

TYSON SYLVESTER

Complainant,

- and -

GOVERNMENT OF MANITOBA
(MANITOBA HEALTH, SENIORS AND ACTIVE LIVING),
(MANITOBA FAMILIES) &
THE WINNIPEG REGIONAL HEALTH AUTHORITY

Respondents.

Re: COMPLAINT OF DISCRIMINATION UNDER *THE HUMAN RIGHTS CODE*
REGISTERED JULY 22, 2016.

REPLY OF THE RESPONDENT MANITOBA FAMILIES

1.0 Background

- 1.1 Disability supports and services are provided to persons with disabilities by Manitoba Families primarily through the Children's disABILITY Services program, the Community Living disABILITY Services program, the Employment and Income Assistance program, and the Disability Health Supports Unit. The following is a brief description of each program.

Children's disABILITY Services

- 1.2 Children's disABILITY Services ("CDS") is a non-statutory, voluntary program that provides assistance to families to help them meet some of the disability related needs of their children who have developmental and/or lifelong physical disabilities. Services and supports are intended to strengthen families and reduce stress so that costly out-of-home placements are prevented or delayed.
- 1.3 CDS provides families with a variety of supports that respond to their unique circumstances and the assessed needs of their child. Staff use a family-centered approach to assist families with identifying and accessing the formal and informal resources they require. These supports may include respite care, child development services, supplies, equipment, transportation, summer skills support, after-school care for adolescents, behavioural services, and home and vehicle modifications.
- 1.4 In collaboration with the Departments of Health, Seniors, and Active Living; and Education and Training, CDS provides policy direction and financial support for the implementation of the Children's Therapy Initiative ("CTI"), which includes children's occupational therapy, physiotherapy, speech and language therapy and audiology services. CTI provides a coordinated approach to the delivery of therapy services so that services for children are maximized. Therapy services are delivered through the regional health authorities, school divisions, and service agencies.

Community Living disABILITY Services

- 1.5 Section 9 of the *The Vulnerable Persons Living with a Mental Disability Act* (the "VPA") authorizes the Minister of Families to provide and arrange support services for vulnerable persons.

Support services provided

9 The minister may provide or arrange for the provision of support services for a vulnerable person.

Definitions

1(1) In this Act,

"**support services**" means those services which may be provided for a vulnerable person under section 9;

"**vulnerable person**" means an adult living with a mental disability¹ who is in need of assistance to meet his or her basic needs with regard to personal care or management of his or her property.

- 1.6 The Minister's authority to provide or arrange for the provision of support services is exercised through the Community Living disABILITY Services ("CLDS") program. Except in the exercise by CLDS of duties pursuant to matters of protection and emergency intervention under Part 3 of the VPA, the provision of support services are voluntary, discretionary and prioritized based on individual need and available resources.
- 1.7 As CLDS services are provided to eligible individuals based on the availability of resources and the priority of need; program eligibility alone does not result in guaranteed service provision. Depending on the assessed needs of the individual, CLDS supports may include: residential services, day services, transportation to and from a day service, respite, crisis intervention and clinical services.
- 1.8 Subsection 11(1) of the VPA provides that an individual plan must be developed for every vulnerable person who receives support services. Through the individual planning process, support services are identified. The vulnerable person, members of that person's support network, and the substitute decision maker or committee (if any) work with a community service worker to identify the person's strengths, needs and dreams for the future. The vulnerable person and the planning team can then begin to determine what services and supports are required. Services may include those provided through Manitoba Families as well as those available in the larger community.
- 1.9 CLDS has recently implemented the Supports Intensity Scale ("SIS) as a standardized assessment tool to assist in the determination of the support needs for program participants, and is now working with an external organization to develop a funding allocation model linking the SIS assessment tool to the CLDS program.
- 1.10 The implementation of the SIS has factored in several important considerations including upholding the principles of the VPA while making responsible fiscal decisions that maximize available resources. The adoption of a standardized assessment tool for all participants requesting CLDS services is critically important to ensure Manitoba creates a transparent, equitable and sustainable program. To date over 3,100 SIS assessments have been completed across the province.
- 1.11 Section 13 of the VPA provides that disputes arise about eligibility for service or about the support services provided to a vulnerable person, Manitoba Families may appoint a mediator to try to settle the dispute. Regardless of whether

