MANITOBA HUMAN RIGHTS ADJUDICATION PANEL

IN THE MATTER OF a complaint made under *The Human Rights Code*, CCSM c. H175

BETWEEN

Harriet Sumner-Pruden,
and Alfred "Dewey" Pruden,
complainants,

AND

The Government of Manitoba,
respondent,

AND

The Manitoba Human Rights Commission,
Commission.

MHRC File No.: 17 LP 10

For the complainant: Ms Allison Fenske and Ms Joelle Pastora Sala
For the respondent: Mr Alan Ladyka and Ms Leslie Turner
For the Commission: Ms Isha Khan

Complaint heard: 14, 15, 16, 17, 22, 23, 24, 28, 29, 30 and 31 January; 4, 5, and 21 February; and 11, 12, and 14 March 2019
Supplementary written submissions filed on: 21 and 22 March 2019
Reasons published: 17 August 2020

ROBERT DAWSON, adjudicator:

[1] An Anishinaabe child and his mother complain that government departments have denied them health care and related services on the basis of their ancestry. For the reasons that follow, the complaint is allowed in part.

Background

[2] At the time of the hearing, the complainant Alfred "Dewey" Pruden was a 16-year-old Anishinaabe boy. I have chosen throughout these reasons to refer to Dewey by

this name that his family and friends know him. My seeming familiarity is not intended to be disrespectful. On the contrary, I feel that, by referring to him as "Mr Pruden", it would be far too easy to forget that this complaint essentially is about a child and the help that he needs.

[3] Dewey resided in Pinaymootang First Nation with his mother, the complainant Ms Harriet Sumner-Pruden, and his father, Mr Alfred Pruden Sr. Dewey was born with many disabilities, including a progressive neurological disorder called Sturge-Weber syndrome. He was prone to seizures during the initial years of his life, requiring him to take many medications. Eventually, Dewey underwent brain surgery when he was four in the hope that the procedure would address his seizures. Instead, he developed new problems: he lost his ability to speak even the very few words that he had previously used; glaucoma led to vision loss; his motor skills were impaired; his overall development was significantly delayed; and, he developed an autism spectrum disorder and attention deficit hyperactivity disorder.

[4] The respondent offered health care and related services to Manitobans afflicted with such conditions, and those services even extended to the parents of children like Dewey. However, the respondent did not make those health care and related services available to Dewey and his mother in the same way that many other Manitobans received them. Sometimes, the respondent simply denied some services. In other

instances, services were provided but delayed. In yet more circumstances, services were provided but then intermittently withdrawn.

[5] The respondent informed Dewey's parents that its offering of health care and related services reflected the constitutional division of powers, whereby the federal government was responsible for the provision of health care and related services to Aboriginal individuals living in First Nation communities.

[6] As a result, Ms Sumner-Pruden filed a human rights complaint on behalf of Dewey and in her own right. The complaint alleges that the Manitoba Government had discriminated against Dewey and Ms Sumner-Pruden in the provision of health care and related services on the basis of their Anishinaabe ancestry and Dewey's disability. Moreover, the complaint asserted that the discrimination had occurred without any bona fide and reasonable cause.

[7] On 8 September 2017, Chief Adjudicator Walsh designated me as the adjudicator to hear and decide this complaint. I convened pre-hearing conferences on 23 November 2017, 19 June 2018, and 28 November 2018. During the pre-hearing stage, the main issue was disclosure of documents and expert reports, which exceeded 4,000 pages. An extraordinary 17 days of hearing filled January to March 2019. At the close of oral argument, the parties asked to file supplementary written submissions, which I then

received by 22 March 2019. At my request, Chief Adjudicator Walsh extended the time for the rendering of my reasons for decision, fixing 31 July 2019 as the deadline.

Why has it taken so long to release these reasons for decision?

[8] The parties filed the last of their supplementary submissions almost seventeen months ago. Section 41(1) of *The Human Rights Code*, CCSM c. H175, expects an adjudicator to render a final decision about a complaint within sixty days after the end of the hearing. Even where the Chief Adjudicator grants an extension to an adjudicator, the new deadline usually pushes back the release of reasons only by two or three months. To that end, former Chief Adjudicator Walsh had permitted me an extended deadline to 31 July 2019. I can confirm that these reasons for decision were substantially completed by me on 29 July 2019. However, a complication had arisen.

