MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF: *The Human Rights Code,* C.C.S.M. c. H175

AND IN THE MATTER OF THE HUMAN RIGHTS COMPLAINTS OF:

RONALD FRANKLIN POLLOCK (ON BEHALF OF NATALIE POLLOCK), DOUG GORDON, SUSAN RENARD and DELPHINE KINVIG,

Complainants,

-against-

WINNIPEG CONDOMINIUM CORPORATION NO. 30,

Respondent.

REASONS FOR DECISION

Adjudicator: M. Lynne Harrison

Appearances: Ronald Franklin Pollock (on behalf of Natalie Pollock)
Doug Gordon
Susan Renard
Delphine Kinvig (by telephone)

Sarah Lugtig, Counsel for the Manitoba Human Rights Commission

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Introduction

These proceedings arise out of Complaints filed by the four Complainants, respectively, between December 5, 2006 and August 9, 2007. The Complainants each allege that the Respondent discriminated against them (or in the case of Mr. Pollock, against his sister) in the provision of services relating to the replacement of Windows in their condominium complex, and failed to reasonably accommodate their special needs based on their respective disabilities, contrary to section 13 of *The Human Rights Code,* C.C.S.M. c. H175 (the *"Code").*

On April 28, 2010, in accordance with subsections 32(1) and (2) of the *Code,* I was designated by the Minister of Justice "as a Board of Adjudication, to hear and decide the above Complaints."

The Complainants have raised a number of preliminary issues. The primary issues relate to jurisdiction and, in particular, whether the Manitoba Human Rights Commission (the "Commission") can terminate all proceedings, including the adjudication, after the Complaints have been referred to adjudication, or alternatively, whether the Commission can withdraw from the proceedings. Other issues include a request by some of the Complainants to amend their Complaints to include allegations of reprisal, requests for funding to retain counsel and to pay witness fees and expenses in the event that the Commission withdraws, and various other requests to accommodate the special needs of the Complainants and their witnesses with respect to the adjudication hearing.

At the request of the Complainants, and with the agreement of the Commission and the Respondent, the full day of May 28, 2010 was set aside to deal with preliminary issues on a separate basis.

The hearing with respect to the Complainants' preliminary issues was held in Winnipeg on that date. These are the Reasons for Decision with respect to those preliminary issues.

Facts

Twenty-four Exhibits were filed at the hearing. These included a Statement of Agreed Facts (Ex. 13) which was expressly stated to be entered "for the purposes of the complainants' joint motion dated May 10, 2010 only and not for any other proceeding or purposes, without further consent from all parties."

After some discussion at the beginning of the hearing and between the parties, the parties also agreed to admit a letter from the Commission to the Board of Adjudication and a series of correspondence which had been exchanged between the

Commission and the parties in the two days immediately preceding the hearing. (Exs. 16-19). On behalf of the Commission, Ms Lugtig emphasized, however, that the correspondence was being admitted for information purposes only, and that the Commission was in no way agreeing that the Board of Adjudication has jurisdiction to review the decisions of the Commission, the Commission's Board of Commissioners or its staff.

No *viva voce* evidence was called.

The relevant facts with respect to the preliminary issues may be summarized as follows.

On December 5, 2006, the Complainant Ronald Franklin Pollock filed a human rights complaint on behalf of Natalie Pollock (the "Pollock Complaint"), alleging that the Respondent breached section 13 of the *Code* by failing to reasonably accommodate Ms Pollock's special needs based on her disabilities.

The Respondent, through counsel, filed its Reply on April 17, 2007, disputing the Pollock Complaint and requesting that it be dismissed. The text of the Pollock Complaint and the Respondent's Reply to that Complaint were filed as Exhibit 2.

Further complaints against the Respondent were filed by Susan Renard, and Doug Gordon on May 2, 2007 (the "Renard Complaint' and "Gordon Complaint", respectively) and by Delphine Kinvig on July 17, 2007 (the "Kinvig Complaint'). Each of these Complainants also alleged that the Respondent had discriminated against them and failed to reasonably accommodate their special needs based on their respective disabilities, contrary to section 13 of the *Code.* The Respondent filed Replies to the Renard and Gordon Complaints on July 30, 2007, and to the Kinvig Complaint on August 17, 2007. The texts of the Renard, Gordon and Kinvig Complaints, accompanied by the Replies to each of those Complaints were filed as Exhibits 3, 4 and 5, respectively. Appendices to the Replies to the four Complaints were filed as Exhibit 6.

On October 27, 2008, following investigation of the Complaints, the Chairperson of the Board of Commissioners wrote to the parties to the Pollock, Gordon and Renard Complaints, to advise that the Board had considered their Complaints on October 22, 2008 and passed motions causing mediation to be undertaken pursuant to subsection 29(2) of the *Code.*

Similarly, on February 25, 2009, following investigation of the Kinvig Complaint, the Vice-Chairperson of the Board of Commissioners wrote to Ms Kinvig, to advise that the Board had considered her Complaint on February 18, 2009 and passed a motion causing mediation to be undertaken pursuant to subsection 29(2) of the *Code.*

On October 14, 2009, the Board of Commissioners considered settlement proposals from the Respondent for the Gordon, Pollock and Renard Complaints. Such proposals had been made on July 3, 2009 and the reasonableness of the offers had been discussed in subsequent submissions from the parties. The Board concluded that the offers were not reasonable and determined that the matters be referred to an adjudicator pursuant to clause 29(3)(a) of the *Code,* to hear and decide the Complaints.

On October 16, 2009, the Chairperson of the Board of Commissioners wrote to each of the Complainants and the Respondent, advising them of the Board's decision. In those letters, the Chairperson also stated as follows:

> If the respondent makes a further settlement proposal in any discussions that occur, the matter can again be brought back to the Board of Commissioners to determine if the offer of settlement is reasonable. Should this occur, both parties will be given a fresh opportunity to address the Board in writing on the issue of whether the offer is reasonable and may provide additional relevant information at that time. The Board will then make a fresh determination based on the information before it, Please note that if the respondent proposes an offer of settlement in the adjudication

process that the Commission considers reasonable but you reject the Commission must terminate its proceedings in respect of the complaint pursuant to subsection 29(2) of *The Code.*

On or about October 26, 2009, Ms Lugtig, legal counsel to the Commission, advised Ms Kinvig (who by then resided in British Columbia) by telephone that the Commission would likely be able to cover her travel costs if she was required to attend the hearing as a party to her Complaint, but that Ms Lugtig would require approval for this. Ms Lugtig also told Ms Kinvig that her travel costs would be covered if she was called by the Commission as a witness for the other Complaints. Ms Kinvig asked whether the Complaints could be heard together. Ms Lugtig explained that she would need the agreement of the Respondent and the other Complainants to join the Complaints. Ms Lugtig contacted the Respondent and on November 23, 2009 was advised that the Respondent agreed to one adjudicator.

On December 21, 2009, Ms Lugtig met with all four Complainants to discuss a number of issues. During that meeting, Ms Lugtig indicated, among other things, that the Commission would only cover the witness fees and travel costs of witnesses that the Commission called to put in its case, and that the Complainants would be responsible for paying the fees and expenses of any additional witnesses that they wished to call. Ms Lugtig also advised that the Board of Commissioners had consistently found that it had to terminate proceedings if it found that a respondent's offer was reasonable, even after the matter had been referred to an adjudicator. Ms Lugtig further advised that she had not yet applied to the Justice Department for adjudicators. The Complainants indicated that they were not willing to have one adjudicator appointed to hear all four Complaints.

On January 6, 2010, Ms Lugtig told Ms Kinvig that if the Commission needed to call her as a witness, Ms Lugtig thought that it would have to pay her travel costs.

On January 29, 2010, Ms Renard wrote to counsel for the Respondent, advising her that she authorized Mr. Gordon to act as her representative for the adjudication of her Complaint. (Ex. 24)

On March 1, 2010, the Minister of Justice appointed four different adjudicators to hear the four Complaints.

On March 16, 2010, counsel for the Respondent forwarded written settlement offers for each Complaint to the Commission, and asked that they be forwarded to the respective Complainants. The Respondent further asked that the Board of Commissioners determine whether the offers were reasonable at its next meeting should any or all of the Complainants not accept the offer(s) and that the Commission advise the Complainants of this request.

The offer with respect to the Gordon Complaint contained the following clauses:

3. the above-referenced complaint will be withdrawn.

4. the Condominium Corporation and its Board members in their personal capacities, will agree not to pursue the complainant for his impersonation of the President of the Condominium Corporation with respect to the window project.

5. the parties will exchange mutual Releases with respect to all current and pending claims and potential claims or complaints, in a form acceptable to counsel for the Condominium Corporation.

The offer with respect to the Pollock Complaint contained clauses which were identical to clauses 3 and 5 above, as well as the following:

4. the Condominium Corporation and its Board members in their personal capacities, will agree not to pursue the complainants for defamatory comments which the complainants and/or either of them have made with respect to the Condominium Corporation and its individual Board members.

On March 16, 2010, Ms Lugtig forwarded the offers to the Complainants. In her cover letter, Ms Lugtig advised that if the Complainant did not accept the offer, the Respondent had asked her to place it before the Board of Commissioners at its meeting on April 7, 2010, to determine whether it was reasonable. Ms Lugtig also asked that the Complainants provide, in writing, any further information for the Board to consider on or before March 30, 2010.

On March 30, 2010, each Complainant submitted a written request that the Board of Commissioners adjourn its consideration of the Respondents offer to him or her.

On April 7, 2010, the Board of Commissioners granted one final adjournment to its meeting scheduled for May 26, 2010 and requested that the Complainants provide their written submissions no later than April 27, 2010.

On April 15, 2010, Ms Lugtig met with all four Complainants. At that meeting, she advised the Complainants that if they were to challenge the Board of Commissioners' jurisdiction to terminate proceedings under clause 29(2)(b) after a complaint has been referred for adjudication, the Board would defend its jurisdiction based on the wording of the *Code,* which differs from other jurisdictions. She also advised that the Board would argue, in the alternative, that it may withdraw from the proceedings, leaving the Complainants to pursue the Complaints on their own at their own expense, based on case law which supports that approach in other Canadian jurisdictions. Ms Lugtig forwarded that case law to the Complainants following the meeting.

On or about April 22, 2010, after one of the adjudicators had had to withdraw, the Complainants requested that their Complaints be joined and heard by one adjudicator on the condition that the adjudicator be willing and able to set aside a full day on or near May 28, 2010 to hear preliminary motions prior to the hearing. The date of May 28 had previously been set for a preliminary hearing with respect to one of the Complaints.

On April 27, 2010, each Complainant provided a written submission for the Board of Commissioners.

On April 28, 2010, at the Complainants' request, and with the consent of the existing adjudicators, the Commission and the Respondent, I was designated by the Minister of Justice as a Board of Adjudication, to hear and decide all of the within Complaints jointly.

On May 6, 2010, the parties for all four Complaints were served with a joint Notice of Hearing stating that the hearing would begin on May 28, 2010.

On May 10, 2010, the Complainants submitted a joint Notice of Motion requesting various Orders, to be heard on a preliminary basis.

A Statement of Agreed Facts and Motions Brief of the Complainants were submitted on May 14, 2010. Copies of various authorities to be relied on by the Complainants at the hearing were submitted on May 17, 25 and 27, 2010. A "Time Response Comparison' was also submitted by the Complainants on May 25, 2010.

On May 21, 2010, the Commission submitted its Brief in response to the issues raised in the Complainants' Motion dated May 10, 2010. That same day, counsel for the Respondent advised by email that the Respondent would not be filing a written submission in respect of the May 28, 2010 Motion and agreed with the written submissions filed by the Commission.

As indicated above, a series of correspondence was exchanged between the parties on May 26 and May 27, 2010, and was admitted at the hearing by agreement of the parties for information purposes only.

In the first of those letters, dated May 26, 2010 (Ex. 16), the Chairperson of the Commission advised each of the Complainants that the Board of Commissioners had considered their respective Complaints and determined that the offer of settlement made by the Respondent on March 16, 2010 was reasonable, on the condition that only the Complainant in each case and Ms Pollock would be required to sign a release and that the release would cover only the allegations contained in their respective Complaints. The letters went on to state that:

> If the Respondent does accept the condition, the Commission will advise you and the Adjudicator that it has terminated the proceedings under s 29(2)(b) of the Code and will give you a reasonable period of time to decide whether you wish to accept the offer.

By letters dated May 27, 2010 (Ex. 17), Ms Lugtig advised each Complainant that the Respondent had accepted the condition described in the letter of May 26, 2010. The letters went on to state:

> Please advise me by June 18, 2010, whether you accept the offer as revised by this condition. If you require additional time to respond, please also advise me of this and the reason by that date. If you do not accept the offer or if I do not hear from you by the above-noted date, the Commission will be closing its file.

On May 27, 2010, counsel for the Respondent advised by email (Ex. 18) that she did not plan to attend the hearing on May 28 regarding the outstanding motions by the Complainants and that

> In light of the decision of the Board of Commissioners to terminate the complaints, it would appear that the only issue outstanding is the complainants' *functus* argument. I am confident that Ms. Lugtig will make able submissions on behalf of the Commission on that score, and I doubt that I would be able to add much, if anything, for your consideration.

On May 27, 2010, Ms Lugtig forwarded a letter from the Executive Director of the Commission to the Board of Adjudication (Ex. 19), by email and courier, with copies to all parties, stating that the Commission would be asking that the letter be added to the record for the hearing on May 28. In that letter, the Executive Director stated as follows:

> I am writing to advise you that the proceedings in the above-mentioned complaints have been terminated by the Board of Commissioners in accordance with subsection 29(2)(b) of *The Human Rights Code.* As a result, the complaints will not be proceeding to an adjudication and our files will be closed.

The hearing commenced on May 28, 2010. Each of the Complainants, with the exception of Ms Kinvig, attended the hearing in person and made submissions. Ms Kinvig attended the hearing by conference call and made submissions. Ms Lugtig appeared and made submissions on behalf of the Commission. No one appeared for the Respondent.

As stated previously, there was a considerable amount of discussion at the beginning of the hearing with respect to the exchange of correspondence on May 26 and 27, 2010, and in particular with respect to the June 18 deadline referred to in Exhibit 17 and the reference to the Commission closing its file. I understand that the parties ultimately agreed to an extension of the time within which each Complainant was to advise as to whether he or she accepted the offer, as revised, until two weeks after the decision on this Motion. The hearing of the preliminary motions then proceeded.

Issues

A number of issues were raised by the Complainants in their Notice of Motion to be dealt with on a preliminary basis, and may be stated as follows:

1. Does clause 29(2)(b) of the *Code* require, or alternatively allow, the Commission to terminate all proceedings respecting a complaint including the adjudication of the complaint, where the respondent makes an offer of settlement which the Commission considers reasonable after the complaint has been referred for adjudication?

2. If not, and the Commission decides to withdraw from the proceedings, can the adjudicator require the Commission to continue as a party to the adjudication?

3. If not, can the adjudicator order the Government of Manitoba to fund or provide legal counsel to the Complainants for the adjudication of their Complaints, at no cost to them?

4. Is the Commission required to pay Ms Kinvig's expenses for attending and participating at the hearing of the Complaints?