¹ Pursuant to subsection 1(1) of the VPA, "**mental disability**" means significantly impaired intellectual functioning existing concurrently with impaired adaptive behaviour and manifested prior to the age of 18 years, but excludes a mental disability due exclusively to a mental disorder as defined in section 1 of *The Mental Health Act*;

"**[M]ental disorder**" is defined in section 1 of *The Mental Health Act* as means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life, but does not include a disorder due exclusively to a mental disability as defined in *The Vulnerable Persons Living with a Mental Disability Act*.

mediation is attempted, a vulnerable person may appeal such disputes to the Social Services Appeal Board (the "SSAB"). Disputes that are not eligible for appeal are those involving increased funding or changes to policy.

Employment and Income Assistance

- 1.12 Adults living with disabilities, regardless of their eligibility for CLDS, may apply to Employment and Income Assistance ("EIA") to determine eligibility to receive financial benefits. The eligibility criteria for enrolment in the EIA (Persons with Disabilities case category) is found in subsection 5(1) of *The Manitoba Assistance Act*, as follows:

Income assistance

5(1) The director shall provide income assistance, in accordance with this Act and the regulations, to or in respect of a person who, in the opinion of the director is a person

- (a) who, by reason of age or by reason of physical or mental ill health, or physical or mental incapacity or disorder that is likely to continue for more than 90 days
 - (i) is unable to earn an income sufficient to meet the basic necessities of himself and his dependants, if any; or
 - (ii) is unable to care for himself and requires to be cared for by another person or in an institution or home for the aged or the infirm;

- 1.13 Schedule A, clause 8(f) of the *Assistance Regulation* (404/88 R) provides participants enrolled in the Persons with Disabilities case category, who are not residing in a hospital, with additional monthly assistance. CLDS participants, persons eligible for Canada Pension Plan-Disability, or persons whose affairs are being administered by the Public Guardian and Trustee are automatically eligible for enrolment in the Persons with Disability case category where EIA financial eligibility is established.
- 1.14 Eligibility under EIA for medical reasons includes medical supports through the program's Disability and Health Supports Unit. These may include diet and nutritional supplements, medical and disability related items, supplies and equipment including but not exclusive to custom orthopedics, wheelchair seating, walker or transfer aids, and incontinence products. EIA may also fund home modifications such as wheelchair ramps, door widening and ceiling tracking depending on the individual's circumstance.

Disability and Health Supports Unit

- 1.15 EIA, CSD, and CLDS program participants may receive additional support for health related supplies, equipment, nutritional or diet supplements based on a diagnosed medical need. The Disability and Health Supports Unit ("DHSU") offers a streamlined, one-stop-shop to help eligible clients access these supports in a consistent, fair and efficient manner. The DHSU reviews and assesses all requests submitted by health professionals on behalf of EIA, CSD, and CLDS program participants. Each program's medical supply and equipment policies and legislation (where applicable) are followed by the DHSU when assessing and approving requests.

2.0 Response to Written Statement of Tyson Sylvester

- 2.1 Unless specifically admitted herein, the Respondent, Manitoba Families, denies the allegations contained in the complaint.
- 2.2 In response to paragraph 3, the Respondent confirms that the Complainant is a 20-year-old man who uses a wheelchair and is severely visually impaired. The Respondent also confirms that the Complainant has cerebral palsy and requires assistance in all aspects of daily living.

