

File Number: 16 EN 234

AMELIA HAMPTON

(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 HEALTH, SENIORS &
ACTIVE LIVING**

1. The Respondent Manitoba Health, Seniors and Active Living ("Manitoba Health") wishes to provide a brief description of Home Care services in Manitoba before responding to the substance of the *Complaint*.
- A. **Home Care Services In Manitoba**
2. Home Care services in Manitoba (hereinafter referred to as "HCS") were established by Manitoba Health in 1974. The purpose of the Program is to supplement the role of family and other informal support networks in providing personal care assistance to individuals in their homes with a view to:
 - (a) Facilitating, if safely and sustainably possible to do so, early hospital discharge; and
 - (b) Deferring, if safely and sustainably possible to do so, entry into long term care facilities.

HCS were not intended to eliminate the role of families in providing personal care assistance to loved ones in the home or to eliminate the role of long term care facilities in providing care to individuals whose needs cannot safely and sustainably be met in their own homes.

3. All Manitoba residents, irrespective of their age or the nature of their disability, are eligible to receive HCS based upon assessed need. The in-home services available include:
 - (a) Personal care services;
 - (b) Meal preparation services;
 - (c) Household maintenance and laundry service;
 - (d) Nursing services;
 - (e) Therapy services;
 - (f) Dialysis;
 - (g) Ostomy services;
 - (h) Nutrition services;
 - (i) Intravenous therapy;
 - (j) Deployment of medical equipment and supplies;
 - (k) Respite care; and
 - (l) Palliative care.

4. In 1997, pursuant to *The Regional Health Authorities Act*,¹ Regional Health Authorities (RHAs) assumed responsibility for the administration and

¹ S.M. 1996, c. 53. *The Regional Health Authorities Act* provides, in pertinent part:

23(1) A regional health authority is responsible for providing for the delivery of and administering health services to meet the health needs in its health region in accordance with this Act and the regulations.

1 In this Act,

"health services" means

operation of HCS. Nevertheless, Manitoba Health continues to maintain policy guidelines in relation to home care services for the purpose of facilitating consistency across all RHAs.

5. Manitoba Health acknowledges that its policy guidelines generally contemplate a service limit of 55 hours of service per week. However, there is also flexibility built into the guidelines, providing for the authorization of a care plan that exceeds the limit in situations involving unique or complex care requirements.² In addition, it should be noted that individuals who feel that the services provided to them are inadequate have a right of appeal to

(c) home care services . . .

- ² In this regard, *Service Level Policy HCS 207.3* provides, in pertinent part:

5.2 In accordance with MHCP goals and in order to address service delivery to home care clients living with unique/complex care requirements, RHAs may authorize a care plan that exceeds the service limit in situations such as (but not limited to):

5.2.1 Short term home care - three (3) months or less

Based on assessed needs, clients may require intense home care services for short periods of time:

- Client is discharged early from an acute care facility and requires care which is normally provided in acute care setting;
- Client requires short term high need care within their existing care plan (e.g. temporary illness);
- Client is in receipt of end of life care/palliative care;
 - Client awaits placement in an alternate care environment and no other care option is available.

5.2.2 Long term home care - over three (3) months

Based on assessed needs, client may require more intense home care services for potentially extended periods of time:

- Facility care is not the most appropriate setting as client is able to self-direct care;
- Client has strong coping skills and is generally engaged in family, work and/or community activities;
- Client requires care above that which can be met in a PCH and who has chronic care conditions resulting in significant care needs (e.g. ventilator dependency).

the Manitoba Health Appeal Board, a statutory appeal body established under *The Health Services Insurance Act*.³ In this regard, *The Health Services Insurance Act* and the *Manitoba Health Appeal Board Regulation*⁴ respectively provide as follows:

The Health Services Insurance Act

Right of appeal

10(1) An appeal may be made to the board by a person

...

(e) prescribed by the regulations as being entitled to appeal to the board.

Manitoba Health Appeal Board Regulation

Appeal re home care services

2 For the purpose of clause 10(1)(e) of the Act, a person who is dissatisfied with a decision of a regional health authority relating to

- (a) the person's eligibility to receive home care services; or
- (b) the level or type of home care services to be provided to the person;

is entitled to appeal the decision to the board.

1 The following definitions apply in this regulation.

...

