey.

146. Thus, the Adjudicator was correct when he stated:[110]

> And let's remember that the function of this hearing is to address the complaint that has been made by the complainant on behalf of her son.

147. And during closing argument of counsel for the Commission, the Adjudicator reiterated the fact that this Complaint had been framed as one that alleged discrimination only against one particular child:[111]

> THE ADJUDICATOR: Let's just remember that this is a complaint about a little boy. We're not trying to remedy every problem that has ever afflicted First Nations people in Manitoba.

148. The SCC has cautioned against the making of "systemic remedies" where the complaint of discrimination is made by individuals. In *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61, the SCC noted that, while the remedy for an individual claimant can have a "systemic" impact, the remedy must still flow from the complaint. As put by Abella J.:[112]

> **63** In that sense, it is certainly true that a remedy for an individual claimant can have a 'systemic' [page389] impact. In *Grismer*, for example, the issue was a rule that excluded individuals with a medical condition affecting peripheral vision - homonymous hemianopia - from obtaining a drivers' licence. The Court concluded that this rule had a discriminatory impact on Mr. Grismer and upheld

[109] Record, Vol. 10, page 2960
[110] Record, Vol. 10, page 2952
[111] Record, Vol. 18, page 5550, Closing Submission of the Commission
[112] *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61, **App BOA Tab 13**

> the Tribunal's order that the Superintendent test Mr. Grismer individually. Although the remedy was individual to Mr. Grismer, it clearly had remedial consequences for others in his circumstances. Similarly, a finding that Jeffrey suffered discrimination and was entitled to a consequential personal remedy, has clear broad remedial repercussions for how other students with severe learning disabilities are educated.
>
> **64** But the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centred on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine whether *Jeffrey* was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission.

149. *Moore* contains important parallels to the present case. The complainant was a child with dyslexia who required intensive instruction in early school years in order to benefit from educational services available the general public. The public school system in British Columbia at the time was unable to provide the necessary supports, so the complainant's family paid for private supports. The Human Rights Tribunal held a 43 day hearing and considered evidence regarding funding in general, budgetary constraints, the nature and impacts of dyslexia in education, and the complainant's particular circumstances. The tribunal found both individual and systemic discrimination, made broad remedial orders, and seized itself to oversee the implementation of some of its orders. The SCC overturned those orders to the extent that they did not flow from the claim as pled.

150. To use the language of para. 64 of *Moore* in the present circumstances, the Complaint was made on behalf of Dewey, and the evidence given to support the complaint centred on him.

151. Similar issues respecting the appropriateness of a broad remedial order in a human rights complaint made by individuals, and not on behalf of a group, were canvassed in *Vilven v. Canada*[113]. The complainants were two Air Canada pilots who alleged that the provision of the pension plan respecting mandatory requirement constituted discrimination. They sought an order stating that the mandatory requirement provision be struck down, an order which would affect not only the two complainants but all Air Canada pilots. The Canadian Human Rights Tribunal declined to make such an order. It noted that the matter involved only individual complainants, and not a group complaint, and found that individual remedies were appropriate:

> **11 …**The present case does involve a systemic complaint. *ATF* involved a complaint by a public interest group on behalf of a large number of alleged victims of a discriminatory practice. This is a case of two separate individual complainants with the same complaint. It is not a group complaint. What the complainants are asking is to have their remedy extend beyond their individual complaints.
>
> **…**
>
> **14** The more appropriate way of applying both *Martin* and s.53(2)(a) in terms of remedy is for this Tribunal to rescind the termination of the complainants by an order to the respondents to cease applying s.5(1) of the Pension plan vis a vis the complainants and redress the discriminatory practice by ordering their reinstatement.

152. That approach should be followed in the present case. This matter also involved only individual complainants, not a group complaint. Any remedy granted by the Court must flow from the complaint. The Commission has not identified any authority that justifies imposing broad remedial orders in the context of an individual complaint.