5. Should the Pollock and Gordon Complaints be amended to include allegations of reprisal?

6. Can Mr. Gordon act as the unpaid agent of Ms Renard in the adjudication?

A variety of procedural issues were also raised by one or more of the Complainants relating to various accommodations for the setting of hearing dates and

the needs of the parties and their witnesses in connection with the adjudication. Finally, the Complainants refer in their Notice of Motion to sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* (the *"Charter,")* and whether their rights under those sections have been or are being contravened.

1. Does clause 29(Z)(b) of the Code require, or alternatively allow, the Commission to terminate all proceedings respecting a complaint, including the adjudication of the complaint, where the respondent makes an offer of settlement which the Commission considers reasonable after the complaint has been referred for adjudication?

To assist in understanding what follows, section 29 of the Code is set out below in its entirety.

Dismissal of complaint

29(1) The Commission shall dismiss a complaint if it is satisfied that

(a) the complaint is frivolous or vexatious; or

(b) the acts or omissions described in the complaint do not contravene this Code; or

(c) the evidence in support of the complaint is insufficient to substantiate the alleged contravention of this Code.

Settlement of complaint

29(2) Where the Commission does not dismiss a complaint under subsection (1), it may cause mediation to be undertaken between the complainant and respondent in an attempt to settle the complaint, and

(a) if the complaint is settled on terms satisfactory to the complainant and respondent, the Commission shall terminate its proceedings in respect of the complaint in accordance with the settlement; or

(b) if the respondent proposes an offer of settlement that the Commission considers reasonable but the complainant rejects, the Commission shall terminate its proceedings in respect of the complaint.

Adjudication or prosecution

29(3) Where a complaint is not disposed of in accordance with subsection (1) or (2) and the Commission is satisfied that additional proceedings in respect of the complaint would further the objectives of this Code or assist the Commission in discharging its responsibilities under this Code, the Commission shall

(a) request the minister to designate a member of the adjudication panel to adjudicate the complaint; or

(b) recommend that the minister commence a prosecution for an alleged contravention of the Code.

Termination of proceedings

29(4) Where a complaint is not disposed of in accordance with subsection (1) or (2) and the Commission does not proceed under clause (3)(a) or (b), the Commission shall terminate its proceedings in respect of the complaint

<u>Position of the Complainants</u>

The Complainants' position is that the Commission may not consider more offers

from the Respondent after the matter has been referred to an adjudicator. Under section 26 of the *Code,* the Commission is to investigate a complaint to the extent it regards "as sufficient for fairly and properly disposing of it in accordance with section 29". Relying on dictionary definitions and various court decisions, the Complainants submitted that "disposing of" a complaint must be interpreted broadly to mean exercising finally one's power of control over, or dealing conclusively with, the complaint. The Commission referred the Complaints to mediation under subsection 29(2) of the *Code* and had the right to consider the Respondent's original offer of settlement. It did so, and rejected it. The Commission then disposed of the Complaints in accordance with clause 29(3)(a) of the *Code,* by asking the minister to designate members of the adjudication panel to adjudicate the Complaints.

Having disposed of the Complaints under clause 29(3)(a), the Commission is *functus officio;* it has no authority to reopen that disposition or to reopen clause 29(2)(b) to consider other offers by the Respondent. The leading case in Canada on *functus officio* with respect to administrative tribunals is *Chandler* v. *Alberta Association of Architects,* [1989] 2 S.C.R. 848 *("Chandler"),* where the Supreme Court of Canada said that the principle of *functus officio* is not to be as strictly applied to administrative tribunals as to courts, and identified exceptions to that principle. None of those exceptions exist here. The Commission made a choice to dispose of these matters as it did, and no one has argued that it acted wrongly or improperly in doing so or that there was a lack of natural justice. None of the cases allow for an exception in these circumstances.

The statute is very clear, There is no ambiguity and no need to interpret it. The Complaints are now in the hands of the adjudicator. The Commission has absolutely no adjudicative duties left. In accordance with section 34 of the *Code*, the Commission is now only a party to the adjudication.

The Complainants also raised issues of bias and fairness. They submitted that there is true bias in these circumstances, that the Commission's position that it can be a party in the adjudication, for and against the Complainants on different issues, and still be a judge of the matter in clause 29(2)(b) is untenable. In the Complainants' submission, the appearance of bias would be assumed by reasonable members of the public. The Complainants (as parties) have a right to oppose actions of the Commission (as a party) without having to worry that the Commission (acting in a judge like function) will terminate the Complaints, or withdraw from the adjudication, and leave the Complainants stranded with no funding to complete the adjudication.

The Commission and the Complainants are supposed to be "on the same team", and it is not fair for the Commission to all of a sudden become an adversary when a point of jurisdiction is raised, and to then terminate the Complaints. It is important that the Commission be "on board" to assist in advancing these matters through the adjudication, as it would be much more difficult for the Complainants to proceed on their own.

Position of the Commission

The Commission's position is that this issue basically involves a question of statutory interpretation. It is not a simple question and has not been dealt with by the courts or adjudicators in Manitoba. The Commission cautioned against the Complainants' approach, which focuses on the wording in the statute and does not appreciate that Canadian courts apply the modern principle of statutory interpretation. The modern approach requires a more contextual and purposive interpretation of statutory provisions. Applying that approach, it is clear that the legislature intended clause 29(2)(b) to apply both before and after a complaint has been referred to an adjudicator.

Counsel for the Commission submitted that to understand clause 29(2)(b), the overall scheme of the *Code,* the human rights complaint process and the Commission's

and adjudicators' roles in the process must be considered. The Commission is the provincial regulatory agency constituted under the *Code* that is responsible for the enforcement of human rights and the prevention of discriminatory practices. Section 29, when read as a whole, indicates that the Commission's proceedings, which must be terminated if faced with a reasonable offer from the respondent, are intended to include adjudications once a referral has been made to an adjudicator. The process under section 29 includes a series of decisions that the Commission may take in disposing of a complaint. It is complicated and multi-faceted, but works well and assists the Commission in fulfilling its responsibilities. Under subsection 29(3), the Commission refers a complaint to adjudication as long as this will further the fulfillment of its responsibilities. Subsection 29(3) describes an adjudication as "additional proceedings in respect of the complaint", to "assist the Commission in discharging its responsibilities under this *Code*". (Commission's emphasis) Nothing in the *Code* indicates that the Commission's proceedings are intended to exclude adjudications.
It was submitted that other sections, such as section 39, which refer to the duty of an adjudicator to conduct a hearing, cannot mean that the legislature intended the adjudicator to hold a hearing on the merits of the complaint in every case. Moreover, the adjudicator's jurisdiction under that section and under section 42 is expressly limited by the other sections of the *Code,* which would include clause 29(2)(b).

With respect to the principle of *functus officio,* the Commission submitted that Canadian courts do not apply that principle strictly to administrative agencies and tribunals. In other jurisdictions with similar statutory schemes, courts have ruled that a human rights commission may reconsider a decision disposing of a human rights complaint to ensure justice to the parties or otherwise properly fulfill its responsibilities under its enabling legislation. The jurisdiction is an equitable one that overrides a strict application of the *functus officio* doctrine and does not require express authority in the enabling legislation. Commission counsel acknowledged that a different result had been reached in a couple of decisions, but argued that those decisions are distinguishable based on, among other things, differences in the relevant statutes.

The Commission submitted that the Complainants have not properly articulated the relevant test for bias. The Complainants' allegation is one of institutional bias. The test therefore is whether a well-informed person, viewing the matter realistically and practically, would have a reasonable apprehension of bias in a substantial number of cases. The Complainants have not met that test. They have misconceived the Commission's role at an adjudication, where it does not participate as a party in its own interest but rather in the public's interest, with a view to ensuring that the objectives of the *Code* and its responsibilities under the *Code* are fulfilled.

The Commission also referred to the historical context as supporting its interpretation that clause 29(2)(b) applies at the adjudication stage. There was no authority in the former Act to terminate proceedings based on a reasonable but rejected offer, nor were the provisions conferring jurisdiction on the board of adjudication made subject to the other provisions of that Act. While the Legislative Debates did not specifically address the intention behind clause 29(2)(b), they indicated the values underlying the new legislation, as shared values of fairness and equality and the rejection of discrimination in a democratic society, and noted that new provisions were also included to strengthen the fairness of the legislation.

Clause 29(2)(b) was evidently among the new provisions aimed at increasing fairness. The Complainants' approach, however, would allow complainants to force a hearing to proceed in the face of a reasonable settlement offer from the respondent. This would seem unfair to the respondent and disregard the public's interest in a fair and efficient human rights enforcement system. Unlike in some jurisdictions, an adjudicator in Manitoba has no jurisdiction to terminate the adjudication on the basis of a reasonable offer by the respondent. Only the Commission is entrusted with this function, which is exceedingly important and must not be limited unnecessarily.

The Commission concluded that the Complainants' approach seriously undermines the legislature's objective with little added benefit for complainants or for

the public's interest in remedying and preventing discrimination, while the Commission's approach achieves a much more effective balance of the legislature's objectives of remedying and preventing discrimination, educating Manitobans about their rights and responsibilities under the *Code,* and ensuring fairness in its enforcement.

The Commission therefore requested a ruling that an adjudicator under the *Code* may not• continue an adjudication if the Commission has terminated proceedings under clause 29(2)(b), adding that this is the only result that accords with the wording of the provision read in light of its legislative and historical context and the expressed intentions of the legislature.

Discussion and Analysis

The Supreme Court of Canada has clearly stated that legislation must be interpreted in accordance with the "modern principle" of statutory interpretation. That principle, as set out in Driedger's *Corisfruction of Statutes* (2 ed., 1983) and quoted by the Supreme Court in *Canada (House of Commons) v*. *Vaid,* [2005] 1 S.C.R. 667, 2005 SCC 30 *("Vaid"),* at paragraph 80, states as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

In *Vaid,* the Court added that this approach is reinforced by section 12 of the federal *Interpretation Act.* The Manitoba equivalent of that section is section 6 of *The Interpretation Act,* C.C.S.M. c. 180, which states that "[e]very Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects." The Court went on in *Vaid* to state that "[s]uch interpretative principles apply with special force in the application of human rights laws."

This approach to statutory interpretation does not, of course, permit rewriting or ignoring the words of the legislation. The legislation must be given a liberal and purposive interpretation, without reading limiting words out of the statute or circumventing the intention of the legislature.

Under the *Code,* the Commission is responsible for accepting and investigating complaints and "disposing of" them in accordance with section 29. Subsection 22(1) thus provides that any person may file a complaint with the Commission alleging that another person has contravened the *Code.* Section 26 states that as soon as reasonably possible, the complaint must be investigated "to the extent the Commission regards as sufficient for fairly and properly disposing of it in accordance with section 29." Under section 28, the complainant and the respondent have a right to be informed of, and to respond to, the findings of the investigation after it has been completed and "prior to disposition of the complaint in accordance with section 29".

Section 29 then sets out a series of steps which the Commission must or may take in disposing of a complaint once its investigation has been completed. Subsection 29(1) provides that the Commission must dismiss a complaint in certain threshold circumstances, i.e., where it is satisfied that the complaint is frivolous or vexatious, fails to identify a contravention of the *Code* or is based on insufficient evidence. Subsection 29(2) provides that where the Commission does not dismiss a complaint under subsection (1), it may cause mediation to be undertaken in an attempt to settle the complaint and must "terminate its proceedings in respect of the complaint' if the complaint is settled on terms satisfactory to the complainant and respondent (clause 29(2)(a)) or if the respondent proposes an offer of settlement that the Commission considers reasonable but the complainant rejects (clause 29(2)(b)). Subsection 29(3) provides that where "a complaint is not disposed of in accordance with subsection (1) or (2) and the Commission is satisfied that additional proceedings in respect of the complaint would further the objectives of the *Code* or assist the Commission in discharging its responsibilities under the *Code*", the Commission must "request the

minister to designate a member of the adjudication panel to adjudicate the complaint" (clause 29(3)(a)) or recommend that the minister commence a prosecution (clause 29(3)(b)). Where a complaint is not disposed of in accordance with subsection (1) or (2) and the Commission does not proceed under subsection (3), the Commission must terminate its proceedings in respect of the complaint, pursuant to subsection 29(4).

Subsection 32(1) provides that as soon as reasonably possible after receiving a request from the Commission under clause 29(3)(a), the minister is required to designate a member of the adjudication panel "to hold a hearing and decide the validity of the complaint". Under subsection 39(1), the adjudicator must then "convene and complete the hearing without undue delay".

In this instance, the Commission did not dismiss any of the Complaints on a threshold basis under subsection 29(1). It referred them to mediation. Having done so, it did not subsequently terminate them under subsection 29(2) based on a settlement or the settlement offer originally made by the Respondent. It therefore proceeded to the next step, and under clause 29(3)(a), requested the designation of adjudicators to adjudicate each of the Complaints. Adjudicators were accordingly designated by the Minister of Justice. There would appear to be no dispute that the Commissions requests for the designation of adjudicators constituted a disposition in accordance with section 29. What is in dispute is the nature or effect of such a disposition.

The Complainants placed considerable reliance on the principle of *functus officio,* arguing that the Commission's disposition of the Complaints was final, that it had no authority to reopen or revisit that decision. The Commission responded that *functus officio* is applied less strictly to administrative agencies and tribunals, and that a human rights commission may reconsider a decision disposing of a human rights complaint to ensure justice to the parties or otherwise properly fulfill its responsibilities under its enabling legislation, without express authority to do so in the enabling legislation.

The Supreme Court of Canada has drawn a distinction between the application

of *functus officio* to the final decision of a court, which is based on a reluctance to amend or reopen formal judgments, and the application of that principle before administrative tribunals, which is based on the policy ground favouring finality of proceedings. In *Chandler, supra,* at pages 861 to 862 (S.C.R.), Mr. Justice Sopinka stated that:

> …there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, *once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances, it can only do so if authorized by statute or* if there has been a slip [in drawing up the decision] or error [in expressing the manifest intention]…
>
> To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation.
>
> …

> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. *If however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it* to *reopen proceedings to make another or further selection.* Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute….
>
> (Emphasis added)

Chandler and the principle of *functus officio* were referred to in several human rights decisions which were filed by the Commission. In support of its position, the Commission relied on the decisions in *Zutter v. British Columbia (Council of Human Rights),* [1995] B.C.J. No. 626 (C.A.) *("Zutter,"),* application for leave to appeal dismissed, [1995] S.C.C.A. No. 243, and *Kleysen Transport Ltd. v. Hunter,* 2004 FC 1413 (T.D.) *("Kleysen").*

In *Zutter,* the issue was whether the British Columbia Council of Human Rights had the jurisdiction to re-open a complaint which had been discontinued under B.C.'s *Human Rights Act.* In the course of the investigation into that complaint, Zutter instructed his solicitor to file a written response to the investigation report. The council decided to discontinue the complaint. Zutter was not notified of the decision until two months later, at which time he discovered that the council had not received any written response from his solicitor. The council denied two requests to re-open the matter, stating that it did not have the statutory authority to reconsider its decision and that the required standard of procedural fairness had been met.