[9] On 19 June 2019, the Manitoba Government revoked the appointments of five of six human rights adjudicators, including my own. These revocations were routine, and all of those adjudicators, including me, had pretty much come to the end of their term on the adjudication panel. Unfortunately, the Government did not give advance notice of its intended revocations. Moreover, the Government took several days to communicate that the revocations had taken place. During the interval between the revocation of my appointment and the day when I was told about the action, I had

released reasons for decision in connection with a procedural motion in *Hampton* v. *Manitoba*, 2019 MBHR 6.

[10] This sequence of events created a problem: I had unknowingly released reasons for decision in connection with a procedural motion after the Government had revoked my appointment as an adjudicator. Section 8(3.1) of the *Code* authorizes an adjudicator to continue his or her work even if the Government has revoked the adjudicator's appointment: "a member of the adjudication panel who has commenced a hearing into a complaint may continue as adjudicator and issue a final decision on the complaint even if his or her appointment has expired and a replacement has been named." The continued authority of the adjudicator depends upon having "commenced a hearing into a complaint". The *Code* does not make clear what amounts to such a hearing. On the one hand, if <u>any</u> kind of hearing meets the requirement of s. 8(3.1), then the procedural motion in *Hampton* was sufficient to authorize me to decide the motion; in that case, my reasons for decision would be valid. On the other hand, if s. 8(3.1) refers only to the substantive hearing of an actual human rights complaint, as opposed to a mere procedural motion, my reasons for decision would be a nullity.

[11] The answer would make a difference. The answer would determine the validity of my reasons in *Hampton*, and the validity or nullity of the reasons in *Hampton* would in turn affect these present reasons for decision in the *Sumner-Pruden* complaint,

because, as set out below, these present reasons rely upon the decision in *Hampton.* If *Hampton* is invalid, that opens these present reasons to challenge.

[12] I therefore invited direction from the new Chief Adjudicator on 27 July 2019. There was a telephone call on 9 December 2019, but the issue remained unsettled. There is now a clamour to publish this decision, and I am happy to oblige.

Some procedural notes to start

[13] Before I turn to a consideration of the substantive issues that arise in the instant complaint, I set out three procedural points.

Amending the style of cause to reflect the respondent correctly

[14] The written complaint identifies two departments of the Manitoba Government as respondents. The parties offered comments at the opening of the hearing about the adequacy of that styling. In particular, the complainants floated the idea of adding a third government department to the list of respondents. This suggestion worried the respondent, because such an amendment could broaden the exposure of the Manitoba Government to any remedial order that might arise from the hearing of the instant complaint. In the end, the hearing got underway, and the notion fell by the wayside.

[15] However, for the reasons set out in *Hampton* v. *Manitoba,* 2019 MBHR 6, at para. 10-20, it is apparent that the naming of two government departments as respondents is poor form and legal nonsense. In place of "Manitoba Health" and "Manitoba Families", the correct styling is "The Government of Manitoba", and I order the amendment of the style accordingly.

Identifying the complainants by name

[16] Where sensitive personal information arises in evidence, my usual practice is to protect the privacy of the parties and use initials or other concealments. In the instant complaint, counsel for Ms Sumner-Pruden especially asked me to name her and her son. I have obliged her.

Using an eagle feather to affirm evidence

[17] Ms Sumner-Pruden asked to affirm her evidence on an eagle feather and to give her evidence while holding the feather. At that particular time, it was a novel request. I permitted it pursuant to s. 39(2) of the *Code*, which allows an adjudicator to determine the procedures to be used at the hearing. I was satisfied that Ms Sumner-Pruden's attestation using an eagle feather would be more meaningful to her and more strongly promote the truthfulness of her testimony than the usual form of oath or affirmation

that *The Manitoba Evidence Act*, CCSM c. E150, prescribes. By way of convenience of reference to other adjudicators, I set out here the oath used in these proceedings:

> Do you affirm that your eagle feather symbolizes your direct connection to the Creator and you hold it in the spirit of honour, and the evidence you shall be giving today in this matter will be the truth, the whole truth, and nothing but the truth?

Analysis of the substantive issues

[18] In the legal analysis that follows, it is easy to forget what this complaint is about. I therefore pause to recall that, at its heart, this complaint is about Dewey, a child who has significant disabilities and the relentless and formidable efforts of his mother, Ms Sumner-Pruden, to seek the health care and other services that he needs.

