MANITOBA HUMAN RIGHTS ADJUDICATION PANEL

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

FILE NO. 16 EN 234

BETWEEN

Amelia Hampton

complainant,

AND

The Government of Manitoba, and Winnipeg Regional Health Authority

respondents,

AND

The Manitoba Human Rights Commission,

Commission

FILE NO. 16 EN 235

AND BETWEEN

Tyson Sylvester

complainant,

AND

The Government of Manitoba, and Winnipeg Regional Health Authority

respondents,

AND

The Manitoba Human Rights Commission,

Commission

Appearances

Mr Byron Williams and Ms Joelle Pastora Sala, for the complainants

Mr Brian Jones, for the respondent Government of Manitoba (Manitoba Health, Seniors and Active Living)

Mr Eli Goldenberg, for the respondent Government of Manitoba (Manitoba Families)

Mr Daniel Ryall, for the respondent Winnipeg Regional Health Authority

Ms Isha Khan, for the Manitoba Human Rights Commission

Motion by written submissions filed on 31 May 2019, 14, 15, and 21 June 2019
Reasons published on 23 June 2019

DECISION NO. 1

ROBERT DAWSON, adjudicator:

[1] The complainants and the Commission jointly move to amend the complaints by revising the description of government departments named as respondents. For the reasons set out below, the motion is granted in part.

I. Background

[2] On 19 July 2016, the complainants each filed a complaint with the Manitoba Human Rights Commission, and both complaints identified the same three respondents, the Winnipeg Regional Health Authority and two

government departments listed as "Government of Manitoba – Manitoba Health, Seniors and Active Living" and "Government of Manitoba – Manitoba Families".

[3] On 20 March 2019, the Chief Adjudicator designated me to hear both complaints together.

[4] As part of the pre-hearing planning process, the complainants and the Commission jointly moved to amend the complaints on 18 April 2019. Their joint motion brief of 31 May 2019 proposed a revision of the description of the two government departments. Instead of "Government of Manitoba – Manitoba Health, Seniors and Active Living" and "Government of Manitoba – Manitoba Families", the complainants and the Commission moved to describe them through a single reference to the "Government of Manitoba, through its various departments and agencies."

II. Positions of the parties

A. The complainants and the Commission

[5] In their joint motion brief, the moving parties noted that the Manitoba Government restructures its organization from time to time. As a result, some of the programs and services implicated by the complaints have moved beyond the

responsibilities and control of the two government departments named in the complaints. Nevertheless, the complainants and the Commission explained that, in tracing such programs and services after they had migrated, the evidence during the hearing and any resulting remedial orders may need to go beyond the two government departments explicitly referenced in the complaints. In anticipation of objections that the adjudication should be properly confined only to programs and services that are within the responsibilities and control of the two government departments named in the complaints, the complainants and the Commission proposed a simple but broad description of a government respondent that would replace the naming of the two government departments: instead of "Government of Manitoba – Manitoba Health, Seniors and Active Living" and "Government of Manitoba – Manitoba Families" as two government respondents, the complainants and the Commission proposed the substitution of "Government of Manitoba, through its various departments and agencies".

[6] The moving parties underlined that the amendment of the complaints would not have the effect of introducing new allegations or grounds of discrimination. Instead, the adjudication of the complaints would proceed on the same allegations and grounds of discrimination as set out in the original complaints. Because no undue prejudice would result to the respondents, the

complainants and the Commission therefore submitted that, pursuant to s. 40 of *The Human Rights Code*, CCSM c. H175 (the "Code"), the amendment should be permitted.

B. The respondent Manitoba Health, Seniors and Active Living and the respondent Manitoba Families

[7] The two government departments filed a joint brief, in which they expressed concern that the broadly-worded amendment could draw into the adjudication programs, services, and government departments and agencies beyond those that the original complaints had implicated. Moreover, the two government departments considered that, by reason of the broad reference to the entire Manitoba government, remedial orders could be directed at government departments and agencies that are not even participants in the instant adjudication and that are beyond the control and direction of the two government departments that the instant complaints have referenced.