An appeal was ultimately taken to the B.C. Court of Appeal, which found that

"nothing which the law recognized as a breach of procedural fairness arose as a result of the unfortunate series of events which ultimately deprived Zutter of the opportunity to present evidence and make submissions", but that from the point of view of Zutter and of any reasonable person the result to him was clearly unfair. The Court recognized the broad purposes of human rights legislation and stated that "it would be an unfortunate irony if the Council, whose very existence and remedial purpose is characterized by the fundamental values of fairness and justice, nonetheless lacked the jurisdiction to remedy that unfairness." (para. 23)

One of the arguments advanced by the respondents in *Zutter* was based on section 15 of the B.C. Act, which provided, in part, that "where proceedings are discontinued or the complaint is dismissed, no further proceedings under this Act shall be taken in relation to the subject matter of the discontinued proceedings or the dismissed complaint". The Court found that it seemed appropriate to confine the scope of the prohibition in section 15 "to new or fresh proceedings, i.e. further complaints, brought in respect of the same 'subject matter', rather than to construe it as additionally stifling the power to *reconsider* a decision or order made in the same proceedings, where it appears . . . that *considerations relating to the fairness of those very proceedings requires some reconsideration"* (emphasis added). The Court stated that when section 15 is so interpreted, there is sufficient indication in the Act that such a decision or order can be re-opened when, in the opinion of the council which made it, the interests of justice and fairness in relation to the proceedings themselves require the re-opening. The Court went on to state that while this jurisdiction would not be subservient to the policy of *functus officio,* that policy would govern the manner in which the jurisdiction to reconsider was exercised by the council, thereby ensuring its restrictive application, just as the power of the Court to admit fresh evidence is carefully and restrictively exercised in deference to the same policy: The Court concluded, therefore, that the council had jurisdiction to reconsider its decision to discontinue Zutter's complaints "in the circumstances of this case".

In *Kleysen,* the Canadian Human Rights Commission had accepted the

investigator's recommendation and dismissed Mr. Hunter's complaint. In doing so however, it had failed to consider written submissions filed by Mr. Hunter. The commission subsequently reconsidered the complaint, and referred it to a conciliator. After conciliation failed, it referred the complaint to a tribunal for a hearing.

On judicial review, Kleysen argued that the commission made a final decision in dismissing the complaint, and had no authority to reconsider or to make any of the subsequent decisions relating to it. The Federal Court found that although there was nothing specific in the *Canadian Human Rights Act* that gave the commission the power to reconsider its decisions, the commission had a "very broad discretion to screen and process complaints" (para. 8). The Court concluded that considering its role and function and its wide discretion over the handling of complaints, the commission had "the power to reconsider a complaint in order to be fair to the parties before it." (para. 13) The commission therefore had the power to reconsider its decision to dismiss the complaint.

Kleysen further argued that if the commission had the power to reconsider a decision, the commission had to treat the parties fairly when doing so, and that it had not been treated fairly. The Court identified a number of serious problems, including that the commission's subsequent decision to refer the complaint to a tribunal was made on the basis of an incomplete record, as it did not have before it some of the materials it had previously considered. In addition, the commission had before it confidential information from the conciliation process which it should not have had. The Court concluded that Kleysen had in fact been treated unfairly and returned the matter to the commission for reconsideration based on the record that should have been before it.

In my view, the *Zutter* and *K!eysen* decisions involve significantly different factual situations, and are distinguishable from the instant case.

Among other things, both *Zutter* and *Kleysen* involved the reconsideration of previous decisions where the fairness of those previous decisions was at issue. In those

cases, the previous decisions had been made based on an incomplete record or in the absence of evidence and for submissions.

That is not the situation in this case. The Commission made it clear in its submission that what is involved here is *not* a reconsideration of its original decision, where it concluded that the Respondent's settlement proposal was unacceptable and determined that the matter be referred to an adjudicator, but a subsequent decision based on a new settlement proposal from the Respondent.

As indicated above, the Commission provided two decisions in which the courts reached a different result than in *Zutter* and *Kieysen,* but submitted that these decisions ought not to be relied upon.

The first of these decisions was that of the Ontario Court of Appeal in *Mckenzie Forest Products Inc. v*. *Ontario Human Rights Commission and Tilberg,* 2000 O.J. No. 1318 (C.A.) ("Tilberg"), leave to appeal refused [2000] S.C.C.A. No. 285. In that case, the Ontario Human Rights Commission had referred Mr. Tilberg's complaint of discrimination to a board of inquiry. A mediation was held, and a second mediation date was scheduled. Prior to that date, the commission informed the board of inquiry, the complainant and the respondent that it had decided that it would "no longer participate" in the hearing before the board, and that Mr. Tilberg was aware of his right to proceed with the matter on his own. The respondent moved before the board of inquiry for an order dismissing Mr. Tilberg's complaint on the basis that the commission had withdrawn and "relinquished carriage of the matters" leaving the board of inquiry "without jurisdiction to entertain the matters". The board of inquiry ruled that it had retained jurisdiction and would continue with the hearing of the complaint.

An application by the respondent for judicial review was granted, and there was an appeal from that decision to the Ontario Court of Appeal. In its decision, the Court of Appeal found that:

1. The complainant has an independent status as a party before the board of inquiry. The legislation does not establish a hierarchy of interests in its protection of human rights; it seeks to protect both the interests of a complainant and those of society as a whole;

2. Once the commission exercises its discretion to refer a complaint to the board of inquiry, its role fundamentally changes. It no longer acts as an investigative and screening body, but becomes part of the proceeding. The determination of the complaint then becomes the responsibility of the board of inquiry. The commission has a responsibility to advocate its view of the public interest, and may also advocate for the interests of the complainant. Its role as a party to the proceeding cannot derogate from the independent status of a complainant;

3. A board of inquiry is an autonomous tribunal which is not only independent but must also appear to be independent;

4. The board of inquiry did not lose its jurisdiction to continue with the hearing of the complaint when the commission decided not to participate further in the proceedings. Once a complaint has been referred to the board of inquiry, there is no provision in the Code which limits the board's obligation to conduct a hearing into a complaint. It is not unreasonable for the commission to withdraw from participating in the hearing when its public interest mandate has been satisfied. The commission's having "carriage of the complaint" should relate to procedure and not to substantive rights. An interpretation of the Code that would not allow the complainant to proceed in the absence of the commission is inconsistent with both the independent party status accorded the complainant in the proceedings and the board of inquiry's independent status and duty to hold a hearing.

The Court of Appeal therefore allowed the appeal and sent the matter back to the board of inquiry for a further hearing.

The other decision referred to by the Commission was *Canadian Museum of Civilization Corporation* v. *Public Service Alliance of Canada,* 2006 FC 703 (T.D.) *("CMCC').* In that case, following investigation and a failure to reach a settlement by conciliation, the Canadian Human Rights Commission referred a complaint by the Public Service Alliance of Canada ("PSAC") to the Canadian Human Rights Tribunal. On reviewing additional materials and the report of a new expert retained by the commission, the commission concluded that the evidence did not support the complaint and stated that it would not be seeking any remedy before the tribunal. The respondent requested that the commission immediately withdraw the complaint from the tribunal, and brought an application for judicial review, challenging the commission's refusal to do so.

The Federal Court found that in order to overcome the principle of *functus officio,* the respondent would have to show a clear statutory power for the commission to withdraw the complaint following referral. The commission's final decision was to refer the matter to the tribunal. Subject to judicial review quashing that decision or statutory authority permitting the commission to reconsider its decision, the commission was *functus* with respect to making a decision in the performance of its screening role under the Act. The principle of *functus officio* and the lack of a statutory power to reconsider a referral decision negated the submission that the commission should have decided again, after referral, whether the evidence was sufficient to warrant a continuation of the tribunal inquiry. It also undercut the notion that the commission has a "continuing duty" to screen complaints after referral.

Further, even if the commission were to withdraw itself as a party in that case, PSAC could continue to push forward with its complaint. Finding that the commission could unilaterally withdraw the complaint would clearly interfere with PSAC's right to

pursue its own interests as a party before the tribunal. It was PSAC's, not the commission's, complaint. The Court concluded that under the *Canadian Human Rights Act,* the commission does not have the statutory authority to unilaterally withdraw a complaint that is before the tribunal, nor an obligation to do so.

In my view, the circumstances in the *Tilberg* and *CMCC* cases more closely resemble those in the instant case. In those cases, after complaints had been referred to adjudication, the human rights commission decided not to participate in the hearing or seek any remedy before the tribunal. In both cases, it was found that the human rights commission was neither obliged nor entitled under the applicable legislation to withdraw a complaint which had been referred to adjudication, and that the respective tribunals had jurisdiction to continue with the hearing .of the complaints after the commissions had decided to withdraw from the adjudication.

In Manitoba, pursuant to subsection 2(1) of the *Code,* the Commission is continued "as an independent agency with the responsibilities assigned to it under this Code and any other Act of the Legislature." The Commission is a statutory body. As such, it has only such jurisdiction as is conferred on it by statute. It may not exercise authority not specifically assigned to it.

There is no wording in section 29 or any other provision of the *Code* which expressly requires or authorizes the Commission to terminate or dismiss a complaint after it has been referred to adjudication.

Nor, in my view, does section 29, read in its entirety and in the context of the other provisions and the scheme and purpose of the *Code,* indicate that the legislature intended that the Commission would retain any authority under clause 29(2)(b) (i.e., that it would be required or authorized to unilaterally terminate or dismiss a complaint under that clause) after the complaint had been referred to adjudication under subsection 29(3).

In my view, section 29 sets out a series or sequence of steps to be taken by the Commission as it moves forward in processing a complaint. I do not understand that section to indicate in any way that the Commission can go backwards, and revisit or reconsider a decision or disposition that it has made under a previous subsection, once it has moved on to the next step in the process.

Thus, for example, subsection 29(1) provides for the dismissal of a complaint on various threshold grounds. Subsection 29(2) provides that "[w]here the Commission does not dismiss a complaint under subsection (1)", it may cause mediation to be undertaken . . . ." It would not make sense, in my view, to interpret the wording of subsection 29(2) as in some way leaving it open for the Commission to go back and dismiss a complaint on threshold grounds under subsection (1) (such as on the grounds that it is frivolous and vexatious), once it has caused mediation to be undertaken. To refer a complaint to mediation, while retaining the option of dismissing it on threshold grounds, would not only be contrary to the interests of the persons involved and the public, but also a waste of resources, and cannot be what was intended. The opening wording of subsections 29(3) and (4) is similar to that in subsection (2), and in my view, must similarly be interpreted as indicating that the Commission has no authority to go back and rely on previous subsections, and in particular to go back and terminate a complaint under clause 29(2)(b), once it has referred the complaint to adjudication under clause 29(3)(a).

The Commission has submitted, however, that section 29, when read as a whole, indicates that the Commission's proceedings are intended to include adjudications. I do not agree.

Clause 29(2)(b) refers to the Commission terminating 'its proceedings" in respect of a complaint, as follows:

…if the respondent proposes an offer of settlement that the Commission

considers reasonable but the complainant rejects, the Commission shall terminate *its proceedings in respect of the complaint.*

(Emphasis added)

Subsection 29(3) refers to "additional proceedings" in respect of the complaint, and reads:

29(3) Where a complaint is not disposed of in accordance with subsection (1) or (2) and the Commission is satisfied that *additional proceedings in respect of the complaint* would further the objectives of this Code *or* assist the Commission in discharging its responsibilities under this Code, the Commission shall

(a) request the minister to designate a member of the adjudication panel to adjudicate the complaint; or
(b) recommend that the minister commence a prosecution for an alleged contravention of the Code.

(Emphasis added)

In my view, the phrase "additional proceedings" in subsection 29(3), consisting of either an adjudication or prosecution, refers to other proceedings, which are, and are intended to be, separate and distinct from the "Commission's proceedings".

I note that the Commission asserted that the adjudication is described in subsection 29(3) as additional proceedings to "assist the Commission in discharging its responsibilities". That latter phrase, however, is preceded by the word "or", and more fully refers to additional proceedings which "would further the objectives of this Code *or* assist the Commission in discharging its responsibilities under this Code" (emphasis added). The Commission has a number of different responsibilities under the *Code,* and I do not believe that such general wording is in any way intended to indicate that the particular duties or responsibilities assigned to the Commission under section 29 would

continue to apply or could be revisited after the Commission has disposed of the complaints under that section.

It is not a matter, as the Commission suggested in its written Brief, of whether the *Code* indicates that the Commission's proceedings are intended to *exclude* adjudications. Rather, it is whether the *Code* indicates that the Commission's proceedings are intended to *include* adjudications. In my view, it does not. Much stronger or more specific wording would be required if that was what the legislature intended. Adjudications (and presumably also prosecutions) are not simply there to assist the Commission or to be used by the Commission as it sees fit. In other words, I do not agree that this wording indicates that the legislature intended that an adjudication (or prosecution) would be included as part of, or subordinated to, the Commission's proceedings.

Nor, in my view, do other sections of the *Code* support such an interpretation of section 29 of the *Code.*

In this regard, subsection 32(1) requires the minister, on receiving a request under clause 29(3)(b), to designate an adjudicator to hear and determine the validity of the complaint. Subsection 39(1) requires the adjudicator to convene and complete the hearing of the complaint. These provisions are mandatory. There is nothing in these sections (or in any other provisions or wording in the *Code)* which limits the adjudicator's power or responsibility to hear and decide the complaint by making it subject to section 29 of the *Code.*

Adjudicators are members of the adjudication panel who have been appointed to that panel by the Lieutenant Governor in Council under section 8 of the *Code.* Subsection 8(2) of the *Code* expressly states that members of the Commission are ineligible to be appointed to the adjudication panel. Subsection 32(3) prohibits the minister from designating a member of the adjudication panel to adjudicate a complaint if that member has participated in any capacity in the prior investigation or disposition of

the complaint. In my view, these provisions indicate a clear intention on the part of the legislature that the investigative and adjudicative stages be kept separate, and that adjudicators be and are to be seen to be independent of the Commission. There is nothing in the *Code* which would indicate that the legislature intended that an adjudicator would have anything less than a high degree of independence.

An interpretation of the *Code* which would allow the Commission to unilaterally terminate the adjudication, at presumably any time prior to its completion, would be inconsistent with the independent status and statutory duty of an adjudicator to adjudicate the complaint.

Furthermore, section 34 of the *Code* expressly identifies who is to be a party to an adjudication, as follows:

The parties to an adjudication under this Code are

(a) the Commission, which shall have carriage of the complaint
(b) the complainant;
(c) any person, other than the complainant named in the complaint and alleged to have been dealt with in contravention of this Code;
(d) the respondent; and
(e) any other person added as a party under section 24 or section 40.

Pursuant to that section, not only the Commission, but also the complainant and the respondent, are parties to the adjudication in their own right.

Subsection 39(4) further specifies that each of these parties is entitled to participate in the hearing, and reads as follows:

The adjudicator shall give every party attending the hearing a full

opportunity to present evidence and make submissions, and to be represented by counsel for those purposes.

Again, there is nothing to indicate or suggest that these rights are subject to any continuing power of the Commission to terminate the adjudication under clause 29(2)(b) of the *Code.* An interpretation of the *Code* which would allow the Commission to terminate the adjudication under clause 29(2)(b) over the objection of the complainants in any case, would surely be inconsistent with the independent party status of the complainants and their rights of participation at the hearing pursuant to sections 34 and 39(4) of the *Code.*

The functions which the Commission performs in terms of investigating complaints, then "disposing of" them pursuant to section 29 of the *Code,* are the types of functions which have been referred to in various authorities (including the *Kleysen, Tifberg* and *CMCC* decisions) as screening or gatekeeper functions. The Commission is obligated under the *Code* to accept and investigate complaints which are filed with it. Having done so, it then screens the complaints under section 29, determining how they are to be disposed of under that section, including whether they are to be referred to adjudication or prosecution under subsection 29(3). In my view, in determining that a complaint is to be referred to adjudication, the Commission makes a final determination and disposition, the effect of which is that its role and responsibilities under section 29 are thereby exhausted.