[19] The hearing of this complaint also painted a broader canvas of supporters, and each of them deserves a separate mention. Although not called to give evidence, Mr Pruden attended and observed the hearing every single day, except when a snowstorm blocked the highway from Fairford, Manitoba. Members of the Pinaymootang First Nation demonstrated their continuing readiness to offer extraordinary support and creative alternatives for Dewey's benefit, including Mr Moti Patram, the local school's principal; Chief Garnet Woodhouse, who is a model of selfless service; and, Ms Gwen

Traverse, the coordinator who manoeuvres through government bureaucracy for the benefit of her community.

The respondent has discriminated against the complainants

[20] There is no dispute among the parties that Dewey and his mother Ms Sumner-Pruden are Anishinaabe. Their ancestry is a characteristic that the *Code* expressly protects at s. 9(2)(a). It is equally accepted that Dewey has a physical and mental disability, which falls within s. 9(2)(l) of the *Code*'s protected characteristics. Lastly, all parties have agreed that, at all material times, Dewey and his mother have lived in Pinaymootang First Nation.

[21] I find that the respondent discriminated against Dewey and his mother on the basis of their ancestry and Dewey's disability. I arrive at this conclusion after accepting the approach that the Commission urged me to adopt; namely, while there may be specific instances of discrimination, it was equally important that I watch for systemic discrimination.

[22] No government or other official intended to treat the complainants differently by reason of their ancestry as Anishinaabe people. However, that was the very effect of the whole of the assorted policies, practices, and even laws that try to carve out the concurrent jurisdiction of the federal and provincial governments in respect of health

care and related services for First Nations people living in First Nations communities. Those intergovernmental arrangements caused health care and related services to be denied, delayed, or intermittently interrupted for the complainants. The same problems did not afflict neighbouring non-First Nations communities, and those residents enjoyed health care and related services without denial, delay, or interruption.

[23] As a result, the complainants suffered treatment that was obviously adverse. The denial or delay of health care arguably had negative effects upon the prognosis for Dewey, and policies that denied other services affected Ms Sumner-Pruden, including the availability of respite workers, transportation services, supplies, and home renovations.

[24] I therefore find that the respondent discriminated against the complainants on the basis of their ancestry as Anishinaabe people and the disability of Dewey. Moreover, I conclude that the complainants suffered adverse treatment by reason of this discrimination.

There is no bona fide and reasonable cause for the discrimination

[25] The respondent maintains that it did not discriminate against the complainants. However, it submits in the alternative that any discrimination was reasonably justified, because the Canadian constitutional framework precludes the respondent from

providing services that are within the exclusive scope of the federal government. The respondent notes that s. 91(24) of the *Constitution Act* empowers the federal Parliament to make laws in relation to "Indians, and Lands reserved for the Indians". However, the division of powers does not constitutionally oust the respondent. In fact, s. 92 of the *Constitution Act, 1867*, gives provincial legislatures with a "broad and extensive" power over significant aspects of health care and related services: *Canada* v. *PHS Community Services Society*, 2011 SCC 44. For example, s. 92(13) assigns power to provinces over "property and civil rights in the province", and this is the basis for the public provision of health insurance. Similarly, s. 92(7) addresses "the establishment, maintenance, and management of hospitals", thus permitting provisions to regulate hospitals and the services provided through them. Indeed, there was evidence during the hearing of the instant complaint that the respondent does provide some health care and related services in a few First Nation communities. The jurisdiction of the federal government is not therefore exclusive; at most, it is concurrent with the provinces. The Canadian constitutional framework does not amount to a reasonable justification for the discriminatory treatment of the complainants.

An alternate defence

[26] In 2010, the complainant Ms Sumner-Pruden filed the original written complaint. At para. 5, Ms Sumner-Pruden listed 22 government programs and services that she

alleged had been denied to her or delayed or interrupted. The respondent submitted that these specific instances formed the complaint that it must defend. Accordingly, as the hearing unfolded, counsel for the respondent cross-examined the complainant and lead its own witnesses, aiming to establish that no discrimination had occurred in respect of any of those 22 government programs and services. In fact, the respondent argued that the complainants had actually received almost all of those programs and services. On the face of the written complaint, there was therefore no discrimination, submitted the respondent, relying upon 43(1) of the *Code*, which sets out the task of an adjudicator:

> after the completion of the hearing, the adjudicator shall decide whether or not, on a balance of probabilities, any party to the adjudication has directly or indirectly contravened this Code *in the manner alleged in the complaint*" [emphasis added].