[8] In addition, the two respondent government departments objected on the ground that, through its inclusion of "agencies", the proposed amendment ignored the fact that some government agencies are beyond the direct control of the Manitoba Government itself, regardless of how the complaints may refer to the respondents.

C. The respondent Winnipeg Regional Health Authority

[9] The respondent Winnipeg Regional Health Authority took no position on the motion. In so doing, it relied upon a representation of the moving parties that, despite its reference to the "agencies" of the Manitoba Government, the proposed amendment would not have the effect of adding other Manitoba health authorities as respondents to the complaints or otherwise suggesting that the respondent Winnipeg Regional Health Authority has control over any other health authority.

III. Analysis and decision

A. The correct way in which to name a government department as a respondent to a Manitoba human rights complaint

[10] In their joint motions brief, the complainants and the Commission explained that they have sought to amend the description of the two government departments for reasons that reflect practical considerations. However, none of the parties, whether moving or responding, approached the issue from the technical perspective that properly determines the disposition of the instant.

[11] Diceyan constitutional theory describes responsible government as an executive power exercised by advisers of the Sovereign who are accountable to a majority of the elected chamber of the legislature: A.V. Dicey, *The Law of the Constiutution* (9th ed., 1939). However, the size and complexity of government have always made it a fiction that cabinet ministers could know everything that their departments undertook, let alone the activities of the rest of the government, even in an age when governments were still small by modern standards: Moses Abramovitz and Vera F. Eliasberg, *The Growth of Public Employment in Great Britain* (Princeton University Press, 1957), p. 8. In the words of Lord Greene in *Carltona Ltd* v. *Commissioners of Works* et al., [1943] 2 All ER 560 (CA) at 563,

> [i]n the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them.

The complexity of government operations has exponentially increased since 1943 when the Master of the Rolls had given those reasons for decision.

[12] Despite this complexity, legal philosophy usually considers governments to be a whole entity, not an assembly of their constituent parts: Hans Kelsen, *General Theory of Law and State* (1945), at Part I:Chpt 9 and Part II:Chpt 1; Hans

Kelsen, *Pure Theory of Law* (2nd ed., 1960), at chpt 6; and, F.W. Maitland, "The Corporation Sole" and "The Crown as Corporation" in *Selected Essays* (1936), at pp. 73 and 104, respectively.

[13] The courts have similarly established that a government department is not a legal entity: in Manitoba, the pronouncements are found in, among other cases, *Vermeylen* v. *Manitoba*, 2008 MBQB 70 at para. 17; and, *Rebillard* v. *Manitoba*, 2041 MBQB 181 at para. 24.

[14] As such, a government department may not be named as a respondent to a human rights complaint. To do otherwise would be to file a complaint against a non-entity.

[15] Instead, s. 10 of *The Proceedings against the Crown Act*, CCSM c. P140, requires that, "[i]n proceedings under this Act, the Crown shall be designated as 'The Government of Manitoba'." Although the statute does not define the word "proceedings", I find that human rights adjudications are "proceedings" within the meaning of the Act.

[16] Historically, "proceedings" have especially referred to civil actions against the Crown. When first enacted in 1951, Manitoba's *Proceedings against the Crown Act* had derived from the *Crown Proceedings Act 1947* (UK), c. 44: *Re The Queen in Right of Manitoba and Air Canada*, (1978) 86 DLR (3d) 631 (MBCA) at 641. The

English statute had in turn focused upon civil actions against the government, especially in light of the development and expansion of liability in tort: Glanville Williams, *Crown Proceedings: An Account of Civil Proceedings by and against the Crown as Affected by the Crown Proceedings Act, 1947* (London: Stevens & Sons, 1948), *passim* but especially at chpt. 6. Over time in Manitoba and other jurisdictions, the kind of proceedings involving governments has significantly broadened: for example, s. 57 of the *Code* confirms that *The Human Rights Code* "is binding on Her Majesty in right of Manitoba".