The complaints then move on to the adjudication stage. At that stage, under section 34, the Commission assumes the role and responsibilities of a party to the adjudication.

A number of other provisions and arguments were relied on and advanced by the Commission as supporting its position on this issue.

It was thus submitted that the Commission is the agency responsible for the

enforcement of human rights and the prevention of discriminatory practices. No particular provision of the *Code* was referred to in support of this submission. I do note that subsection 6(1) states that the Commission is responsible to the Minister for the administration of this Code, but also states that this is "[s]ubject to the powers and responsibilities expressly vested in other authorities by this Code". As indicated above, it is my view that the power and responsibility for deciding the complaint are expressly vested in the adjudicator once the complaint is referred to adjudication; the Commission's responsibility at that stage is as a party as set out in section 34.

The Commission also pointed to section 31 as supporting its position that the proceedings referred to in section 29 are intended to indicate the overall processing of a complaint under the Code. Section 31 provides that if the Commission determines that either party to a settlement has failed to comply with the settlement terms, "notwithstanding clause 29(2)(a)", the Commission may reopen "the proceedings" and proceed under section 29 as if no settlement had been reached. I do not agree that section 31 supports the Commission's position. On the contrary, in my view, its reference to clause 29(2)(a) must be interpreted as referring to the settlement of a complaint *before* it has been referred to adjudication, since reopening the proceedings and proceeding under section 29 would involve determining whether the complaint is to be referred for adjudication or prosecution under subsection 29(3) or terminated under subsection 29(4).

Even if section 31 could be interpreted as applying to a settlement of a complaint after it has been referred to adjudication, the fact that a specific provision was considered necessary to allow the Commission to reopen proceedings in these particular circumstances (i.e., after a complaint has been settled under clause 29(2)(a) but the settlement has failed), and that this is the only such provision, indicates in my view that the legislature did not intend that the Commission could revisit or reopen proceedings in other circumstances where it has disposed of a complaint, and in particular, once it has disposed of a complaint by referring it to the minister for the designation of an adjudicator under clause 29(3)(a).

The Commission also argued that provisions such as section 39, which refer to the duty of an adjudicator to conduct a hearing, cannot mean that the legislature intended that the adjudicator must hold a hearing on the merits in every case which is referred to adjudication. Otherwise, it was suggested, the parties could not agree to settle a complaint and an adjudicator could not refuse to hear a complaint that gives rise to an abuse of process or is outside the adjudicator's jurisdiction.

The Commission's position on this point, as I understand it, is that to interpret these sections as requiring an adjudicator to hold a hearing on the merits in each case makes no sense. The legislature must therefore have intended that the Commission would continue to have jurisdiction to deal with such matters after a complaint has been referred to adjudication, including to consider further settlement offers from a respondent.

In advancing this argument, the Commission appears to focus on particular sections in isolation, without taking into account other provisions of the *Code.* Among these is subsection 43(5), which provides that an adjudicator "may, at any time and with the consent of the parties to the adjudication, make any order that the parties agree to, and thereafter the parties are bound by the order." Thus, for example, if all of the parties to an adjudication agree to settle or withdraw a complaint, the adjudicator may presumably make a consent order consistent with what the parties have agreed upon. As for a complaint which gives rise to an abuse of process, I would expect that the answer to this might at least partly lie in the gatekeeper functions performed by the Commission prior to the complaint even being referred to adjudication, where cases would generally be screened out before they are referred to the minister, and in the adjudicator's power to control the procedures to be used at the hearing. With respect to the issue of jurisdiction, an adjudicator cannot hear and decide a matter which is beyond his or her jurisdiction. An issue as to whether a matter is within the adjudicator's jurisdiction or not can be dealt with at the beginning of the hearing or, as in this case, on a preliminary basis.

In short, I do not interpret the *Code* as necessarily requiring an adjudicator to hold a hearing on the merits in each case. In any event, even if the provisions of the *Code* were interpreted as requiring a hearing on the merits in each case which is referred to adjudication, I do not agree that such an interpretation would make no sense, or would be a proper basis for inferring that the Commission must continue to have the power to unilaterally settle a complaint under clause 29(2)(b).

The Commission has submitted that the adjudicator has no jurisdiction under the *Code* to terminate the adjudication on the basis of a reasonable offer by a respondent which is not acceptable to the complainant. That issue, of course, is not before me. I may assume, without deciding, that that is the case. The Commission goes on to state that only the Commission is entrusted with this very important role in our province, which is an exceedingly important function and must not be limited unnecessarily. That does not necessarily follow.

If the legislature considered it so exceedingly important for the Commission to perform such a function after a complaint has been referred to adjudication, it would surely have expressly said so. There is no provision which states that the Commission may or must perform such a function at this stage of the proceedings. Further, I do not believe that such jurisdiction on the part of the Commission can be inferred based on the adjudicator's presumed lack of jurisdiction in this regard. In my view, the legislature did not intend such extraordinary relief to be available to the Commission at the adjudication stage. This is not a matter of limiting the Commission's role unnecessarily. Rather, it is my view that to accept the Commission's position on this point would be to expand its role in this regard far beyond what the legislature provided and intended.

It was suggested that the Complainants' approach would allow any complainant to refuse to resolve a complaint and force the respondent, Commission and adjudicator to go through the considerable time and expense of a public hearing, only to arrive at approximately the same relief as had been offered, and that this not only seems quite

unfair to the respondent but also disregards the public's interest in a fair and efficient human rights enforcement system.

There is, however, nothing preventing a respondent from advancing whatever offer or offers it may wish to make, and the Commission dealing with those offers under subsection 29(2), at any time up until the Commission refers a complaint to the minister under subsection 29(3). Presumably the same offer could be made prior to the complaint being referred to the minister, and if it was found to be acceptable by the Commission but not by the complainant, the Commission could then terminate its proceedings under clause 29(2)(b). I do not consider it particularly unfair for the process under clause 29(2)(b) to be available only up until the time at which a complaint is referred for prosecution or adjudication. Clause 29(2)(b) is an extraordinary provision. The timing of a settlement offer by a respondent is within the respondent's control. It is clear from the legislation that the processing of complaints under the Code is intended to proceed expeditiously, The fact that an offer could be dealt with in this way before a complaint is referred to adjudication, but not thereafter, would seem to me to encourage timely and reasonable settlement discussions on the part of both respondents and complainants. In my view, this would be consistent with a fair and efficient human rights enforcement system.

The Commission submitted that the *Code* would not allow an adjudicator to award costs to a respondent in these circumstances, as the threshold for an award of costs under section 45 of the *Code* is high and would not encompass the refusal of a reasonable offer *per se.* Assuming, without deciding, that this is the case, in my view, the fact that a party to an adjudication may only be awarded costs in exceptional circumstances cannot be relied on as an indication that the legislature intended that the Commission would have the authority under clause 29(2)(b) to terminate a complaint where the complainant rejects what the Commission considers to be a reasonable offer made after the complaint has been referred to adjudication. It would seem at least as likely that it was intended to encourage settlement discussions and the making of

reasonable settlement proposals at an earlier stage, before a complaint is referred to adjudication.

I appreciate that, for whatever reasons, it is not unusual for parties to be unable to settle matters until shortly before a hearing. It would seem to me that it would still be open to the parties to agree to settle a complaint after it has been referred to adjudication. At that stage, however, a settlement would presumably be based on the agreement of all of the affected parties.

I would add that the above comments with respect to timely and reasonable settlement offers is in no way intended as a comment on what has transpired with respect to these Complaints. As part of the Complainants' submission at the hearing, Mr. Gordon referred to the Time Response Comparison (Ex. 14) which he had prepared, comparing the response times of the Respondent with those of the Complainants between the time when the first of the Complaints was filed in December 2006 and May 2010. The Respondent was not represented at the hearing, and while counsel for the Commission indicated that the Commission was not there to defend the Respondent, she nevertheless added that the Commission did not believe that the response times were unreasonable. The evidence which was before me did not cover, and was not intended to cover, all that has happened in respect of these Complaints since they were filed. I am not in a position to comment on the response times of the parties in this case, and do not intend to do so.

The Commission has also referred to sections 39 and 42, submitting that by virtue of those sections, the adjudicator's jurisdiction is expressly limited by other sections of the *Code,* including clause 29(2)(b). Subsection 39(2) relates to general procedures at the hearing before the adjudicator. It states that "[s]ubject to this Code and the regulations, the adjudicator may determine the procedures to be used at the hearing and may receive at the hearing such evidence or other information as the adjudicator considers relevant . . . ." The opening words ("subject to .. .") indicate that where there is a potential conflict between the adjudicator's general powers to

determine procedures and receive evidence and what is set out in other provisions of the *Code,* the other provisions will prevail. Thus, for example, the adjudicator must give every party attending the hearing a full opportunity to present evidence and make submissions, and to be represented by counsel (subs. 39(4)), and must have the proceedings recorded (subs. 39(5)). The adjudicator must also provide appropriate interpretation services to a party or witness who is unable to understand all or part of the proceedings (subs. 39(6)).

Section 42 deals with the decision of the adjudicator, and provides that "[s]ubject to the other provisions of this Code, every adjudicator has exclusive jurisdiction and authority to determine any question of fact, law, or mixed fact and law that must be decided in completing the adjudication and in rendering a final decision respecting the complaint." The opening words of that section indicate that certain limits to the adjudicator's decision-making jurisdiction are set out in the *Code.* For example, the adjudicator must apply the standard of a balance of probabilities in making a decision (subs. 43(1)), there is a limit on the amount of exemplary damages which may be ordered (subs. 43(3)), a decision or order generally may not require the removal of any person from an employment or occupation or the expulsion of any occupant of housing accommodation (s. 44), and the adjudicator generally may not order a party to pay some or all of the costs of another party (s. 45). A party to an adjudication may also apply for judicial review of any order or decision of an adjudicator on the grounds set out in subsection 50(1) of the *Code.*

Clause 29(2)(b), however, has nothing to do with procedure or evidence at the hearing or with decisions made by the adjudicator at the hearing. In my view, there is no potential conflict between that clause and sections 39 and 42, and I do not understand the opening words of those sections to indicate in any way that clause 29(2)(b) was intended to apply at the adjudication stage or that the adjudicator's jurisdiction under those sections is subject to or limited by clause 29(2)(b).

The Commission also referred to its *Guidelines for Requests for Reconsideration*

of Complaints (“Guidelines”), which it submitted reflect the approach in *Zutter* and *Kleysen* and have never been overturned by a court or an adjudicator. The *Guidelines* state, *inter alia,* that once the Board of Commissioners has made a decision, “that decision must stand unless it can be shown by the complainant or the respondent that there now exists new and different material information that was not available when the original complaint was originally considered.” (Commission’s emphasis) As I understand it, the Commission’s position is not that the *Guidelines* apply in this situation, since reconsideration has not been raised. Rather, it is to show that even where a decision is “final”, an agency or tribunal is not necessarily *functus officio,* as long as the statute allows this. The Commission submitted that nothing in the *Code* indicates that any particular decision by the Commission is to be its final decision or that the Commission may *not* terminate the complaint proceedings under clause 29(2)(b) once the matter has been referred for adjudication.

The Guidelines, which are from the Commission’s Policy and Procedures Manual, reflect the Commission’s policy with respect to the reconsideration of its decisions. That policy is not part of the statute, and I do not find it to be of assistance in addressing this particular issue. Again, it is not a question of there being nothing in the *Code* to indicate that the Commission may not terminate complaint proceedings under clause 29(2)(b) once the complaint has been referred for adjudication. Rather, it is a question of whether there is anything in the *Code* which indicates that the Commission *may* terminate complaint proceedings under clause 29(2)(b) at this juncture. As stated previously, the powers of the Commission, as a statutory body, must be found in the statute.

Finally, I note that in the October 16, 2009 letters to the Complainants and the Respondent advising that the Board of Commissioners had determined that the matters be referred to an adjudicator, the Commission indicated that if the Respondent made a further settlement proposal, the matter could be brought back to the Commission to determine if the offer was reasonable, and concluded:

> Please note that if the respondent proposes an offer of settlement in the adjudication process that the Commission considers reasonable but you reject, the Commission must terminate its proceedings in respect of the complaint pursuant to subsection 29(2) of *The Code.*

While this reflects the Commission's position on this issue, the Commission has not suggested, and properly so in my view, that it could rely on this letter to in some way reserve jurisdiction to consider further offers.

In conclusion, I am not convinced that clause 29(2)(b) requires or allows the Commission to terminate all proceedings respecting a complaint, and in particular the adjudication of the complaint where, after the complaint has been referred for adjudication, the respondent makes an offer of settlement which the Commission considers reasonable but the complainant rejects.

I find that the disposition of a complaint under clause 29(3)(a) of the *Code* constitutes a final decision and disposition under section 29, the result of which is that the powers and responsibilities of the Commission under clause 29(2)(b) are thereby exhausted.

I would add that there is no suggestion in this case that the Commission acted unfairly in deciding to refer the Complaints to adjudication, or that there was any error or slip which might entitle it to reopen or revisit its disposition of the Complaints.

Accordingly, having considered the evidence and material filed and argument presented, I conclude that the Commission is *functus officio* in terms of its section 29 powers or functions and has no authority to reopen or revisit its disposition of the Complaints or to unilaterally terminate the adjudication of the Complaints under clause 29(2)(b) of the *Code.*

2. If clause 29(2)(b) does not require, or allow the Commission to terminate all proceedings, and the Commission decides to withdraw from the proceedings, can the adjudicator require the Commission to continue as a party to the adjudication?

Position of the Complainants

The Complainants' position is that the Commission's refusal to participate in the adjudication if the Complainants succeed in their *functus officio* motion is unfair and punitive to them. In their submission, there is no good reason for the Commission to abandon the adjudication. Their Complaints had to have merit in order to get to this stage.

The Complainants were complimentary of the work that the Commission had done and how helpful the Commission had been up until the point of the Respondent's second offers. In their Notice of Motion, the Complainants seek an order finding that "it would be unfair to the Complainants and against the intent and spirit of the Code for the Commission to leave the complainants on their own at this point to argue the Complaint in the adjudication hearing if the Commission is found *functus officio* in section 29(2)(b)" of the *Code.* The remedy sought by the Complainants in their Brief is that, to the extent that I may do so within my jurisdiction, "I suggest to the Commission that they have a duty to participate in the adjudication . . ." The Complainants say that they are capable of doing a fair job at the adjudication, but submit that it would be more difficult for them to do so without the Commission's help. They say that they cannot understand why this has become so adversarial now that they are so close to the finishing line.

Position of the Commission

In its written submission, the Commission submitted that if I were to find that the Commission could not terminate the adjudication proceedings and the Commission

were to conclude in the future that it was required to terminate proceedings under clause 29(2)(b), the Commission could and would withdraw from the proceedings. As indicated above, the day before the hearing of these preliminary issues, the Commission advised that the Board of Commissioners had terminated the proceedings in accordance with clause 29(2)(b) of the *Code* and that, as a result, the Complaints would not be proceeding to adjudication and the Commission's files would be closed.