In effect, the respondent was saying that, where an adjudicator found that there had been a contravention of the *Code*, s. 43(1) restricted the finding to the specific manner of contravention as set out in the written complaint. However, a human rights complaint is not a pleading: in *Pollock* v. *Winnipeg Condominium Corp. No. 30*, 2011 CanLII 93943 (MB HRC), Adjudicator Harrison noted at p. 66 of the unpaginated reasons that "a complaint is not the same as a 'pleading' in court proceedings, and may be less precise or specific." Similarly, in *Damianakos* v. *University of Manitoba*, 2015 CanLII 11275 (MB

HRC), Adjudicator Walsh (as she then was) captured with approval at para. 32 the submission of the Commission that "the complaint should not be viewed as a form of civil pleading where every material fact must be pleaded, remedies must be articulated, and statements of hearsay and evidence must be avoided." A respondent need only be able to defend itself against the allegation of contravention set out in the written complaint. In the instant complaint, the respondent was not surprised by the allegations or the evidence that the complainants or the Commission introduced during the hearing. In fact, there had been full documentary disclosure during the pre-hearing stage, so the respondent very well knew that the complainants would put into evidence more than the 22 government programs and services listed at para. 5 of the written complaint.

Remedial order

[27] Having found that the respondent has contravened the *Code*, s. 43(2) affords me with a discretion to order the respondent to do one or more of the following:

> (a) do or refrain from doing anything in order to secure compliance with this Code, to rectify any circumstance caused by the contravention, or to make just amends for the contravention;
> (b) compensate any party adversely affected by the contravention for any financial losses sustained, expenses incurred or benefits lost by reason of the

> contravention, or for such portion of those losses, expenses or benefits as the adjudicator considers just and appropriate;
>
> (c) pay any party adversely affected by the contravention damages in such amount as the adjudicator considers just and appropriate for injury to dignity, feelings or self-respect;
>
> (d) pay any party adversely affected by the contravention a penalty or exemplary damages in such amount, subject to subsection (3), as the adjudicator considers just and appropriate as punishment for any malice or recklessness involved in the contravention;
>
> (e) adopt and implement an affirmative action program or other special program of the type referred to in clause 11(b), if the evidence at the hearing has disclosed that the party engaged in a pattern or practice of contravening this Code.

Securing compliance with the Code

[28] The complainants seek an order that would require the respondent to cease immediately "its discriminatory practices regarding the provision of services to Dewey and other First Nation children with disabilities in Manitoba, including immediately rescinding all its policies of exclusion of First Nation children living on reserve." The wording of this proposed order is too broad in application: first, it refers to "discriminatory practices" without particularizing them, which would create difficulty in the enforcement of the order; secondly, it purports to extend the order beyond the complainants; and thirdly, it seeks the rescinding of all policies of exclusion, even

though they are neither listed nor do I know what all of those policies entail and the effects of rescinding them. Therefore, I worry that the scatter of my remedial shotgun is too dangerous without further and better information.

[29] At the same time, a variant upon that order would be appropriate in light of the finding that the respondent discriminated against the complainants. In order to avoid the problems of the complainants' proposed order, I would impose a positive obligation upon the respondent. I intend my version of the order not only to direct an end to the respondent's discriminatory treatment of the complainants, but also consequently to make available those health care and related services to which other non-First Nation people usually have access.

[30] I pause here to explain my unwillingness to extend the remedial order beyond the complainants. Despite the efforts of the complainants, I have little evidence on which I am prepared to rely that would enable me to make orders that would benefit any individuals beyond the named complainants in the instant proceedings. I have entirely discounted the written and oral evidence of the purported expert Vandna Sinha. At most she summarizes the anecdotal evidence of individuals who might have better testified in person. At worst she overextends herself by giving evidence outside the scope of her expertise.

Damages for financial losses sustained

[31] The complainants seek $200,000 as a compensatory award for Ms Sumner-Pruden's future wage loss. In addition, the complainants seek a "just and reasonable amount" to cover the future cost of caring for Dewey. I decline to make any order pursuant to s. 43(2)(b) on the ground that there is insufficient evidence before me that would support an award in any amount. I acknowledge that Ms Sumner-Pruden gave evidence about the wages that she used to earn in a managerial position that she abandoned in order to take a much lower-paying job that would allow her to care for her son. I entirely accept Ms Sumner-Pruden's evidence as true, but I am not an actuary. I need some guidance as to what amounts to fair compensation for the loss of future wages. I therefore make no award to her.