- 2.3 In response to paragraph 4, the Respondent confirms that the Complainant has been in receipt of EIA since turning 18 and lives at
- 2.4 In response to paragraph 5, the Respondent notes that in addition to the CDS and CLDS the Department provides support to persons with disabilities through the EIA program.
- 2.6. In response to paragraph 6 and 7, the Respondent submits that the Complainant has conflated the services that are provided by CDS with those provided by the public school system. First, eligibility for CDS ends at age 18. The in-school services provided to the Complainant after he turned 18 would have been provided by the school. Second, "Special Needs Categorical Funding" is provided through the school system and not CDS. Third, services such as the "one-one support" that the Complainant received "during his entire schooling" would have been provided by the school system. Other than medical supplies and equipment, and respite, which are provided by CSD until an individual turns 18 (and by EIA/DHSU afterward) would have been supplied to the Complainant through the educational or health systems.
- 2.7. In response to paragraph 8 and 9, the Respondent has no knowledge regarding "strain" experienced by the Complainant and his mother. If the Complainant has an issue with the services received under the EIA program he may make a complaint to the Fair Practices Office² or to the SSAB, if applicable.
- 2.8 In further response to paragraph 9, the Respondent advises that CDS does not fund screen readers. In all likelihood the screen reader was provided by the Complainant's school. Furthermore, since being an EIA participant the DHSU has provided supports for the Complainant such as a lap tray, cushion, contour back, wheel lock, transfer belt, headrest, ceiling track installation, a big button telephone and a reclining bath chair.
- 2.9 In response to paragraph 10, the Respondent advises that the Society for Manitobans with Disabilities ("SMD") case manager met with the Complainant numerous times over a couple of years to discuss age of majority planning and to complete the needed referrals as the Complainant approached age 18. The SMD case manager estimates that he had contact with the Complainant and/or his family weekly at times and likely met with them in person over 100 times over the five years as the Complainant's case manager.
- 2.10 The Respondent has no knowledge of the Complainants assertions in paragraph 11.
- 2.11 The Respondent takes no issue with paragraph 12.
- 2.12 In response to paragraph 13, the Respondent takes no issue with the Complainants characterization of the DSM IV and the DSM V, except for the statement that the DSM V "does not refer to the IQ test." In fact, IQ tests are used in the DSM V to measure intellectual functioning.
- 2.13. Further to the response above and in response to paragraph 14, as previously noted, the Respondent takes issue that IQ testing is contrary to the VPA's legislative intent. As noted earlier, to receive services and supports under the VPA one must exhibit "significantly impaired intellectual functioning." As noted above, the DSM V provides that IQ tests are used to measure intellectual functioning.

² The Fair Practices Office provides confidential and impartial assistance to Manitobans applying for, or receiving EIA services (among services from other programs). The Office investigates complaints, mediates disputes and makes recommendations on individual cases to program staff based on investigation outcomes. It also helps to identify complaint patterns and makes recommendations to Government on how service delivery and fairness can be improved within the participating programs.

- 2.16 In response to paragraph 15 and 16, the Respondent advises that a more accurate characterization of why the Complainant was deemed to be ineligible for CLDS is that a qualified clinician (registered psychologist) completed testing (WAIS-IV³) and concluded that the Complainant did not present with significant impairments in intellectual functioning. As noted in earlier, in reference to the definition of mental disability, to receive services and supports under the VPA one must exhibit "significantly impaired intellectual functioning."
- 2.17 The Respondent advises that in response to an appeal by the Complainant, the SSAB confirmed the decision of the CLDS program regarding the program's finding of ineligibility.
- 2.18 The Respondent has no knowledge of the Complainant's assertions in paragraphs 17, 18, 19, 20, 21, 22, 23, 24, and 25 denies the validity of the Complainant's allegations in paragraphs 26,27, 28, 29, 30, and 31, in reference to a contravention of *The Human Rights Code*.

3.0 Response to the allegations of Individual and Systemic Discrimination Based on Disability and Age

- 3.1 The Respondent submits that *if* there is merit in the Complainant's allegation of individual and systemic discrimination based on age and disability, there is no contravention of the Human Rights Code (the "Code") given the lack of jurisdiction for the Commission to consider the validity of allegedly discrimination and the operation of the CLDS program as a "special program" pursuant to section 11 of the Code. As such, the Respondent requests that that the Commission dismisses this complaint pursuant to subsection 29(1) of the Code.
- 3.2 The Complainant also that "[he] and other adults with severe physical disabilities find themselves in a legislative and policy gap of services" (paragraph 27). The Respondent submits *if* systemic differential treatment exists then that discrimination is legislatively based⁴ (as the Complainant, himself, argues) and as such **the Commission does not have the jurisdiction to consider the validity of allegedly discriminatory legislation**. The Manitoba Human Rights Commission Board Policy # P-6⁵ (Subject: Jurisdiction – Legislation) provides the following in respect to this submission:

The Code is paramount legislation, which means that it takes precedence over other laws (section 58). The Commission does not however have the power to strike down or declare ineffective a law that does not appear to comply with *The Code*.