The Commission relies on the *Tilberg* and *CMCC* cases in arguing that it is entitled to withdraw from the proceedings. It says that as in those cases, a complainant in Manitoba is an independent party to the adjudication, in addition to the Commission, and the adjudicator has no statutory authority to stop the Commission from withdrawing. The Commission states that it has taken this position and is defending its jurisdiction for reasons of fairness, and in accordance with the objectives of the *Code* and its responsibility to the public interest.

Discussion and Analysis

As indicated above, section 34 of the *Code* mandates that the Commission, the complainant, any other person named in the complaint and allegedly dealt with in contravention of the *Code,* the respondent, and any other person who is added as a party, are all parties to the adjudication. Subsection 39(4) further mandates that each party has the right to participate at the hearing and to be represented by their own counsel for those purposes. Each party thus has a separate and independent status, and their own role to play, at the adjudication.

The role of the complainant and the respondent as parties to the adjudication is to advance or protect their own individual interests. The role of the Commission is different. It is not there to advance its own interests. I agree with the Commission that its role as a party to the adjudication is to represent and advance the public interest. The different roles and functions to be performed by the various parties are consistent with

the objectives of the *Code,* which seeks to advance the interests of both the public and individuals in preventing and remedying discrimination.

In identifying the Commission as a party to the adjudication, clause 34(a) also directs that the Commission "shall have carriage of the complaint". "Carriage of the complaint" is not defined in the *Code,* and I did not hear any argument with respect to the meaning of that phrase. In *Tilberg,* the Ontario Court of Appeal concluded that the proper interpretation of that phrase as it appeared in a corresponding provision of Ontario's Human *Rights Code* should relate to procedure and not to substantive rights. Accordingly, the provision was to be interpreted as instructing the tribunal that as between the human rights commission and a complainant or complainants, carriage was to be assigned to the commission.

In my view, the same meaning should be attributed to that phrase as it is used in clause 34(a) of the *Code.* The *fact* that the Commission is designated as having "carriage of the complaint" thus signifies that procedurally, as between it and a complainant, it is the Commission which is to have carriage of the complaint. As between the Commission and the complainant, therefore, it is the Commission which takes the lead and has the procedural burden of advancing the case with a view to establishing that the complaint is justified.

This does not mean that it has become the Commission's, as opposed to the complainant's, complaint. Nor does it mean that the Commission is required to advance or adopt the complainant's position or case. Indeed, such an interpretation would be inconsistent with the independent party status of the Commission arid the complainant.

I cannot agree with the Complainants' statement that the Commission is supposed to be "on the same team" as they are. As indicated above, as parties to the adjudication, the Commission represents the public interest, and Complainants represent their own interests. Their interests may or may not coincide. Thus, in some cases, the Commission's position may be similar to that of a complainant. In other

cases, the Commission may take a position which differs from or is opposite to that of a complainant just as a complainant may take a position which differs from or is opposite to that of the Commission.

The Commission has a responsibility to advocate its view of the public interest. In doing so, it may also advocate for the interests of the complainant, but it is not required under the statute to do so.

I recognize that in many, if not most cases, complainants choose not to be represented by their own counsel, to adduce any evidence or to make any representations at the hearing, relying instead on the evidence adduced and submissions made by the Commission or Commission counsel. They cannot rely on that fact however, as creating a legal duty or requirement on the part of the Commission to represent them or to adopt and advocate their position at the hearing.

In referring a complaint to adjudication, the Commission must be satisfied that additional proceedings are warranted to further the objectives of the *Code* or to assist it in discharging its responsibilities under the *Code.* Thereafter, the Commission may continually assess its position as a party to the adjudication. As the matter moves forward to adjudication, the Commission may therefore vary its position or take a different position from one it held at the time of the referral to adjudication.

Although I have previously concluded that the Commission has no authority under clause 29(2)(b) to terminate the adjudication based on a reasonable offer of settlement once a matter has been referred to adjudication, that does not mean that the Commission cannot or should not consider any further offers of settlement at that stage. In my view, where a respondent proposes a further offer of settlement, the Commission, as a party, is entitled to consider the reasonableness of that offer and whether it would be in the public interest to settle the matter on that basis. If it concludes that such an offer is reasonable and that a settlement is in the public interest, but the complainant, does not agree, can the Commission then withdraw from the adjudication?

Section 34 of the *Code* states that the Commission and others "are" parties to the adjudication. Section 40 of the *Code* goes on to provide that other persons may be added as parties to the adjudication. There is no provision in the *Code,* however, which states that a party may withdraw or remove itself as a party to the adjudication, or that the adjudicator may allow a party to cease being a party to the adjudication. In the face of section 34 of the *Code,* I am not convinced that the Commission has the authority to withdraw *as a party* to the adjudication.

I am, however, of the view that a party, including the Commission, may be entitled to withdraw *from actively participating* at the adjudication. Subsection 39(4) gives every party an opportunity to present evidence and make submissions. It does not say that they must do so. I was not pointed to any statutory provision or case law which suggests that an adjudicator has authority under the *Code* to require that a party adopt or argue a particular position or point or to stop a party from withdrawing from participating at the hearing.

The Commission's Board of Commissioners determined that the settlement offers made by the Respondent were reasonable, subject to one condition which was then accepted by the Respondent. With the exception of certain clauses which had to be disclosed for the limited purpose of addressing the proposed amendment of two of the Complaints (which is dealt with later in these Reasons), I am not aware of the terms of those offers. I am not in any way suggesting by this that it would have been appropriate to disclose the contents of those offers. Settlement negotiations and offers are generally privileged. In any event, I was not pointed to any statutory provision or authority which would indicate that I have the power under the *Code* to review the Commission's determination of whether the offers are reasonable and whether a settlement based on those offers would be in the public interest, It is not up to an adjudicator to second guess such a determination by the Commission.

The Complainants have argued that these settlement offers from the Respondent

were frivolous and vexatious. That argument appears to be based at least in part on their position that the Commission had no authority to consider any further offers after the Complaints had been referred to adjudication, and that the making of those offers resulted in significant delays. I have found, however, that the Commission did have the authority to consider further settlement offers. Having done so, the Commission determined that the offers were reasonable. I am not in a position to find otherwise. I cannot agree, therefore, that the offers were frivolous and/or vexatious.

Similarly, I cannot accept the Complainants' argument that there was no good reason for the Commission to abandon the adjudication, or that its refusal to participate in the adjudication is unfair and punitive. It is not a matter in this instance of whether or not there is some merit to the Complaints. The Commission's decision to withdraw was based on its determination that the Complaints should be resolved based on settlement offers which in its estimation were reasonable. The evidence indicates that before the Commission made that decision, the Complainants were given an opportunity to provide further information, and each of the Complainants provided a written submission for the Board of Commissioners. The Complainants may not like the Commission's decision, but there is nothing to suggest that there was no good reason for it.

The Commission says that it made its decision in accordance with the objectives of the *Code* and its responsibility to the public interest. It is up to the Commission to decide how best to carry out its public interest responsibility under the *Code.* An adjudicator does not have the statutory authority to go behind that decision. As indicated above, in *Tilberg,* the Ontario Court of Appeal concluded that it was "not unreasonable for Ontario's) Commission to withdraw from participating in the hearing before the Board of Inquiry where its public interest mandate has been satisfied." (para. 42) I similarly find that it is not unreasonable for Manitoba's Commission to withdraw from participating in the adjudication where it concludes that its public interest mandate has been satisfied.

In paragraph 22 of their Brief, the Complainants argue that:

> It wouldn't be fair because the Complainants pointed out an irregularity in the law and were correct, that the Commission would pull out of the Adjudication. The Complainants are only upholding the law. They are being singled out unfairly in violation of their *Charter* section 7 and 15(1) guarantees; section 7 regarding unfair process and procedure, and section 15 regarding denial of choice of forum.

I am satisfied that the Complainants are not being "singled out unfairly" because of the position that they have taken with respect to further settlement offers and the Commission's ability to withdraw. The Complainants were aware of the Commission's position on this issue even before the Complaints were referred to adjudication. When the Commission wrote to the Complainants and the Respondent advising them that the Complaints were to be referred to adjudication, it clearly indicated that it could and would entertain further settlement offers, and expressly stated that if the Respondent proposed an offer of settlement in the adjudication process that the Commission considered reasonable but the Complainants rejected, "the Commission must terminate its proceedings in respect of the complaint pursuant to subsection 29(2)" of the *Code.* The Commission's subsequent consideration and acceptance of offers from the Respondent were consistent with its advice to the Complainants and the Respondent. Its approach and actions were also consistent with its policy and approach to the reconsideration of its decisions as set out in the Guidelines referred to above (at p. 48) There is no evidence to support the Complainants' assertion that they are being singled out by the Commission because of the position they have taken.

The Complainants have stated that the Commission was helpful to them, at least up until the time the second offers were received. The evidence indicates that the Commission met with the Complainants at various times after the Complaints were referred for adjudication, and has kept them informed as matters have progressed towards the hearing. There was no evidence or suggestion that the Complainants do not have information or documents which have been gathered to date in connection with

their case and which they might need if they decide to proceed with the hearing of the Complaints.

In arguing that it would be unfair for the Commission to leave them on their own at this point, the Complainants' position is that it would be more difficult for them to do a fair job at the adjudication without the Commission's help. They would prefer to have the Commission's help in proceeding from this point forward and advancing the Complaints on their behalf. I have found that they are not entitled to that help under the *Code.* To the extent that they believe that it should be otherwise, that is a matter for the legislature.

In conclusion, I am satisfied that the Commission may not withdraw as a party to the proceedings. It may, however, withdraw from actively participating at the adjudication. I conclude that I do not have the authority to require the Commission to continue to actively participate as a party to the proceedings.

3. If the adjudicator cannot require the Commission to continue as a party to the adjudication, can the adjudicator order the Government of Manitoba to fund or provide legal counsel to the Complainants for the adjudication of their Complaints, at no cost to them?

Position of the Complainants

The Complainants say, in the alternative, that if the Commission is found to be *functus officio* regarding clause 29(2)(b), then abandons the hearing, leaving them stranded to argue the cases on their own, they are seeking an order requesting the Government of Manitoba to fund the hearing and to provide a lawyer to take up where the Commission's lawyer left off. The Complainants submit that the adjudicator has the authority to make such a request of the Government under sections 41(7) and 42 of the *Code.* They also rely on sections 57 and 58 of the *Code* in support of their position. They submit that this would be a reasonable remedy if the Commission withdraws, that

there is nothing in law that would prohibit it and that the "quasi constitutional basis and fundamental supremacy of the *Code* would override any policy that may now divert that particular funding only to the Commission."

Position of the Commission

The Commission submits that the Complainants have pointed to no authority for their claim that the Government of Manitoba must pay for legal counsel or provide a lawyer free of charge for the Complainants should the Commission withdraw from the adjudication. The *Code* does not provide a right to paid legal representation.

The Commission states that absent a statutory right to counsel, the only other potential ground for such relief would be under section 7 of the *Charter,* with respect to which certain requirements dictated by the Supreme Court of Canada would also have to be satisfied. In this regard, they refer to the requirements set out by that Court in *New Brunswick (Minister of Health and Community Services) v. G.(J.),* [1999] 3 S.C.R. 46 *("G.(J.)").* The Commission says that the Complainants have not met those requirements, and that their case is clearly not an eligible one.

Discussion and Analysis

Boards of adjudication or adjudicators under the *Code* are statutory tribunals, whose powers or jurisdiction are confined to those which, are conferred on them by statute. I am unable to find that either section 42 or subsection 41(7) confers any authority on an adjudicator to order the Government to provide the Complainants with state-funded legal counsel. As indicated previously, section 42 provides that, subject to other provisions of the *Code,* an adjudicator "has exclusive jurisdiction and authority to determine any question of fact, law, or mixed fact and law that must be decided in completing the adjudication and in rendering a final decision respecting the complaint." That section deals with the jurisdiction or power of an adjudicator to determine issues. It does not confer on an adjudicator the power to grant any particular relief, and in

particular, to require the Government to provide funding or legal counsel to the Complainants. Subsection 41(7) speaks to the replacement of an adjudicator, and an adjudicator's retention of jurisdiction prior to his or her designation being revoked, and has nothing to do with this issue.

The Complainants also referred to sections 57 and 58 of the *Code.* Section 57 provides that the *Code* is binding on the Crown. Section 58 states that unless expressly provided otherwise, the substantive rights and obligations in the *Code* are paramount over those in every other Act of the Legislature. The fact that the *Code* is paramount or that it has been characterized as quasi-constitutional legislation does not translate into an entitlement to legal representation at the Government's expense. Again, sections 57 and 58 do not confer any authority on an adjudicator to order or request that the Government fund or provide legal counsel for the Complainants.

I recognize that subsection 39(4) provides that the "adjudicator shall give every party attending the hearing a full opportunity to present evidence and make submissions, and to be represented by counsel for those purposes." Neither that section nor any other provision of the *Code,* however, provides that a complainant (or any other party) has any right to be represented by, or that an adjudicator has authority to require that the Government provide a party with, *state-funded* legal counsel. Rather, in my view, subsection 45(1) indicates the opposite, in that it provides that the parties to an adjudication shall generally bear their own costs.

The Commission referred to section 7 of the *Charter.* That section was also referred to by the Complainants in their Notice of Motion, where they stated in general terms that they were seeking, *inter alia,* an order finding that their "rights to fair process under section 7 of the *Charter* have been contravened" and cited as one of the grounds for their Motion that the "unfair process by the Commission is unconstitutional".

The Complainants did not expand on this reference to that section in their written or oral submissions on this issue.

Section 7 of the *Charter* reads as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

No authorities were provided by the Complainants with respect to this issue. The decision in G.(J.), which was filed by the Commission, was a case involving child protection and custody proceedings. In that case, the New Brunswick Minister of Health and Community Services applied to extend an order granting him custody of three children. The children's parent, who was indigent and receiving social assistance, was denied legal aid to retain a lawyer to represent her at the custody hearing. The parent brought a motion seeking relief for a prospective violation of section 7 of the *Charter.* She argued that the custody hearing would be unfair if she were not represented by counsel, and requested that the court order the government to provide her with state-funded counsel pursuant to section 24(1) of the *Charter.* The constitutional issue before the Supreme Court was whether the failure to provide legal aid to respondents in custody applications by the Minister would have constituted an infringement of section 7 of the *Charter,* and if so, whether the infringement would have been justified under section 1 of the *Charter.*

The Court found that the Minister's application to extend the custody order engaged section 7 of the *Charter,* in that it threatened to restrict the parent's right to security of the person guaranteed by section 7; that section 7 guarantees the parent the right to a fair hearing when the state seeks to obtain custody of their children; and that for the hearing to be fair, the parent must have an opportunity to present his or her case effectively. The Court stated that a parent need not always be represented by counsel to ensure a fair custody hearing, but that in some circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings and the capacities of the parent, the government may be required to provide an indigent parent

with legal counsel. The Court concluded that the government was under a constitutional obligation to provide the parent with state-funded counsel in the particular circumstances of that case.

In outlining the procedure that should be followed in similar cases in the future, Chief Justice McLachlin indicated that the parent should have first exhausted all possible avenues for obtaining legal aid or state-funded legal assistance. If, after that, the parent wants a lawyer but is unable to afford one, the judge should consider whether the parent can receive a fair hearing through a consideration of the above three factors, i.e., the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent. If the judge is then not satisfied that the parent can receive a fair hearing and there is no other way to provide the parent with a lawyer, the court should order the government to provide the parent with state-funded counsel under section 24(1) of the *Charter.*

I did not have argument as to why or how section 7 of the *Charter* may apply in the circumstances of this case. Even if I were to assume, without in any way deciding, that the section 7 rights to life, liberty and security of the person are engaged in these circumstances, I am satisfied, with reference to the criteria set out in *G.(J.),* that the Complainants rights to a fair hearing do not require that they be represented by state-funded legal counsel in this case. Among other things, there is no evidence that the Complainants cannot afford to retain counsel to represent them in these proceedings, should they wish to do so.