[32] Moreover, I say the same about the complainants' submission that there should be a "just and reasonable" contribution towards the future of care of Dewey. I am prepared to accept that, by reason of denials and delays in treatment, the prognosis for Dewey has declined. It was open to the complainants to call an expert witness. They chose not to do so. At most I have the exclamation of Dr Perlov who describes as "outrageous" the failure to accommodate Dewey's needs in school. In short, I am left with insufficient evidence to support an award. I therefore make no award to Dewey.

Damages for injury to dignity, feelings, or self-respect

[33] The complainants submit that $100,000.00 for each complainant is a just and reasonable award for injury to dignity, feelings, or self-respect. The Commission pointed to several human rights awards made in Ontario, and the complainants added a further case to the list that raised the quantum even higher.

[34] However, I resist the temptation to look to Ontario when setting the scale for Manitoba awards of damages for injury to dignity, feelings, or self-respect. I respectfully disagree with the approach taken by Adjudicator Walsh in her award of $75,000 to a complainant who endured prolonged workplace bullying: *T.M.* v *Manitoba (Justice)*, 2019 MBHR 13 at para. 309. Adjudicator Walsh worried at para. 306 that an award could be too low and effectively become a "licence fee to discriminate".

[35] However, I wonder if that is a relevant consideration where the respondent is a provincial government. Accordingly, I return to the principles that informed the award of damages for injury to dignity, feelings, or self-respect in *Jedrzejewska* v *A+ Financial Services Ltd*, 2016 MBHR 1 at para. 56-57 and 60. In that complaint, an award of $20,000 was made to each of the complainants who had endured prolonged and vile sexual harassment in the workplace. In the instant complaint, the discrimination was ongoing over many years. The subject matter was health care, which is critical and important. The complainants had little recourse except to suffer the discriminatory treatment.

Taking into account the spectrum of Manitoba awards for injury to dignity, feelings, or self-respect, I award $30,000.00 to Dewey and $12,500.00 to Ms Sumner-Pruden.

Exemplary damages

[36] The complainants seek exemplary damages against the respondent in the amount of $5,000.00 for each complainant. The complainants led evidence that, at one point, the respondent had created a process by which to resolve funding disputes between the federal and Manitoba governments under Jordan's Principle. The complainants infer that, in retaliation for the filing of the instant complaint, the respondent had maliciously refused to advance Dewey's case to the resolution process. However, the respondent had called a witness who gave an alternate explanation that removed any suggestion of malice from the choice not to present Dewey's case to the resolution process. I prefer that direct explanation of the respondent's witness over the speculation of the complainants. I therefore decline to make an award for exemplary damages.

Implementing a special program

[37] For the same reason that I declined to consider any individuals other than the complainants named in the written complaint, I am unwilling to make any of the broad

and systemic orders. I simply lack information, and I especially worry about the consequences that could follow upon the making of such orders.

[38] To those who had hoped to benefit from such orders, I respectfully suggest that a human rights adjudication panel is not the forum by which to undertake any extended study and reformulation. Such exercises are better confined to judicial review or extraordinary government commissions.

Decision and order

[39] For the reasons set out above, the complaint is allowed in part.

[40] I order as follows:

(a) the respondent shall hereafter provide health care and related services to the complainants without regard to the fact that they are Anishinaabe individuals who reside in a First Nation community;

(b) the respondent shall pay damages for injury to dignity, feelings, or self-respect in the amount of $30,000.00 to the complainant Alfred "Dewey" Pruden and $12,500.00 to the complainant Harriet Sumner-Pruden within 45 days of the date of this decision;

(c) the respondent shall be styled in the instant complaint as "The Government of Manitoba".

[41] I retain jurisdiction for the purpose of resolving any issues that may arise out the implementation or interpretation of this order.

[42] I draw to the parties' attention s. 50(2) of the Code, which requires that any application for judicial review of this decision must be made the Court of Queen's Bench within 30 days of the making of this decision or within such further time as the court may allow.

17 August 2020 *Original signed by*

Robert Dawson