YHRPA File: 2024-03 Cooke

Before the Yukon Human Rights Board of Adjudication

In the matter of the Yukon *Human Rights Act*

and the matter of

Marsha Cooke ("Complainant")

&

Yukon Human Rights Commission ("Commission")

v.

Government of Yukon, Department of Health and Social Services ("Respondent")

BOARD DECISION

Before: Chief Adjudicator Judith Hartling
Adjudicator Victoria Chan
Adjudicator Roxane Larouche

Appearances

Michael DeRosenroll and Emma Dickson for	Commission
Marsha Cooke	Complainant
Lesley Banton and Mina Connelly for	Respondent

Heard: Whitehorse, Yukon, November 3 to 7, 2025

Written Reasons by:
Chief Adjudicator Judith Hartling

Concurred by:
Adjudicator Roxane Larouche

Dissenting Written Reasons by:
Adjudicator Victoria Chan (Pages 47 to 50)

Table of Contents

1. This matter has a dissent by Board member Victoria Chan.

2. The majority decision is confirmed by Chief Adjudicator Judith Hartling and Board member Roxane Larouche.

Background

3. Private midwifery, that is midwifery one could pay for privately, was available in the Yukon until April 15, 2021.

4. In an effort by the Respondent (YG) to provide publicly funded, safe, accessible, and high-quality maternity care (Ex.1, TAB 5 and 8) to Yukoners, the *Midwives Regulation* (Regulation) was enacted January 28, 2021. It was legislated to come into force April 15, 2021.

5. However, the Respondent was not prepared on April 15, 2021 to put the Regulation into effect. The Respondent had not yet developed a midwifery program.

6. On April 15, 2021, it was prohibited to practice private or publicly funded midwifery in the Yukon unless a midwife met the criteria in the Regulation.

7. It appeared there was no one in the Yukon at the time who could meet the criteria and, if there was, it is unclear that there was a system in which they could register.

8. As of April 15, 2021, midwifery services were not available to women in the Yukon.

9. The Respondent provided the *Insured Health and Hearing Services Midwife - Interim Policy* for medical travel for midwifery, issued April 15, 2021.

10. The Regulation wasn't fully in force until February 12, 2024, save for a brief period of approximately six months.

11. This created adverse effects on pregnant females residing in the Yukon.

12. The salient fact is that midwifery, private or public, was not available in the Yukon, due to the lack of a midwifery program and the prohibitions in the Regulation, for a period between April 15, 2021 and February 12, 2024, except for one six-month period.

13. The Board agrees with the Respondent's submissions that this case is not to decide if midwifery is a good thing, or whether home births are safer than hospital births.

14. The Complainant gave evidence of challenges and distraught emotions because of the denial of midwifery services. This evidence is directed towards the consideration of a remedy.

15. From *Disability Rights Coalition v. Nova Scotia (Attorney General), 2021 NSCA 70*:

> [15] As in all matters that come before the Court (Board), we must be guided by the law. (The insert is the Board's)

16. The key issue in this matter is: Does the Board have jurisdiction to hear this complaint? Is this an attack on the legislation?

17. In particular: What constitutes a "service" pursuant to s. 9(a) of the *Human Rights Act*, RSY 2002, c 116 (the "Act")?

18. These are the legal issues the Board must decide.

The Complaint

19. The original complaint was filed on June 20, 2021.

20. This complaint was referred to the Panel on September 17, 2024.

21. The issues raised by the Complainant include the following:

    a. Is the Yukon Midwifery Program ("YMP") a service to the public for the purpose of s. 9(a) of the Act? If so, were decisions with respect to implementing the YMP part of that service to the public?

    b. Is the regulation of midwifery a service to the public for the purpose of s. 9(a) of the Act?

    c. Did the Respondent discriminate against the Complainant on the basis of sex, including pregnancy and pregnancy-related conditions, contrary to s.7(f) of the Act, when offering or providing services to the public?