"home care services" means home care services, as referred to in clause (c) of the definition "health services" in section 1 of *The Regional Health Authorities Act*, that are provided by a regional health authority.

Manitoba Health does not know whether Ms Hampton has applied to either the Respondent the Winnipeg Regional Health Authority and/or the Manitoba Health Appeal Board for a care plan that exceeds 55 hours of service a week.

³ R.S.M. 1987, c. H35. Subsection 9(1) provides:

9(1) The Manitoba Health Appeal Board is established consisting of not less than five members appointed by the Lieutenant Governor in Council.

⁴ Manitoba Regulation 175/2008 (17 November 2008).

B. Response To Written Statement Attached To Complaint Form

6. Manitoba Health has no knowledge of Ms Hampton's individual circumstances, the details of her care provided through home care or the nature of her interactions with the other named Respondents. Consequently, except as hereinafter provided, Manitoba Health is simply not in a position to respond to most of the statements set out in the Written Statement attached to the *Complaint Form*.

C. Manitoba Health's Position On The Merits of The Complaint

7. The specific provision of *The Human Rights Code*⁵ alleged to have been contravened by Manitoba Health is subsection 13(1), which provides:

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.

The *Complaint* also identifies age and physical or mental disability as the characteristics upon which the alleged discrimination is based.

8. It is submitted that the *Complaint* as against Manitoba Health is premised upon its characterization as a service provider relative to the delivery of home care services. As noted above, however, statutory responsibility for the administration and delivery of home care services rests with RHAs. In this regard, it should be noted that RHAs are legal persons in their own right⁶ whose affairs are directed by Boards of Directors.⁷ It is respectfully

⁵ S.M. 1987-88, c. 45.

⁶ Section 11 of *The Regional Health Authorities Act* provides:

Corporate status

11 A regional health authority is a corporation, and, subject to this Act and the regulations, has all the rights, powers and privileges of a natural person of full capacity for the purposes of carrying out and exercising its responsibilities, duties and powers under this Act and the regulations.

⁷ Section 14 of *The Regional Health Authorities Act* provides:

Board of regional health authority

14(1) The management and affairs of a regional health authority established or continued under this Act shall be directed by a board of directors consisting of the

submitted, therefore, that for the purposes of this *Complaint*, Manitoba Health cannot reasonably be regarded as a service provider within the meaning of subsection 13(1) of *The Human Rights Code*. In the alternative, Manitoba Health submits that, in any event, its policy guidelines do not differentiate between individuals on the basis of age or the nature of their disability. More specifically, these guidelines do not contemplate the provision of greater levels of home care service for minors with disabilities or for adults found to be vulnerable persons within the meaning of *The Vulnerable Persons Living With A Mental Disability Act*.⁸

9. Specifically as regards the application of subsection 9(3) of *The Human Rights Code*⁹ to this *Complaint*, it is respectfully observed that subsection 9(3) is an interpretive provision only. It cannot reasonably be interpreted as imposing upon government a substantive obligation to ensure that uniform levels and types of service be made available across all government disability programs because such an interpretation would be inconsistent with section 11 of *The Human Rights Code*, which stipulates:

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

prescribed number of directors who are appointed or elected in accordance with this Act and the regulations.

⁸ S.M. 1993, c. 29.

⁹ Subsection 9(3) of *The Human Rights Code* provides as follows:

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).

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

In other words, from a human rights standpoint, it is lawful to implement targeted special programs or other accommodations that, for example:

- (a) Promote educational opportunities for minor children with disabilities who might otherwise not be able to attend school; and/or
- (b) Are aimed at preventing the institutionalization of vulnerable persons in developmental centres through the provision of residential services in the community.

In addition, it should be noted that there are other services available to Ms Hampton as an adult that would not have been available to her while she was a minor.

10. In the further alternative, it is submitted that the 55-hour service limit referenced in Manitoba Health's policy guidelines is a bona fide and reasonable means of safeguarding the sustainability of home care and the delivery of home care services to as many Manitobans as possible. As noted above, the guidelines, read in context, are flexible enough to accommodate special needs in unique and/or complex cases and the application of said guidelines is subject to oversight by the Manitoba Health Appeal Board.
11. It is respectfully submitted, therefore, that this *Complaint* should be dismissed.

RESPECTFULLY SUBMITTED THIS DAY OF ^{31st} OCTOBER, 2016.

Jayne Kapac
Crown Counsel