Further, while the Complainants have said that it would be more difficult for them to present and argue their cases at the adjudication hearing on their own, they have also stated that they believe they are capable of understanding the issues and effectively presenting their positions. Based on their own belief, and their written submissions and participation at the hearing of these preliminary issues, I cannot conclude that the Complainants would be unable to participate meaningfully and

effectively at the adjudication of their Complaints. On the contrary, I am convinced that they can receive a fair hearing without state-funded legal assistance.

In summary, I am satisfied that there is no basis for an order requiring or requesting the Government to fund or provide legal counsel to the Complainants for the adjudication of their Complaints.

4. Is the Commission required to pay Ms Kinvig's expenses for attending and participating at the hearing of the Complaints?

Position of the Complainant

Ms Kinvig now resides in British Columbia. In the Notice of Motion, she seeks written assurances that the Commission will provide her with funding to travel to and from Manitoba and maintain a residence in Winnipeg while the Complaints are heard and she presents her case. In her oral submission, Ms Kinvig stated that she does not have the funds to pay for the hearing. She emphasized the importance of human rights, and submitted that she should have the opportunity to fully participate in the full hearing of the Complaints for her own and everyone else's benefit.

The Complainants are asking that 20 days be set aside for the hearing on the merits of the Complaints. Ms Kinvig provided a rough calculation of $5,000.00 as the amount that she anticipated requiring based on 20 days of hearings and current rates for expenses, including transportation to and from the airport, airfare, hotel, meals and laundry. She also asked that such funding be paid to her as early as possible, so that she could make the appropriate arrangements at discounted rates.

Position of the Commission

The Commission submits that the Complainants have pointed to no authority for the claim that the Commission must pay Ms Kinvig's expenses if it does not call her as a

witness. The Commission submits that with one possible exception, an adjudicator has no authority to order the Commission to pay Ms Kinvig's expenses. The only exception may be the provision for witness fees and expenses at the rate of compensation payable to witnesses in the Court of Queen's Bench pursuant to subsection 39(7) of the *Code.* The Commission states that it takes no issue with its statutory obligations should it have occasion to call Ms Kinvig as a witness. It says that it has consistently stated that it will pay the expenses of witnesses it calls, including a party to a Complaint. It has also made clear, however, that it would terminate its proceedings if the Respondent made an offer which the Commission considered to be reasonable.

Discussion and Analysis

Subsection 39(7) of the *Code* states that every witness who is "required to attend a hearing is entitled to receive from the party requesting his or her presence witness fees and expenses at the rate of compensation payable to witnesses in the court."

The Commission has not disputed that if it were to call Ms Kinvig as a witness at the hearing, it would have to pay attendance money as provided in subsection 39(7). The Statement of Agreed Facts shows that, consistent with that section, the Commission did in fact advise Ms Kinvig that it would cover her travel casts if it intended to call her as a witness. The Commission also indicated that it would terminate the proceedings if it found that an offer from the Respondent was reasonable. The Commission subsequently advised that it had terminated the Complaints and would be closing its files. At the hearing of the preliminary motions, the Commission stated, in the alternative, that it would be withdrawing from the proceedings. In either event, it is clear that the Commission no longer has any intention of participating in the proceedings or calling any witnesses.

I have already found that the Commission may not terminate the adjudication of the Complaints, but that it may withdraw from actively participating in these proceedings. In the circumstances, given the Commission's stated intention to withdraw

and the fact that it no longer intends to participate at the adjudication or to call Ms Kinvig or anyone else as a witness, subsection 39(7) can have no application to the Commission. The Complainants have not identified, and I am not aware of, any other section of the *Code* or any authority which would support their claim that the Commission must pay Ms Kinvig's fees and expenses for the hearing of the Complaints.

I note that according to the Statement of Agreed Facts, Ms Lugtig indicated, prior to the Complaints being joined, that the Commission would likely be able to cover Ms Kinvig's travel costs if Ms Kinvig was required to attend the hearing as a party to her Complaint, but that Ms Lugtig would require approval for this. The evidence does not indicate, and I cannot conclude, that there was any binding agreement or commitment by the Commission to cover Ms Kinvig's travel or other expenses in the circumstances.

In conclusion, I find that there is no basis for an order requiring the Commission to pay Ms Kinvig's expenses for attending and participating at the hearing of the Complaint.

5. Should the Pollock and Gordon Complaints be amended to include allegations of reprisal?

Position of the Complainants

The Complainants base their allegations of reprisal on clauses 3 to 5 of the settlement offers from the Respondent dated March 16, 2010 (see above pp. 7-8). They submit that the Respondent has clearly threatened to sue Ronald and Natalie Pollock and Doug Gordon unless their respective Complaints are dropped. They argue that the so-called offers by the Respondent are ridiculous, frivolous, extremely unreasonable and inequitable, and that instead of reasonably accommodating the Complainants, the Respondent has resorted to blatant intimidation tactics and threats to make sure these Complainants know there will be recriminations against them.

The Complainants refer to the Respondent's use of the word "pursue" in the settlement offers. Relying on dictionary definitions of "pursue" (meaning, *inter alia,* to sue, prosecute or enforce a matter judicially), they argue that the offers clearly indicate that the Respondent will sue these three individuals if they do not drop their Complaints. The Complainants rely on the decision in *Ketola* v. *Value Propane Inc.,* 2002 CanLil 46510, 44 C.H.R.R. D/20 (O. H.R.T.) *("Ketola")* to argue that a threat to sue constitutes reprisal. It is their position that these threats to sue by the Respondent constitute a reasonable cause of action in reprisal under section 20 of the *Code,* and that these Complainants have the right to have their Complaints amended on a preliminary basis, to enable proper preparation for the adjudication.

The Complainants assert that settlement negotiation privilege does not apply to these offers, as any settlement privilege that may have existed under clause 29(2)(b) is statutory and disappeared when the forum for that privilege became *functus.* They submit, moreover, that settlement negotiation privilege is not available for reprisals under section 20 of the *Code,* that there is no exception in section 20 which allows a reprisal or threat of reprisal to be made in a settlement offer under clause 29(2)(b).

In the alternative, referring to *TDL Group Ltd. v. Zabao Holdings Inc.,* 2008 MBQB 86 *("TDL")* and the exceptions to settlement negotiation privilege listed therein) they submit that a threat to sue is an exception to, and not protected by, settlement negotiation privilege. In their oral submissions, as I understand it, they also argue that any privilege would have been removed by the communication of the offers. The Respondent wrote to the Commission, not the Complainants, and the documents were therefore "put out to the wind", They further say that the proposed amendments are based on the actual documents which, having been quoted in the Statement of Agreed Facts, are not, or are no longer, privileged. They conclude that the amendments would not result in any prejudice and ought to be allowed.

<u>Position of the Commission</u>

In her oral submission, counsel for the Commission stated that if I were to decide that I am *functus* (as a result of the Commission's determination that the Respondent's March 16, 2010 offers of settlement, as amended, were reasonable and its advice on May 27, 2010 that the proceedings in the Complaints were terminated in accordance with clause 29(2)(b) of the *Code),* then there would no longer be any complaints to amend and this issue would be moot.

Alternatively, in its written Brief, the Commission submits that the general rule governing amendments to human rights complaints at the adjudication stage is that an amendment may be allowed if it does not expand the scope of the factual inquiry, but merely cites new grounds on which liability might be founded". That approach is predicated on the principle that "there can be no prejudice or surprise to respondents in such circumstances" *(Musty v. Meridian Magnesium Products Ltd. (No. 3)* (1998), 35 C.H.R.R. D/237 (Ont. Bd. lnq.) *("Musty"),* at para. 59). The Commission argues that prejudice can include the loss of the benefit of the investigation and conciliation processes provided by a human rights commission.

The Commission acknowledges that some human rights tribunals, including Ontario's, have departed from the general rule and allowed amendments alleging reprisals based on new facts, but submits that such a departure should not be followed in Manitoba, given the wording of the *Code.* The Commission submits that if the requested amendments are allowed, the adjudicator will be deciding not only the validity of the Complaint, but also that of an entirely new complaint which has not gone through the investigation or referral processes provided under the *Code* and has not been referred for adjudication. In the Commission's submission, that is not permitted under Manitoba's *Code.*

The Commission further asserts that even if the adjudicator has the authority to make the requested amendments, such amendments ought not to be made if it is plain and obvious that the allegations cannot succeed. In the Commission's submission, it is

clear that the reprisal allegations cannot succeed, as the only facts on which they are based are clauses in a settlement proposal. Those clauses are protected by settlement privilege and inadmissible as evidence in an adjudication of a human rights complaint. The Commission submits that the reprisal allegations do not fall within the exceptions listed in *TDL.*

Commission counsel further submits that even if the clauses were admissible, it is plain and obvious that an allegation of reprisal based on those clauses must fail, as the alleged facts do not support the test for reprisal. Proving reprisal requires proving that a respondent intended to retaliate against a complainant for participating in proceedings under the *Code.* There must be facts which, viewed reasonably, could support such an intention. No such facts are alleged here, and a reasonable person in the Complainants' situation who takes into consideration the relevant context could not conclude that retaliation is intended.

Discussion and Analysis

I previously concluded that the clause 29(2)(b) of the *Code* does not allow the Commission to terminate all proceedings respecting a complaint, and in particular the adjudication of the complaint, after the complaint has been referred for adjudication. Accordingly, the issue regarding the amendment of the Pollock and Gordon Complaints is not moot and must be addressed.

An adjudicator has the authority to allow a party to amend a complaint pursuant to section 40 of the *Code,* which reads as follows:

> 40 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.

Section 40 must not be interpreted in a vacuum. That section and the scope of an adjudicator's amending power must be interpreted in light of the other provisions in the *Code* from which the adjudicator derives his or her jurisdiction and in the context of the *Code* as a whole.

Under the *Code,* an adjudicator is charged with the responsibility of adjudicating "the complaint". Thus, under clause 29(3)(a), the Commission requests that the minister designate a member of the adjudication panel to adjudicate "the complaint". Subsection 32(1) states that on receiving such a request, the minister must designate a member of the adjudication panel to hold a hearing and decide the validity of "the complaint". Pursuant to section 33 of the *Code,* the adjudicator is provided with a copy of "the complaint" and, where applicable, the reply. Section 42 provides that subject to other provisions of the *Code,* "every adjudicator has exclusive jurisdiction and authority to determine any question of fact, law, or mixed fact and Jaw that must be decided in completing the adjudication and in rendering a final decision respecting *the complaint."* (emphasis added)

In *Cook v. Onion Lake First Nation,* 2002 CanLII 45929, 43 C.H.R.R. 77 *("Cook'),* Chairperson Groarke considered the scope of the word "complaint" and of the power of the Canadian Human Rights Tribunal to amend a complaint under the *Canadian Human Rights Act,* stating as follows, at para. 11:

> The case law focuses on the facts of individual cases, rather than the law. It establishes that the word "complaint" must be interpreted broadly, in a manner that captures the full extent of the complainant's allegations. There is a point, however, where an amendment of a complaint can no

longer be considered a “mere amendment” and becomes a substantially new complaint. In such a situation, the Commission cannot be said to have requested an inquiry and the Tribunal has no jurisdiction to proceed.

In keeping with the nature and purpose of the *Code,* I am similarly of the view that “the complaint” must be interpreted broadly, The power to amend the complaint enables the adjudicator to ensure that the substance of the allegations which have been raised by the complainant can be fully and properly addressed at the adjudication.

The adjudicator’s jurisdiction is nevertheless circumscribed by the words “the complaint”. In my view, read in conjunction with the other provisions of the *Code,* the adjudicator’s amending jurisdiction under section 40 of the *Code* would not extend to adding new or different complaints which do not fall within the substance or scope of the complaint which has been referred for adjudication. Whether a proposed amendment can be said to come within the substance or scope of the original complaint would depend on the facts and circumstances in each case.

The first consideration, therefore, must be whether a proposed amendment falls within the scope of the original complaint. If an adjudicator is satisfied that it does, the adjudicator must then consider whether the amendment ought to be allowed. In this regard, it is clear from the wording of section 40 that the adjudicator’s power to grant such an amendment is discretionary. Contrary to what was argued by the Complainants at least at one point during their submission, a complainant therefore does not have the *right* under the *Code* to have the complaint amended at the adjudication stage.

I was not referred to any Manitoba cases dealing with amendments under the *Code* or the factors which an adjudicator ought to take into account in exercising his or her discretion to grant or deny an amendment under the *Code.*

The *Musty* case, referred to by the Commission, was decided under the

applicable provisions of Ontario's human rights legislation. I note that the wording of the legislation in that case differed from that in Manitoba's *Code* and was arguably broader, in that the Board's jurisdiction to amend derived from its mandate to determine whether "a *right* of the complainant" under the Act had been infringed, as opposed to determining "the validity of *the complaint".* In that case, the Ontario Board of Inquiry concluded that Boards may exercise their discretion to allow an amendment which raises a new ground of complaint where it is based on the same facts as the original complaint, as this does not result in prejudice to the respondent. The Board thus stated as follows, at paragraphs 58 to 59:

> The Board has the jurisdiction to amend a complaint. That jurisdiction is exercised having regard to all of the circumstances. Whether to allow an amendment is thus a discretionary decision. In exercising this discretion, Boards have considered whether a proposed amendment, which often involves the assertion of a new ground of contravention, arises out of the same factual allegations as the original complaint and whether raising it for the first time at the hearing would prejudice the respondents…
>
> The proposition that emerges is that complaints may be amended where the amendment does not expand the scope of the factual inquiry, but merely cites new grounds on which liability might be founded. The underlying principle behind the proposition is that there can be no prejudice or surprise to respondents in such circumstances.

In *Cook,* which was also filed by the Commission, the Canadian Human Rights Tribunal referred to the fundamental obligation of a tribunal to hear the substance of the complaint before it, then stated as follows, at paragraph 17:

> …The rule of practice is accordingly that issues arising out of the same set of factual circumstances should normally be heard together. This is a general legal rule, which improves the efficiency of the process and avoids

> the possibility of inconsistent rulings. In the human rights context, it also recognizes the inevitable fact that complaints are usually filed before a thorough investigation has taken place, without the benefit of legal scrutiny. As a result, they are often imprecise. It follows, as a practical matter, that commissions and tribunals need some authority to amend complaints so that they are in keeping with the law and evidence.

The Tribunal went on to conclude, at paragraph 20, that the general practice:

> . . . appears to be that amendments will normally be allowed if they do not alter the substance of the complaint, as reflected in the material facts of the case. If the amendment prejudices the case for the respondent, on the other hand, it should not be allowed. The case law does not discuss how much prejudice is sufficient but it must be real and significant. There must be "actual prejudice", There may also be factors such as delay, which are implicitly prejudicial. This might include the loss of the investigation and conciliation processes.