       In particular:

       i. Did the Complainant experience an adverse impact connected to a service provided by the Respondent by not being able to have a home birth attended by a midwife for the births of her third child and/or her fourth child?

       ii. If so, was the Complainant's sex a factor in any such adverse impact?

    d. Did the Respondent engage in systemic discrimination pursuant to s.12 of the Act?

       In particular:

i. Has a series of incidents connected to one or more services provided by the Respondent adversely impacted pregnant women by depriving them of the ability to have a home birth attended by a midwife?

ii. If so, was their sex a factor in any such adverse impact?

e. If questions (c) and/or (d) are answered in the affirmative, was the Respondent's conduct for a reasonable cause pursuant to s.10(d) of the Act, or was there a bona fide and reasonable justification for the discrimination?

Facts

22. The Yukon *Midwives Regulation* was enacted on January 28, 2021, coming into force April 15, 2021.

23. Prior to January 28, 2021, there was no publicly funded midwifery regulation or program in the Yukon but one could obtain the services of a midwife privately.

24. Prior to the enactment, the Complainant (Ms. Cooke) had given birth to two children with the privately paid for services of a midwife, Ms. Kaiser. The births were complicated.

25. The *Midwives Regulation* came into force April 15, 2021, but was not operative. There wasn't a program developed. The evidence was unclear as to whether one could register as a midwife if they met the criteria. However, it can be inferred that not only was there not a program for midwifery but there was no manner in which to register if you did

meet the criteria. Midwives were prohibited by the Regulation to practice unless registered pursuant to s.3 of the *Midwives Regulation*.

26. On April 15, 2021, the Respondent provided an insured services policy for medical travel for midwifery.

27. The travel policy enabled pregnant women to apply to travel outside of the Yukon to access midwifery services; it did not provide for actual Outside midwifery services.

28. The midwives' program wasn't fully in effect until February 12, 2024.

29. The Respondent did not provide a transition policy or amendment which would permit unregistered midwives to provide services privately while YG developed a program.

30. Therefore, the Complainant was unable to have the services of a midwife in the Yukon, publicly or privately funded, during her third pregnancy and birth.

31. On May 4, 2022, by way of a press release, Ex. 1, Tab 7, the Respondent announced the following:

> The Yukon Midwifery Program has hired a second registered midwife and anticipates being able to receive clients at the clinic as early as the first week in July. Whitehorse residents who are in their first 20 weeks of pregnancy will be able to apply for midwifery care prior to the program launch.

32. On July 20, 2022, the Regulation was fully in force.

33. On December 29, 2022, Ms. Kaiser was registered as a midwife.

34. Ms. Kaiser was the midwife for the Complainant for her first and second pregnancies under the private arrangement, and partially for the fourth pregnancy under the Yukon Midwifery Program.

35. However, on January 12, 2023, midwifery services were suspended due to staff shortages. Pre- and post-natal care were provided but not birthing services.

36. The Complainant had been using the services of the midwife Ms. Kaiser for her fourth pregnancy when she was admitted to the YMP as eligible client.

37. On March 6, 2023, the Complainant was advised that midwifery services had been transferred to Solstice Maternity. This was a group of doctors. No home births were permitted under the care of Solstice Maternity.

38. The Complainant did use some of the services of Solstice Maternity but she wanted a home birth; it was important to her. Solstice Maternity did not provide for home births.

39. Despite the emotional distress experienced by the Complainant in not having the services of a midwife, she chose and did give birth to the third and fourth child at home. This was without medical care. The births were complicated.

40. Full-service midwifery care resumed on February 12, 2024. Ex. 1, Tab 8.

The Statutory Framework, *Human Rights Act*, Yukon

41. The applicable sections of the Yukon *Human Rights Act* are as follows:

7 Prohibited grounds

It is discrimination to treat any individual or group unfavourably on the following grounds…

(f) sex, including pregnancy, and pregnancy related conditions.

9 Prohibited Discrimination

No person shall discriminate

(a) when offering or providing services, goods, or facilities to the public,

10 Reasonable Cause

It is not discrimination if treatment is based on…

(d) other factors establishing reasonable cause for discrimination.