The Manitoba Court of Appeal has held that allegedly discriminatory legislation must be challenged through the courts under section 15 of the *Canadian Charter of Rights and Freedoms*. In *Gale Estate v. Hornick* [1997] M.J. No. 154 (C.A.) ("*Gale*"), the Court expressly stated:

[...] Human Rights legislation does not create and does not pretend to create a mechanism to determine the validity of or to strike down allegedly discriminatory provincial legislation. In other words it is not a provincial Charter of Rights and Freedoms with the potential to limit the ability of the legislature to enact laws of general application. [...] [at paragraph 15]

In *Tranchemontagne v. Ontario (Director Disability Support)*, [2006] 1 S.C.R. 513, the Supreme Court of Canada considered *Gale* and clarified that a human rights statute is a quasi-constitutional document:

³ Wechsler Adult Intelligence Scale – Fourth Edition

⁴ Services provided under the VPA to adults with a mental disability

⁵ http://www.manitobahumanrights.ca/publications/policy/policy_jurisdiction_legislation.html

It has been described as quasi-constitutional, and as more important than all others (save for the constitutional laws), but it falls short of being a constitutional document entitling the Tribunal or the Courts to disallow legislation or require changes to it. [at paragraph 36].

Policy # P-6 further provides that although the Commission will not consider the validity of allegedly discriminatory legislation, it will continue to consider whether the actions of any "person" in applying the provisions of any law are discriminatory. In answer, the Respondent submits that there has been no violation of the Code in the application of the VPA. For instance in terms of eligibility assessment, the CLDS program relies on the internationally accepted DSM-V standards in assessing intellectual disability and standardized, individually administered intelligence tests administered by qualified clinicians. Furthermore, as referenced in response to paragraph 22 of the complaint, in situations where individuals are "untestable" then an accommodation is made in that a letter from a qualified clinician (i.e. the school psychologist or other psychologist) confirming significantly impaired intellectual functioning (manifested prior to the age of 18 years) would be sufficient to establish that individual as a "vulnerable person" under the VPA.

- 3.3 Additionally, the Respondent submits that the CLDS program is a "special program" as referred to in section 11 of the Code, and as such the provision of services to adults living with a mental disability who are in need of assistance to meet their basic needs with regard to personal care or management of property, is not to be seen as discrimination. Section 11 of the Code is as follows:

Affirmative action, etc. permitted

11 Notwithstanding any other provision of this Code, it is not discrimination, a contravention of this Code, or an offence under this Code

(a) to make reasonable accommodation for the special needs of an individual or group, if those special needs are based upon any characteristic referred to in subsection 9(2); or

(b) to plan, advertise, adopt or implement an affirmative action program or other special program that

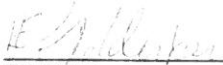
(i) has as its object the amelioration of conditions of disadvantaged individuals or groups, including those who are disadvantaged because of any characteristic referred to in subsection 9(2), and

(ii) achieves or is reasonably likely to achieve that object.

The CLDS program is intended to and does ameliorate the conditions of a distinct set of disadvantaged individuals (as the challenges faced by those with mental disabilities are distinct from those encountered by individuals with physical disabilities). For instance, the existence of the residential services aspect of the CLDS program has led to the de-institutionalization of scores of vulnerable persons from developmental centres⁶.

- 3.4. Given the foregoing, it is respectfully submitted, therefore, that this complaint should be dismissed.

All of which is respectfully submitted this 21st day of October, 2016.


 Eli Goldenberg
 Crown Counsel

⁶ See Complaint of Association For Community Living v. Government of Manitoba (File No. 06 EN 404).