The above passages from the *Musty* and *Cook* cases refer to prejudice as one of the factors to be considered on a motion to amend. Prejudice is specifically referred to in Manitoba's *Code,* where an adjudicator's power to grant an amendment is expressly limited by the stipulation in section 40 that the adjudicator *shall not* exercise his or her authority to amend a complaint "if satisfied that undue prejudice would result to any party or any person proposed to be added as a party." "Undue prejudice" is not defined, but must mean that at least a certain amount of hardship or prejudice may be expected and would not be fatal *per se* to a request for an amendment. A degree of prejudice which is less than "undue" would nevertheless presumably remain one of the factors to be taken into account when considering whether an amendment ought to be allowed.

Another factor to be considered on a motion to amend a complaint is whether the proposed amendment raises a valid, arguable point which has merit. The cases indicate

that where it is plain and obvious that the complainant will not succeed with the allegations which he or she seeks to add, an amendment will not be allowed. (See, e.g., *Bressette v. Kettle and Stony Point First Nation Band Council,* 2004 CHRT 2 (CanLII) *("Bressette),* at para. 6).

In the instant case, dealing first with the question of jurisdiction, I am not satisfied that I have the authority to grant the amendments being sought by the Complainants on their Motion.

In my view, the requested amendments not only raise a new ground on which liability might be founded, but are also based on new and different factual circumstances from those which form the basis of the Complaints which were referred to adjudication.

The allegation in each of the original Complaints is that the Respondent contravened section 13 of the *Code* (discrimination with respect to services, accommodations, etc.). It is alleged in the Complaints that the Respondent discriminated against, and failed to accommodate the special needs of, the Complainants, in the provision of services, being the replacement of windows in their condominium complex.

By contrast, the proposed amendments are with respect to alleged breaches of section 20 of the *Code* (reprisals). The proposed amendments appear to be based on an alleged threat by the Respondent (and its Board members in their personal capacities) to sue certain Complainants based on actions taken by those Complainants, who allegedly impersonated the Respondent's President and defamed the Respondent and its individual Board members.

In this regard, I would note that in the section of their Notice of Motion relating to the amendment of the two Complaints, the Complainants simply say that they are seeking an order that "the complaints of Pollock and Gordon will be amended to include

reprisal against the Respondent". The materials which were filed nevertheless indicate that the basis for the proposed amendments is three clauses in two of the settlement offers made by the Respondent, including the alleged threats by the Respondent (and its Board members in their personal capacities), in their offers, to pursue Mr. Gordon "for his impersonation of the President of the [Respondent] with respect to the window project" and the Pollocks "for defamatory comments . . . made with respect to the [Respondent] and its individual Board members." Apart from that, the Complainants do not refer to and have not identified the specific paragraphs which they say should be added, or any other specific amendments which they say should be made, to these Complaints.

There is no reference in the original Complaints or Replies to certain material facts on which the Complainants' proposed amendments would appear to be based. There is little or no mention of any facts or circumstances surrounding or relating to any alleged impersonation or defamatory comments. The settlement offers themselves were made subsequent to the filing of the Complaints, and subsequent to the referral of those Complaints to the minister for the designation of an adjudicator. The clauses in question in those offers refer to various individuals who were not mentioned in the original Complaints, namely the President and Board members of the Respondent. While there is a reference in one of the offers to Mr. Gordon's alleged impersonation having been "with respect to the window project", I am not satisfied that this one general reference to the "window project" constitutes a sufficient link or nexus between the proposed amendments and the original Complaint or Complaints.

I am mindful of the fact that the Complainants are representing themselves at this point, and as a result that they may not be held to the same standard of "pleading" as if they were represented by counsel. I am also mindful of the fact that a complaint is not the same as a "pleading" in court proceedings, and may be less precise or specific. Nevertheless, having considered all of the materials filed and arguments presented, I cannot conclude that the facts which would form or potentially form the basis of the proposed amendments are the same as, or sufficiently related to, those in the original

Complaints, such that the amendments, as proposed, fall within the scope of, or can be considered to be a continuum of, those Complaints.

In the circumstances, I find that the proposed amendments raise new and different complaints which are outside the scope of the Complaints that have been referred to adjudication, and are beyond the scope of my jurisdiction.

The fact that the Complainants' Motion to amend the Complaints is based on allegations of reprisal does not alter my conclusion with respect to my jurisdiction to grant the proposed amendments. Whether an adjudicator has the power to grant an amendment to add allegations of reprisal will depend on the facts and circumstances of the particular case and the terms of the applicable legislation.

The Complainants referred to the decision of the Canadian Human Rights Tribunal in *Bressette,* one of the authorities which was filed by the Commission. In that case, the Tribunal Member concluded, at paragraphs 5 to 6, that

> …[t]here is discretion in the Tribunal to amend the complaint to deal with additional allegations, provided that sufficient notice is given to the respondent so that it is not prejudiced and can properly defend itself The fact that the proposed amendment involves a different section of the *Act* to that in the original complaint does not deprive the Tribunal of jurisdiction.
>
> It should not be necessary for individuals to make allegations of reprisal or retaliation arising after a complaint, by way of separate proceedings. Rather, an amendment should be granted unless it is plain and obvious that the allegations in the amendment sought could not possibly succeed. An obvious example, at least for allegations of retaliation, would be where the alleged incidents of retaliation were shown to have occurred prior to the filing of the complaint. The Tribunal should not embark on a

> substantive review of the merits of the amendment. That should be done only in the fullness of the evidence after a full hearing.

The Tribunal went on to grant an amendment to add an allegation of reprisal under section 14.1 of the federal Act, having found that out of a multitude of incidents referred to by the complainant, some disclosed a tenable claim for retaliation and that it was not plain and obvious that the complainant would not succeed with those allegations.

I do not find the *Bressette* case to be of much assistance in this regard in that, among other things, there is little or no indication in that case of the nature or scope of the amendments, or the facts relating to the alleged incidents and their relation to the original complaint.

While the Commission alluded to different or additional considerations having been applied in certain cases in other jurisdictions in respect of amendments alleging reprisals, I did not have argument on the scope of any such considerations or exceptions from the general rule", or on the particular circumstances of those cases.

I note that in its decision in *Cook,* the Canadian Human Rights Tribunal did suggest that the practice may be different with respect to amendments regarding alleged reprisals. At paragraph 19, the Tribunal thus quoted the reasoning of the Ontario Board of Inquiry in *Entrop* v. *Imperial Oil Limited* (1994), 23 C.H.R.R. D/186 *("Entrop"),* as follows:

> It would be impractical, inefficient and unfair to require individuals to make allegations of reprisals only through the format of separate proceedings. This would necessitate their going to the end of the queue to obtain investigation, conciliation and adjudication on matters which are fundamentally related to proceedings already underway. Insofar as reprisals are intended to intimidate or coerce complainants from seeking

> to enforce their rights under the *Code,* this would thwart the integrity of the initial proceedings and make a mockery of the *Code's* obvious intent to safeguard complainants from adverse consequences for claiming protection under the *Code.* The allegations of reprisal should be dealt with in the context of the original complaint.

The Tribunal went on to suggest that this "rule regarding allegations of retaliation can probably be seen as an exception to the general practice regarding amendments." (para. 20)

The amendment at issue in *Cook,* however, did not relate to an allegation of retaliation or reprisal and the Tribunal's comments with respect to a "rule" regarding allegations of reprisal were clearly *obiter.* Further, the quoted passage from *Entrop* refers to matters which are "fundamentally related" to the proceedings already underway. In *Entrop,* counsel had sought a ruling to permit the Commission to introduce evidence of reprisals by the respondent against the complainant for making a human rights complaint. The Board, after referring to the relevant facts as being "integrally related", found that the complaint should be amended to include a specific reference to the applicable section of the Ontario Code, stating as follows, at para. 7:

> Although the facts alleged would appear to be integrally related to the original complaint of employment discrimination, the Commission intends to argue violation of a separate section of the *Code,* the reprisal provision in s. 8, and this section should be specifically listed in the complaint.

The *Entrap* decision therefore appears to be generally consistent with, rather than an exception to, the general rule.

An amendment to add the ground of reprisal was allowed in *Kotola,* a case which was relied on by the Complainants. As in *Entrop,* the facts relating to the allegation of reprisal would appear to have been integrally related to those concerning the original

complaint. In the original complaint, it was alleged that the respondents treated the complainant differently, including by terminating his contract for services due to a disability. In responding to the complaint, the respondents stated, among other things, that they terminated the complainant's contract for services because he was caught stealing propane, and threatened criminal prosecution and retribution. In addition, shortly after the subject-matter of the complaint was referred to the board, the respondents served the complainant with a Statement of Claim in Small Claims Court, seeking $10,000.00 in punitive, exemplary and aggravated damages. The basis of that claim was the human rights complaint against the respondents and the theft of propane. On the commission's motion and on consent of all parties, the board ordered that the complaint be amended to add the ground of reprisal.

As with *Entrop,* the *Ketola* decision thus appears to be consistent with the general rule regarding amendments described in *Musty* and *Cook.*

In any event, based on the facts and circumstances in the instant cases and the wording of Manitoba's *Code,* it is my view that I do not have the authority to grant the Complainants' Motion to amend the Complaints to add the proposed claims of reprisal.

If I am mistaken with respect to the question of jurisdiction and I do in fact have the authority to allow the amendments, having considered all of the facts and circumstances in these cases, I am not persuaded that the proposed amendments ought to be allowed and am not prepared to grant the Complainants' Motion to amend.

The Commission did not argue, and no evidence was adduced to the effect that the proposed amendments would result in "undue prejudice" to any party such that the Complainants' Motion to amend the relevant Complaints could not be allowed. However, as indicated above, the Commission did argue that prejudice can include the loss of the benefit of the investigation and conciliation processes.

The Commission has argued that it is plain and obvious that the proposed

allegations of reprisal cannot succeed, given that the only facts on which they are based are clauses in settlement offers which are protected by settlement privilege. The Complainants say that settlement privilege does not apply in this case.

Settlement privilege or settlement negotiation privilege is a rule of evidence or common law privilege, according to which settlement discussions or communications are inadmissible in evidence. The protection afforded by the privilege is said to be justified by a policy concern which recognizes that "parties be encouraged to resolve their private disputes without recourse to litigation, or, if an action has been commenced, encouraged to effect a compromise without recourse to trial". (See *TOL*, at para. 23, quoting from Sopinka, *The Law of Evidence in Canada).* The privilege recognizes that settlement discussions would be impossible or much less effective without such protection.

Settlement privilege is a "class" or "blanket" privilege. Documents and communications which fall within the category of a "class" privilege are *prima facie* privileged. A party who resists disclosure must initially establish that the communications fall within the class of communications in furtherance of settlement. It is then up to a party seeking to introduce or rely on such communications to establish that an exception exists, such that the privilege does not or should not apply. (See *TOL,* at paragraphs 20-21)

A "class" privilege is to be distinguished from a "case by case" privilege, where communications are *prima facie* assumed not to be privileged but may acquire privileged status in particular cases. Case by case privilege was considered in *M. (A.) v. Ryan,* [1997] 1 S.C.R. 157 *("Ryan"),* a decision which was relied upon by the Complainants, and in which the issue was whether a psychiatrist's notes and records containing statements made in the course of treatment were protected from disclosure. *Ryan* was not concerned with, and did not alter the law with respect to, settlement negotiation or class privilege.

Whether settlement privilege applies to a communication is determined by reference to three conditions which are set out in *TDL,* at paragraph 27, as follows:

(a) a litigious dispute must be in existence or within contemplation;
(b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and,
(c) the purpose of the communication must be to attempt to effect a settlement.

In this instance, I was not provided with copies of the documents or communications on which the proposed amendments are based, I did, however, have before me the Statement of Agreed Facts which states, *inter alia,* at paragraph 50, that on March 16, 2010, the Respondent's counsel:

> …forwarded a *written offer to settle* for each complaint to the [Commission], asking that they be forwarded to the respective complainants. The [Respondent] further asked that the Board determine whether the offers were reasonable at its next meeting should any or all of the complainants not accept the offer(s) and that the [Commission] advise the complainants of this request.
>
> (Emphasis added)

The three clauses from the "offer to Mr. Gordon" and the "offer to Mr. Pollock" which the Complainants rely on in respect of their Motion, are then quoted in the Statement of Agreed Facts.

In my view, it is clear in this instance that the "written offer[s] to settle" satisfy the above conditions. They were made in the context of a dispute which had been referred to adjudication, and are expressly stated to be offers to settle the Complaints. The

intention that they would not be disclosed at the hearing of these Complaints if a settlement was not concluded should be inferred in the circumstances. (See *TDL,* at para. 31) They therefore fall within the category of settlement negotiations and are *prima facie* privileged.

I do not agree with the Complainants' reference in this regard to clause 29(2)(b) of the *Code* and their assertion that any settlement privilege that may have existed in that clause disappeared when the forum for that privilege became *functus.* As indicated above, settlement privilege is a common law, as opposed to a statutory, privilege. It does not arise from, or depend for its existence on, clause 29(2)(b). Rather, it is separate and distinct from that clause. There is nothing in clause 29(2)(b) that abrogates or takes away from that privilege. If anything, clause 29(2)(b) further promotes and emphasizes the importance of settlement, by allowing a settlement to be concluded even where all parties are not in agreement. In any event, clause 29(2)(b) has nothing to do with this issue.

The same applies with respect to section 20 of the *Code.* As settlement privilege arises out of the common law, it is not a question of whether there is some exception in section 20 which allows for settlement privilege to apply. Rather, it is whether there is language which excludes that privilege. Absent clear language to that effect section 20 cannot be interpreted as abrogating or excluding the common law rule of privilege. There is no such language in that section.

The question remains whether an exception to settlement negotiation privilege may apply in these circumstances, such that the privilege may yield. A number of circumstances which might constitute valid exceptions to otherwise protected settlement communications were listed in a passage from *Meyers v. Dunphy,* 2007 NLCA 1, and quoted in *TDL,* at paragraph 53, as follows:

> (1) Whether without prejudice communications have resulted in a concluded compromise agreement;

(2) To show that an agreement apparently concluded between the parties during the negotiations should be set aside• on the ground of misrepresentation, fraud or undue influence;

(3) Where a clear statement made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel;

(4) If the exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety, but such an exception should only be applied in the clearest cases of abuse of a privileged occasion;

(5) In order to explain delay or apparent acquiescence in responding to an application to strike out a proceeding for want of prosecution but use of the letters is to be limited to the fact that such letters have been written and the dates at which they were written;

(6) Whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him; and

(7) Where an offer is expressly made "without prejudice except as to costs".

In *TDL,* the court went on to state, at paragraph 56, that "[absent an applicable exception, privileged settlement communications must not be used by one party to prove an ultimate issue for a winning case."

In arguing that a threat to sue is an exception to settlement privilege, the Complainants referred in particular to the second and fourth exceptions listed above.

With respect to the second exception, I find that there is simply no factual basis to support the application of that exception herein.

Similarly, with respect to the fourth exception, there is in my view no factual basis for its application herein. That exception refers to "perjury, *blackmail and other unambiguous impropriety'* (emphasis added). It also states that the exception "should

only be applied in the *clearest cases of abuse* of a privileged occasion" (emphasis added).