12 Systemic Discrimination

Any conduct that results in discrimination is discrimination.

Reasoning/Analysis

42. Until April 15, 2021, private midwifery, that is, publicly unfunded and unregulated midwifery, was permitted in the Yukon. Midwifery was not a designated profession pursuant to the *Health Professions Act*.

43. On January 28, 2021, the *Midwives Regulation*, under the *Health Professions Act*, Yukon, was enacted.

44. The regulation came into force on April 15, 2021.

45. However, the Respondent, Yukon Government (YG), was not prepared to administer the regulation at that time.

46. A letter dated August 11, 2021, sent from the Minister to the Complainant stated:

> As you know, our government has been working with our partners to establish integrated, funded and regulated midwifery services in Yukon. In consultation with our partners and expertise from Yukon midwives, we have developed the *Midwifery Regulation*, which came into effect on April 15, 2021. At that time, midwifery services became temporarily unavailable in-territory while the midwifery program is built and integrated into Yukon's existing healthcare system, and the necessary policies developed. ....
>
> The *Midwifery Regulation* was brought into force ahead of the program, as the regulations needed to be in place to allow the department and our partners to complete the necessary next steps in the program's development and is consistent with the recommendations of our local and national partners. (Ex. 1, Tab 3)

47. Simultaneously, that is, on April 15, 2021, when the Regulation came into force the *Insured Health and Hearing Services Midwife-Interim Policy* for medical travel was issued.

48. Because of section 3 of the Regulation, midwives were prohibited from practicing midwifery unless they were registered and held a license under the Regulation.

> 3 Prohibitions
>
> (1) An individual must not practise midwifery unless they are registered and hold a licence under this Regulation.
>
> (2) An individual must not practise midwifery except in accordance with the Act and this Regulation and with limitations, restrictions or conditions imposed on their license or registration.

49. The effect of this was that no individual could practice midwifery on a private basis without being licensed with the Respondent

50. Neither, though, was there a publicly funded program available to register midwives and provide for their services.

51. On May 4, 2022, the Respondent published a press release stating the following:

> The Yukon Midwifery Program has hired a second registered midwife and anticipates being able to receive clients at the clinic as early as the first week in

> July. Whitehorse residents who are in their first 20 weeks of pregnancy will be able to apply for midwifery care prior to the program launch. (Ex.1, Tab 7)

52. On July 20, 2022, the publicly funded YMP was in force.

53. On December 29, 2022, Ms. Kaiser was registered as a midwife in Yukon.

54. On January 12, 2023, the Respondent announced midwifery services would be limited. Only pre- and post-natal care were permitted with no attendance at births due to staffing shortage. (Ex. 1, Tab 6)

55. On March 6, 2023, the Respondent sent in a letter to the Complainant advising of the suspension of full midwifery services and the limitations that were in effect. (Ex. 1, Tab 5)

56. The midwifery program was temporarily transferred to Solstice Maternity. This was a group of doctors working together to provide services to pregnant women. They did not attend home births.

57. On February 12, 2024, the Yukon Midwifery Program resumed full service. (Ex.1, Tab 8)

58. Prior to April 15, 2021, the Complainant, a resident of Yukon, had the option to hire the services of a midwife in Yukon and, in fact, did so for the births of her first two children.

59. However, she could not have the services of a midwife for the care and birth of her third child as she was pregnant and gave birth during the period that the program was not in place.

60. She had the option of:

- Applying under the Midwife Travel Policy to travel to another jurisdiction in order to obtain services of a midwife;
- Having a hospital birth; or
- Having a pregnancy without pre- and post-medical care and without medical care and medical service for an at-home birth.

61. The Complainant chose to have a home birth.

62. When the Complainant was aware of her fourth pregnancy, the Regulation had been fully in effect, that is, with pre- and post-natal care and home birthing. She was looking forward to having the services of a mid-wife. She was devastated and emotionally distraught when she was advised that, as of January 12, 2023, there was a temporary suspension of the midwife program. Pre- and post-natal care were available but not home births.