[17] The Code itself considers human rights adjudications to be "proceedings". Like *The Proceedings against the Crown Act*, the Code does not define "proceedings". Nevertheless, examples of the Code's reference to "proceedings" include:

> **s. 20**
> No person shall deny or threaten to deny any benefit, or cause or threaten to cause any detriment, to any other person on the ground that the other person…
>
> (d) has testified or may testify in a proceeding under the Code; or
>
> (e) has participated or may participate in any other way in a proceeding under the Code….
>
> **s. 39(5)**
> The adjudicator shall cause sound recordings to be made of the proceedings at the hearing and shall make copies of the recordings and the documents filed at the hearing available on reasonable

conditions for review or reproduction by any party who so requests.

s. 39(6)
The adjudicator shall provide appropriate interpretation services for any party or witness who is unable, by reason of deafness or other disability or lack of familiarity with the language used at the hearing, to understand the proceedings or any part thereof.

s. 46(4)
The adjudicator must send the sound recordings of proceedings at the hearing, and all documents and materials filed at the hearing, to the Commission as soon as

> (a) the deadline for applying for judicial review of the adjudicator's final decision under subsection 50(2) expires, if no application for judicial review is made by that deadline; or
>
> (b) all proceedings in respect of the judicial review of the adjudicator's final decision have concluded, if an application for judicial review of the final decision is made.

s. 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… (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.

s. 50(4)
Forthwith upon receiving a copy of the application for review, the adjudicator shall deliver to the court the record of the proceedings in respect of which the decision or order under review was made.

[emphasis added]

[18] As these excerpts demonstrate, the Code itself incorporates the word "proceedings". Given that the word also appears in *The Proceedings against the Crown Act*, a presumption of consistent expression arises: according to the rules of statutory interpretation, where the same words have been used across statutes, those words must almost always be construed so that meaning is consistently expressed: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed., 2008 at pp. 214-15.

[19] A human rights adjudication therefore is a proceeding within the meaning of *The Proceedings against the Crown Act*. Accordingly, s. 10 of that statute prescribes the description of the two government departments in the instant complaints as "The Government of Manitoba."

[20] However, the complainants and the Commission have arrived at a different wording. Their version would replace the two government departments with a government respondent identified as "Government of Manitoba, through its various departments and agencies." This proposed description is incorrect for several reasons. First, it does not comply with s. 10 of *The Proceedings against the Crown Act*, which I have found to apply to human rights complaints. Secondly, the proposed formulation refers to the "various departments" of the Manitoba Government, and these are not legal entities; moreover, the addition is

unnecessary and adds nothing to the prescription that s. 10 of *The Proceedings against the Crown Act* requires. Lastly, the reference to the "agencies" of the Manitoba Government is problematic. As the two government departments noted in their joint brief, not all public entities are within the direct control of the Manitoba Government. A body that performs governmental functions is not necessarily a Crown agency. In order for it to be a Crown agency, either a minister must substantially control the body, or a statute must expressly declare it to be an agent of the government: *Fox* v. *Newfoundland*, [1898] AC 667 (PC, Can.). At the same time, s. 21(a) of *The Interpretation Act*, CCSM c. 80, expects that, like any corporation, a Crown agency that is incorporated would be made a party in its own name. Conversely, where a Crown agency is unincorporated, it has no legal personality by which to participate in the adjudication of a human rights complaint or any other legal proceedings. Accordingly, the moving parties' proposed amendment is incorrect, and I set it aside.

B. The allegations and grounds of discrimination set out in the complaints constrain the scope of the instant adjudication

[21] Although the correct respondent in these complaints is "The Government of Manitoba", the parties do not thereby acquire a licence to implicate the entire

government or otherwise inflict undue prejudice upon the respondent government.

[22] Section 40 of *The Human Rights Code,* CCSM c. H175, extends to an adjudicator the discretion to amend a complaint:

> At any time prior to the completion of the hearing, the adjudicator may, on such terms and conditions as the adjudicator considers appropriate,
>
> (a) permit any party to amend the complaint or reply, either by adding parties thereto or otherwise; or
>
> (b) on his or her own initiative, add other persons as parties;
>
> but the adjudicator shall not exercise his or her authority under this section if satisfied that undue prejudice would result to any party or any person proposed to be added as a party.