In this situation, the only facts relied upon by the Complainants are the three clauses in the offers to settle which they allege constitute threats of reprisal under section 20 of the *Code;* Section 20 of the *Code* prohibits reprisals (including threats of reprisals) for enforcing rights or complying with obligations under the *Code,* and reads as follows:

> **Reprisals**
> 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
>
> (a) has filed or may file a complaint under this Code; or
> (b) has laid or may lay an information under this Code; or
> (c) has made or may make a disclosure concerning a possible contravention of this Code; or
> (d) has testified or may testify in a proceeding under this Code; or
> (e) has participated or may participate in any other way in a proceeding under this Code; or
> (f) has complied with, or may comply with, an obligation imposed by this Code; or
> (g) has refused or may refuse to contravene this Code.

In *Ketola,* the Board referred to reprisal as being an "intentional act" and observed that "there must be intent, willful blindness or recklessness to find reprisal". The Board went on to state, at (C.H.R.R.) paragraph 120, that

> …suing, or threatening to sue, a complainant may or may not constitute reprisal or threat of reprisal respectively. It will depend on the intent behind

> the action or threat of action and whether a reasonable complainant would perceive it as retaliation or punishment. The context of the action or threat of action plays an important part in this determination. There will be instances where a respondent legitimately and in a *bone fide* manner commences a civil action against a complainant, before or during the *Code* process. To automatically find otherwise would deprive one from exercising those rights available in the civil litigation context. This could be disastrous, *inter alia,* when limitation periods apply.

In this case, the settlement offers do *not* state that the Respondent will pursue Mr. Gordon and the Pollocks for filing or pursuing their Complaints or participating in proceedings under the *Code.* On the contrary, they state that, as part of the proposed settlement, the Respondent and its Board members will agree not to pursue these Complainants for their alleged impersonation of the Respondent's President and defamatory comments. On their face, the proposed amendments do not disclose any intention on the part of the Respondent to retaliate against these Complainants for filing or pursuing their Complaints. It is not unusual in settlement negotiations to resolve or attempt to resolve all outstanding or potential issues between the parties. In the circumstances, I am not persuaded that the proposed amendments disclose the necessary foundation for advancing a claim that the fourth exception to settlement privilege applies.

In addition, I do not accept the Complainants' argument that any privilege has been removed or waived due to the communication of the offers. The offers were not "put out to the wind" when they were sent to the Commission. Regardless of whether it was *functus officio* under clause 29(2)(b) or not, the Commission was a party to the adjudication, with carriage of the Complaints, and would have been involved in any final settlement of the Complaints. The Commission had been working with the Complainants, who were not represented by counsel, and it was not inappropriate for the offers to be communicated to the Complainants through the Commission. The facts

indicate that the Respondent expected the communications to be disclosed to the parties, but not to anyone else.

Nor has privilege been removed by reason of parts of the offers having been quoted in the Statement of Agreed Facts. The Complainants themselves raised the issue of whether the offers were privileged, arguing that they were not. They cannot, simply by raising that issue, cause privilege to be removed. The issue could not be addressed without reference to the impugned parts of the offers. Only those portions of the offers which were relevant to the Complainants' Motion were quoted in the Statement of Agreed Facts. Further, the first paragraph of the Statement of Agreed Facts expressly stated that the facts contained in that Statement were entered by agreement of the parties "for the purposes of the complainants' joint motion dated May 10, 2010 only and not for any other proceeding or purposes, without further consent from all parties." (original emphasis) The reference to and quotation from the offers in these circumstances cannot be considered a waiver of settlement privilege.

Even if I am mistaken with respect to the issue of settlement privilege, such that the settlement offers or the relevant clauses are not protected by that privilege, I am still not persuaded that I ought to exercise my discretion to grant the Complainants' Motion to amend the two Complaints. As indicated previously, the Complainants raise new grounds of complaint, based on new and different factual allegations. In such circumstances, the cases indicate that an amendment will generally not be allowed.

In addition, in my view, it is plain and obvious that the proposed claim of reprisal could not succeed. In reaching this conclusion, I recognize that at this stage, an adjudicator should not embark on a substantive review of the merits of the amendment. However, as stated above, I am of the view that on their face, the facts or clauses which the Complainants rely on in seeking the amendments do not disclose the necessary factual foundation for such a complaint, including any intention on the part of the Respondent to retaliate against these Complainants for initiating or participating in proceedings under the *Code.*

As a result, I would deny the Complainants' Motion to amend the Pollock and Gordon Complaints.

6. Can Mr. Gordon act as the unpaid agent of Ms Renard in the adjudication?

In the Complainants' Notice of Motion, Mr. Gordon is seeking an order that he be permitted to act as Ms Renard's paid agent in the adjudication, on an unpaid basis. A letter from Ms Renard to Ms Everard, counsel for the Respondent, dated January 29, 2010, and copied to Commission counsel, was filed as Exhibit 24 at the hearing. In that letter, Ms Renard authorizes Mr. Gordon to act as her representative for the adjudication of her Complaint, including any and all communications prior to the hearing.

The Commission's position on this issue is that the adjudicator has the authority to allow Mr. Gordon to act in this capacity. The Commission submits that Manitoba case law supports a non-lawyer acting as an agent for a party in legal matter, provided it is on an *ad hoc* basis (i.e. to assist a friend) and unpaid. (See: *Law Society of Manitoba* v. *Pollock,* 2008 MBCA *61,* at paras. 46-47)

I agree, and conclude that in these circumstances, Mr. Gordon may act as Ms Renard's agent for the adjudication of her Complaint, on an unpaid basis.

7. Additional Issues

<u>Hearing Dates</u>

In their Notice of Motion, the Complainants request that hearing dates for the adjudication of the merits of all four Complaints be fixed at five days per Complainant, or a total of 20 days, and that a specific date be set.

In its Brief filed prior to the hearing, the Commission acknowledged the adjudicator's authority to set hearing dates, subject to obligations of procedural fairness and to the Commission's authority to terminate proceedings under clause 29(2)(b) of the *Code.* The Commission went on to note, however, that the Complainants had not said why they were requesting 20 days for the hearing of the four Complaints and suggested that there ought to be further discussion and exploration of the number of witnesses, their availability and the estimated length of their testimony before dates were set.

At the hearing, Commission counsel submitted that as the Commission had stated previously, if the Commission found itself in the position it was now in, it would be required to terminate the Complaints. Its first position, therefore, was that the Complaints may not proceed to adjudication. If it were decided that the Complaints may not proceed, there would be no point in setting hearing dates. If it were decided otherwise, the Commission would be withdrawing.

At the conclusion of the submissions by the Complainants and the Commission on this point I indicated that I believed that it would be premature to set hearing dates, and that I was not prepared to do so at that time. Assuming that the adjudication proceeds, the parties will have to consider and address a number of factors, including those raised by the Commission in its Brief and referred to above (e.g., the number of days reasonably required for the hearing of the Complaints, the availability of the parties, the number of witnesses, their availability, the estimated length of their testimony, etc.). In the event that the adjudications proceed, many of these factors will have to be explored and clarified, preferably in writing. As indicated at the hearing, a teleconference could then be convened to address the matter of scheduling further hearing dates.

<u>Accommodations for the Needs of the Parties and Witnesses</u>

In the Notice of Motion, three of the Complainants, namely Ms Kinvig, Mr. Gordon and

Ms Renard, ask that they be allowed to bring to and use at the hearing a number of pieces of equipment, and that the room in which the hearing is to be held satisfy certain requirements with respect to lighting. Ms Kinvig requests, for example, that she permitted to bring a laptop computer, specialized tape recorder and digital recorder into the hearing "so that she may take appropriate notes and record such information during the hearing that she feels is needed so she can conduct her portion of the case." She says that the specialized tape recorder is to be used "to play any taped evidence she may need to present at the 20 day hearing."

It is submitted that Ms Kinvig (and Mr. Gordon and Ms Renard) each require some or all of the above equipment in order to function effectively during the hearing. Similarly, Ms Kinvig says that the requested lighting, including natural light from clear, untinted windows, blinds or drapes to control the amount of light, no fluorescent lights, and lamps with bright white light (or other type of light, if required) set beside each person, is required to accommodate her extreme sensitivity to light and to enable her and others to see to their maximum potential and to function effectively.

Ms Kinvig also requests that any of her witnesses who reside in British Columbia be permitted to testify by telephone, as she says that she cannot afford to pay the airfare to have them come to Winnipeg to testify. Ms Kinvig refers to three individuals living in British Columbia whom she wishes to call as witnesses, being a medical doctor who would testify as an expert witness and two other individuals who would testify about her ability to function in different lighting situations and her financial situation. She states that any other witnesses residing in Manitoba will appear as required.

In her oral comments, Commission counsel referred to the submissions in the Commission's written Brief with respect to these issues. In that Brief, the Commission states that the adjudicator has the authority, in controlling the procedures at the hearing, as well as the responsibility under the *Code,* to provide reasonable accommodation for the disability-related needs of parties and their witnesses in adjudication proceedings. On the basis that Ms Kinvig, Mr. Gordon and Ms Renard appear to require the

equipment and lighting they have requested due to their disabilities, the Commission takes no issue with their request, subject to the availability of a hearing room with the requested lighting and the obligations of the parties to engage in further dialogue if needed to arrive at reasonable accommodation to the point of undue hardship.

Given the Commission's subsequent decision to terminate the Complaints or alternatively withdraw from the proceedings, counsel for the Commission went on to add in her oral submission that the Commission was not taking any position on any of the issues relating to how the hearing ought to be conducted.

I am satisfied that an adjudicator has authority under the *Code* to provide reasonable accommodation for the disability-related needs of parties and their witnesses in adjudication proceedings, Subsection 39(2) of the *Code* provides that subject to the *Code* and the regulations, the adjudicator may determine the procedures to be used at the hearing and may receive such evidence or other information as he or she considers relevant and appropriate, whether or not the evidence is given under oath or affirmation or would be admissible in a court of law.

However, I am generally not satisfied that there is a sufficient basis on which I can assess the appropriateness of, and need for, the various accommodations requested by the Complainants at this time.

The Complainants argue that they require certain pieces of equipment in order to function effectively at the hearing, but have provided little detail in this regard. In the circumstances, I am unable to properly assess this request, including the need for each piece of equipment, and the manner and extent to which the Complainants, collectively or individually, propose to use the various pieces of equipment. I note, for example, that Ms Kinvig refers to using the specialized tape recorder to "play any taped evidence she may need to present". I do not understand this reference to presenting "taped evidence", and do not accept that this would be appropriate.

The Complainants made a number of requests with respect to requirements for the room and lighting in the room where the hearing is to be held, without identifying any particular room or rooms which might be suitable. I do not know what locations, if any, may satisfy these requirements, or whether they are otherwise suitable or available. Counsel for the Commission arranged for the room for the hearing of the Complainants' Motions, and indicated that the Commission consulted with the Complainants when the room was booked, and that all had agreed with that location for the hearing of the Motions. The room was a basement room, with no natural light or windows, and in that regard was not consistent with the requirements listed by the Complainants in their Notice of Motion. Yet it appeared from the comments of the Complainants who were present at the preliminary hearing that the location, and particularly the lighting, were generally acceptable to all, although there was some suggestion that if the Commission had a list of possible alternate locations, those locations could be considered.

In the result, while I am not prepared to make an order in this regard, I am prepared to consult with the parties and consider any further submissions or requests to reasonably accommodate the needs of the parties in terms of any necessary and appropriate specialized equipment and of the room and lighting in the room where the hearing is to be held. With respect to the room and lighting, that may involve making the same or similar arrangements for the room where these Motions were heard (assuming that that room is available), or considering an alternate location if one is identified.

As for Ms Kinvig's request that individuals from British Columbia whom she wishes to call as witnesses be allowed to give evidence by telephone, the basis for that request is said to be that Ms Kinvig cannot afford to pay for them to come to Winnipeg to testify. No evidence was filed to support that assertion. Instead, Ms Kinvig apparently anticipates having two of those witnesses testify at the adjudication as to Ms Kinvig's financial situation. That does not help her on this Motion, nor is there any indication as to how that evidence might be relevant to the adjudication on the merits of her

Complaint.

In any event, at this juncture and on the material before me, I am not in a position to be able to properly assess the nature and extent of the evidence of these three proposed witnesses, including the relevance and importance of their anticipated evidence and the extent to which the ability to challenge and assess their credibility might be a significant consideration. Accordingly, I find that the Motion for an order that these three witnesses be allowed to testify by telephone is premature and I deny same.

In summary, I am not prepared in these circumstances to exercise my discretion to grant any orders as sought by the Complainants under this heading at this point.

The *Charter*

The Complainants refer in their Notice of Motion and their Brief to sections 7 and 15 of the *Charter.* In their Notice of Motion, they seek orders finding, *inter alia:*

> (i) that the Complainants are entitled to choose a favourable forum (the adjudication as opposed to section 29(2)(b) when such a choice exists under section 15(1) of the Charter. [sic]
> (j) that the Complainants' rights to fair process under section 7 of the *Charter* have been contravened. …

As referred to earlier (see above, p. 58), the Complainants argued in paragraph 22 of their Brief that they "are being singled out unfairly in violation of their *Charter* section 7 and 15(1) guarantees; section 7 regarding unfair process and procedure, and section 15 regarding denial of choice of forum."

In their oral submission, the Complainants argued that if there is ambiguity, legislation should be interpreted to accord with the *Charter.* They submitted that the

Complainants are not asking for *Charter* remedies, but only that the *Charter* be taken into consideration as an interpretive principle.

The Commission's position is that the Complainants have failed to articulate or prove in fact or law any violation of any *Charter* right by the Commission.

I agree with the Commission that the Complainants have failed to articulate or prove a violation of any *Charter* right. The Complainants have acknowledged that they are not seeking any *Charter* remedies. Accordingly, there will be no order under this heading.

Conclusion

In summary, based on the foregoing, and having considered the evidence and material filed and argument presented, I conclude that:

1. Clause 29(2)(b) of the *Code* does not require or allow the Commission to terminate all proceedings respecting the Complaints, and in particular the adjudication of the Complaints in these circumstances where, after the Complaints were referred for adjudication, the Respondent has made an offer of settlement which the Commission considers reasonable.

2. The Commission may not withdraw as a party to the proceedings. It may, however, withdraw from actively participating at the adjudication. I do not have the authority to require the Commission to continue to actively participate as a party to the proceedings.

3. There is no basis for an order requiring or requesting the Government to fund or provide legal counsel to the Complainants for the adjudication of the Complaints.

4. There is no basis for an order requiring the Commission to pay Ms Kinvig's expenses for attending and participating at the hearing of the Complaints.

5. I do not have jurisdiction to grant the Complainants' Motion to amend the Pollock and Gordon Complaints to include the allegations of reprisal which they are seeking to add. If I am mistaken with respect to the question of jurisdiction, taking into consideration the facts and circumstances in these cases, the proposed amendments ought not to be allowed.

6. Mr. Gordon may act as Ms Renard's agent for the adjudication of her Complaint, on an unpaid basis.

7. Hearing dates have not been set. In the event that the adjudication of the Complaints proceeds, the parties will need to consider and address several factors, including the number of days and witnesses reasonably required, their availability, etc., following which a teleconference could be convened to address the matter of scheduling hearing dates.

   I am not prepared to grant any of the orders sought by the Complainants with respect to accommodations for the needs of the parties and their witnesses at this point. I am, however, prepared to consult with the parties and consider further requests to reasonably accommodate their needs.

   The Complainants have not articulated or proven a violation of any *Charter* right, and have acknowledged that they are not asking for any *Charter* remedies. There will be no order under this heading.

Dated at Winnipeg, Manitoba, this 12th day of October, 2011.

"M. Lynne Harrison" Adjudicator