63. She gave birth to her fourth child at home without medical assistance.

64. The Respondent did not present evidence to show justification, accommodation, or reasonable cause for discrimination.

Issues

Did the Yukon Human Rights Panel have jurisdiction to decide this matter?

65. In order to decide if the Panel has jurisdiction, we must first make a finding that the Complainant was discriminated against.

66. In finding discrimination, we must find

- a protected characteristic;
- an adverse impact from a service the Respondent offered;
- and that the protected characteristic was a factor in the adverse impact.

67. If, on a balance of probabilities, a *prima facie* case of discrimination is found then the Respondent must show accommodation or justification for the action.

The Test to Prove Discrimination

68. From the *Disability Rights Coalition* case,

> [100] The test is established by the *Act*, interpreted with *Charter* values in mind and with guidance in its application from *Moore* and other authorities.

69. Justice Abella provided guidance. To meet the onus of proving discrimination, *Abella J.in Moore V British Columbia (Education) (2012) S.C.R*., stated the following:

> [33] …complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service: and that the protected characteristic was a factor in the adverse impact. Once a prima facie case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

70. The *prima facie* test is on a balance of probabilities.

Protected Characteristic

71. The Respondent argued that it was depriving access to midwifery, in particular to a safe home birth, that was the characteristic and not sex, including pregnancy.

72. From the closing argument of the Respondent:

> In his closing, my friend indicated that the Moore tests, he suggested, goes as follows: Ms. Cooke is female which is a protected ground. She was deprived of access to a safe home birth twice due to the actions of the Yukon government, and that pregnancy is sex based, therefore it was a factor.

> Our submission is that that is not the correct way to perform that test. Clearly, Ms. Cooke does have a protected characteristic in that she is a female and is pregnant. We understand that she is arguing that the adverse impact was that she was deprived of access to a safe home birth twice due to the actions of the Yukon government, either through the regulation or through the program. However, her being pregnant was not a factor in being deprived of a home birth.
>
> She was deprived of a home birth, if you find that she was _the factor in that was because there were no registered midwives that were available to her during the times in which she was giving birth to her third and fourth child.
>
> In other words, her sex and being pregnant was not a factor in being able to get a home birth. It was, I mean, her being pregnant, obviously, was why she needed a home birth but what caused a deprivation of access to a safe home birth was the fact that there were no midwives practicing in Yukon at the time in which she was giving birth to her third and fourth child.

73. The Commission dealt at length in closing argument as to the definition of sex and pregnancy, but it was clear that the Complainant was pregnant at the pertinent times and was a female.

74. The Respondent agrees the Complainant had a protected characteristic of being female and being pregnant but submits that this characteristic was not the cause of the adverse impact.

75. The Board finds that Ms. Cooke did have a protected characteristic of sex, including pregnancy and pregnancy related conditions.

76. The Respondent argued though that it wasn't the protected characteristic that was discriminated against but rather access to midwifery, which is not a protected characteristic, that caused an adverse impact.

77. The Board disagrees with this submission.

78. The majority of the Board found the fact there being no registered midwives in the Yukon at the pertinent time was because of the discriminatory action of the Respondent of denying the opportunity to have a midwife. The Respondent prohibited midwifery until there was a program in place and then later limited the service.

79. The majority of the Board found, as is discussed later, that midwifery was a service offered to the Complainant by the Respondent.

80. The prohibition, and later the limitation of midwifery services, was discriminatory in that it was a factor in the adverse impact.

81. The Respondent cannot confer a service and then deny access to it.

Adverse Impact

Is not having the services of a midwife an adverse impact to the Complainant?