[23] In applying s. 40 of the Code, *Pollock* v. *Winnipeg Condominium Corp. No. 30*, 2011 CanLII 93943 (MB HRC) ("*Pollock*") set out a three-step test: first, the proposed amendment must fall within the scope of the original complaint (para. 196); secondly, the proposed amendment raises a valid and arguable point that has merit (para. 202); and, thirdly, the adjudicator ought to exercise his or her discretion in light of the facts and circumstances of the particular case (para. 222).

[24] Because s. 10 of *The Proceedings against the Crown Act* requires the description of the government respondent as "The Government of Manitoba", it follows that the application of that Act's prescription must meet the three-step test in *Pollock*. The first step requires that the amendment fall within the scope of

the original complaint. In order to meet the test, the identification of the government respondent as "The Government of Manitoba" must not be allowed to take the adjudication beyond the original complaints and their allegation that the government respondent, together with the respondent health authority, has discriminated against the complainants and failed to provide certain services.

[25] The second step requires that the amendment must have merit, and *The Proceedings Against the Crown Act* establishes that.

[26] Thirdly, s. 40 of the *Code* requires that no undue prejudice should result by reason of the proposed amendment. At para. 8 of their joint brief, the two government departments implied that problems may arise if a broad description of the Manitoba government were to replace the complaints' original reference to specific government departments:

> [t]he practice of the Commission has been to treat individual government departments as distinct respondents. This practice has benefits beyond the issue of convenience of government counsel. In particular, this practice allows a better understanding for all parties, as well as the Commission and the investigator assigned to a complaint, of the nature and extent of the complaint. It also quite rightly requires the complainant to focus their complaint and identify the specific programs or areas within government where discrimination is alleged to have occurred.

I acknowledge the concern set out in the joint motion brief, but I answer that, first, the application of *The Proceedings against the Crown Act* does not preclude

the government respondent from representation throughout the adjudicative process by lawyers for each implicated government department. A team of government lawyers effectively represents the interests of their respective client departments and, working collaboratively, also expedites the adjudicative process. Secondly, the complainants and the Commission have provided assurances that they would not use a broadly-worded description of the government as a springboard by which to expand the scope of the hearing or the ambit of any remedial orders. I am quite prepared to take the moving parties at their word. However, by way of assurance to the government respondent and as caution to the complainants and the Commission, I state that it would be open to vigorous and valid objection if the hearing or disposition of the instant disputes went beyond the scope of the allegations and grounds of discrimination set out in the complaints. Relevance to the complaint remains the standard. Indeed, the *Code* itself precludes forays beyond the allegations and grounds of discrimination found in the complaints: s. 38(1)(b) prevents documentary fishing expeditions, confining a production order only to those documents that "may be relevant to the complaint"; and, s. 39(2) restricts evidence or other information at the hearing to that which is "relevant and appropriate". In order to avoid undue prejudice, the scope of the hearing and any resulting remedial orders must directly reflect

the allegations and grounds of discrimination set out in the complaints, and the burden of demonstrating that connection is upon the party that claims to act within that scope.

[27] There is one last point to address. The complainants and the Commission stated in their joint brief that the Manitoba Government has undergone reorganization since the filing of the instant complaints. Some of the programs or services implicated by the complaints now fall beyond the responsibilities and control of the two government departments that the original complaints had referenced. Despite this migration, such programs or services remain within the scope of the adjudication. A complaint is not static, especially where a government respondent has reorganized itself. It may be necessary to trace the migration of a program or service from its place at the time that a complaint was filed, to the place where it finds itself at the time that an adjudication takes place. The tracing of a migrating program or service is not a licence to explore related programs or services that have emerged over time. The adjudication must always remain grounded in the allegations and grounds of discrimination set out in the complaint.

IV. Decision and order

[28] For the reasons set out above, the motion is granted in part. The disposition balances the need to avoid undue prejudice to the government respondent while enabling the moving parties to trace programs and services that have migrated beyond the two government departments implicated in the complaints.

[29] I therefore order that the instant complaints are amended to refer to the government respondent as "The Government of Manitoba".

[Original signed by]

23 June 2019

Robert Dawson