153. The remedy sought by the Commission is set out at para. 101 of its Brief. It has five components, some with sub-components.

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[113] *Kelly v. Air Canada and Air Canada Pilots Association and Vilven v. Air Canada*, 2010 CHRT 27 (CanLII), **MB BOA Tab 8**

154. The Commission in para. 101(a) seeks a declaration of the existence of systemic discrimination, which is said to arise from “the Government of Manitoba’s policies, practices and laws that result in denials, delays and disruptions in the provision of health care and related services,” and in para. 101(a) the Commission seeks an order that the systemic discrimination cease.

155. With respect to policies, the Brief in para. 101(c) cites two policies – the Children’s disABILITY Services eligibility policy, and the Manitoba Home Care Program eligibility policy, and seeks an order that Manitoba rescind these policies. These are policies which were put into evidence and form part of the record. They applied to the services sought by the Complainants and raised in the Complaint. They were discussed by witnesses. If the court was inclined to grant any remedy, Manitoba accepts that the order sought in para. 101(c) might be appropriate.

156. However, still with respect to policies, the Brief goes on in para. 101(d) to seek an order that Manitoba rescind any other policies not expressly contained in the record of the proceedings, but which restrict children living on First Nations from receiving disability and related services.

157. Neither Manitoba nor the Court know how many such policies there might be, what all these policies might entail, what programs they might apply to, or what might be the effect of rescinding them. Manitoba is left to guess which policies or practices would be captured by this proposed remedy, and as such, there is no ability to meaningfully respond by way of evidence or legal submissions.

158. The inappropriateness of this proposed “systemic remedy” is apparent from the comments of SCC in *Moore*: the remedy should flow from the complaint. As has been noted, the Complaint in this case was made by two individuals, not on behalf of a group or class; and it focused on only services for which eligibility was governed by the two particular eligibility policies cited above. No other policies were referenced in the Complaint, and there was no evidence about them at the adjudication. The remedy sought by the Commission does not flow from the

Complaint. Rather, it effectively invites a commission of inquiry into the practices, policies and laws of Manitoba with the presupposition that they are discriminatory.

159. The same analysis applies to the order sought by the Commission in para. 101(e) of its Brief respecting cessation of three practices. The court does not know what programs or services might involve such practices, or what the effect of ceasing such practices might be. In particular, while para. 101(e)(i) refers to "denying services on reserve," many non-First Nations child must travel to locations away from the home community to receive services. Para. 101(e)(ii) refers to denying services through Provincial Outreach Therapy for Child upon the First Nations child entering school, but these services cease for all non-First Nations School when they enter school.

160. The order sought would cover a class or group of persons living in a variety of unidentified locations, and would apply to an unidentified number of programs and services of the Respondent which were not the subject of any evidence at the adjudication. At risk of repetition, the facts of this case concern a single set of complainants, in single community, with their own factual matrix. To the extent that the Complainants intended to broaden the complaint to include other persons, programs, services or communities, that would expand the evidence required to fairly adjudicate the complaint. As it stands, Manitoba had no meaningful ability to respond to this theoretical complaint, and as such, an order in this regard would be wholly inappropriate.

161. An order such as suggested by the Commission in para. 101(e) of its brief would be as the Adjudicator noted, entirely inconsistent with the conscious decision of the Complainants to make a Complaint only with respect to themselves, and not on behalf of any class or group or list of other persons as they had the ability to do.

### C) **Conclusion**

162. The Respondent therefore submits that the Court should exercise its jurisdiction to set aside the decision of the Adjudicator and re-hear this matter based upon the record that was before the Adjudicator. Should the Court exercise its jurisdiction on that basis, then Manitoba submits that the Complaint should be dismissed for the reasons outlined in this brief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

This 25th day of August, 2023.

Manitoba Justice
Legal Services Branch
Per:

___________________________
Jim Koch, Crown Counsel

Counsel for the Respondent
The Government of Manitoba