82. The law has developed from a fault-based concept of discrimination to an effects-based model.

83. This is a lengthy citation, but it describes the development well. *Fraser v Canada (Attorney General), 2020 SCC 28*:

> [30] … discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground …. Instead of explicitly singling out those who are in the protected groups for differential treatment, the law indirectly places them at a disadvantage...
>
> [31] Increased awareness of adverse impact discrimination has been a "central trend in the development of discrimination law", marking a shift away from a fault-based conception of discrimination towards an effects-based model which critically examines systems, structures, and their impact on disadvantaged groups…. Accompanying this shift was the recognition that discrimination is "frequently a product of continuing to do things 'the way they have always been

done'", and that governments must be "particularly vigilant about the effects of their own policies" on members of disadvantaged groups…

[37] This Court first dealt with adverse impact discrimination in *Ontario Human Rights Commission v. Simpsons-Sears Ltd*., [1985] 2 S.C.R. 536. Employees at a department store were periodically required to work on Friday evenings and Saturdays. Theresa O'Malley, an employee of the store and a member of the Seventh-Day Adventist Church, was required by her faith to observe the Sabbath from sundown Friday until sundown Saturday. She brought a complaint against the store under the *Ontario Human Rights Code*, R.S.O. 1980, c. 340, claiming that the rule requiring her to work on Saturdays discriminated against her on the basis of religion.

[38] Writing for a unanimous Court, McIntyre J. agreed. He stressed that the *Ontario Human Rights Code* was meant to provide protection against the "result or the effect" of discriminatory conduct (p. 547). Citing *Griggs* and several Canadian decisions, Mcintyre J. concluded that the *Act* prohibited adverse effects discrimination, which he distinguished from direct discrimination as follows:

> A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. [p. 551]

[53} How does this work in practice? Instead of asking whether a law explicitly targets a protected group for differential treatment, a court must explore whether it does so indirectly through its impact on members of that group (see *Eldridge*, at paras. 60-62; *Vriend*, at para. 82). A law, for example, may include seemingly neutral rules, restrictions or criteria that operate in practice as "built-in headwinds'" for members of protected groups. The testing requirement in *Griggs* is the paradigmatic example; other examples include the aerobic fitness requirement in *Meiorin*, and the policy requiring employees to work on Saturdays in *Simpsons-Sears* (see also *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489). To assess the adverse impact of these policies, courts looked beyond the facially neutral criteria on which they were based, and examined whether they had the effect of placing members of protected groups at a disadvantage (Moreau (2018), at p. 125).

84. The Regulation is not discriminatory in itself. It is the policy of not applying the Regulation which was discriminatory. It is the effect of the policy which is discriminatory.

85. Yukon females were prohibited from accessing midwifery from April 15, 2021 to June 20, 2022, and were limited in the services from January 2023 to February 12, 2024.

86. This had an adverse effect on the Complainant who wanted midwifery care including attendance at the birth.

87. In the *Simpsons-Sears* case, an employee was relieved of her position when the store required employees work Friday evenings and Saturdays. This was her Sabbath. She could not work on her Sabbath. This was a neutral-appearing policy affecting all employees which was held as discriminatory conduct on an employee. She was disadvantaged. She suffered an adverse impact. It prevented her from being employed by Simpsons Sears.

88. In the *Meiorin* case female firefighters were discriminated against when new guidelines for fitness were brought in for all firefighters. Females would not be able to meet the fitness policy yet could meet all other necessary requirements of a firefighter. They suffered an adverse impact of not being employed as firefighters. The policy had a discriminatory effect on a protected group being female.

89. Here the Regulation was neutral, even positive if implemented, but the policy of not implementing and limiting the benefit/service of midwifery placed an entire group at a disadvantage. Not just one person, as in *Simpsons-Sears*, or a group within a group, being female firefighters within the group of firefighters, but an entire group, being

pregnant female residents in the Yukon, was placed at a disadvantage. This included the Complainant. They suffered the adverse impact of not having access to midwifery.

90. The policy to not implement midwifery was a more direct policy singling out all pregnant women in the Yukon, whereas as with *Simpsons-Sears* the policy was not directed to any one person or group, but rather to all employees. But only one employee was unintentionally adversely affected.

91. In *Merioin*, the policy wasn't directed at females but it indirectly adversely impacted females — a disadvantaged group.

92. Discrimination can be unintentional.

93. Discrimination can be indirect, not singling out a person or group.

94. It's the effect of the conduct of the party creating and applying the policy that is the discrimination.

95. Here we find a more direct application of the discrimination as it is discrimination against all pregnant women in the Yukon.

Comparative

96. The Respondent submitted the following:

> The question is whether the government denied pregnant women benefits it accorded to others in the same situation, save for their sex and pregnant status. The answer is no. The regulation states that an individual must not practice midwifery unless they are registered and hold a license under that regulation. At the time Ms. Cooke was due to give birth to her third and fourth child, there were no individuals that were registered in Yukon or held a license under that regulation. In other words, there were no individuals that could practice midwifery in Yukon, and no one had access to such a midwife.

> We submit the comparison is a crucial component in the discrimination analysis. Identifying inequality is an inherently comparative exercise. In essence, the claim is that you have been treated differently than others based on your membership in a protected group. It is not enough to say that because Ms. Cooke is a pregnant woman, and her wishes regarding her birth plan were not met, that she experienced discrimination based on sex, including pregnancy. Discrimination cannot be based on a mere finding that a member of a protected group has some unmet need. It must be shown that, compared to others, Ms. Cooke was denied a benefit or subject to additional burden based on her sex, including pregnancy. Ms. Cooke was neither denied a benefit available to others, nor subjected to a burden not imposed on others based on her sex. Again, no one had access to a birth to a home birth attended by a midwife, because there were no midwives in Yukon at the time in which she delivered her third and fourth child.
>
> It is well settled law that the right to equality does not include a positive right to receive a particular level of government funding or benefits. To make a finding of discrimination, Ms. Cooke has to establish that, due to her sex and pregnancy, she was denied a benefit that was available to other members of society. Under the regulation and via the Yukon midwifery program, Ms. Cooke was neither denied a benefit available to others, nor subject to a burden not imposed on others based on her sex.

97. The majority of the Board does not agree with this submission. Rather it finds that a comparative analysis is not required.

98. The Yukon *Human Rights Act* does not state a comparative analysis to another identifiable group is mandatory. Only a finding of unfavourable conduct is required.

99. Section 7 of the *Human Rights* Act reads:

> It is discrimination to treat any individual or group unfavourably on any of the following grounds …
>
> (f) sex, including pregnancy, and pregnancy related conditions.

100. Interestingly the Nova Scotia *Human Rights Act* does appear to require a comparative analysis.

101. Section 4 of the Nova Scotia Act reads:

> For the purposes of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (i) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

102. Using the phrases “imposed on others” or “available to others” appears to create a comparison test that the Complainant must be compared to others. However, even with this wording the Nova Scotia Court of Appeal found that a direct comparison is not required.

> [165] We are satisfied the same principles should animate the pursuit of equality under human rights legislation. Although the Act sets out a definition of discrimination that engages comparisons to "others, a finding of prima facie discrimination does not require the identification of any particular comparison group or any formulistic comparative analysis. Although a complainant may use comparison to another identified group as evidence of a distinction and resulting burden or disadvantage (which is what the complaints did here) a failure to do so does not necessarily doom the complaint. *Disability Rights Coalition v. Nova Scotia (Attorney General),* 2021 NSCA 70

103. If a comparative group was required what would a comparative group be?

104. *Withler v Canada (Attorney General)*, 2011 SCC 12 states as follows:

> [59] Finally, it has been argued that finding the “right” comparator group places an unfair burden on claimants (Daphne Gilbert and Diana Majury, “Critical Comparisons: The Supreme Court of Canada Dooms Section 15” (2006), 24 *Windsor Y.B. Access* Just. 111, at p. 138). First, finding a mirror group may be impossible, as the essence of an individual’s or group’s equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison. As Margot Young warns: If there is no counterpart in the experience or profile of those closer to the centre, the marginalization and dispossession of our most unequal will be missed. These cases will seem simple individual instances of personal failure, oddity or happenstance.
>
> [60] In summary, a mirror comparator group analysis may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply. In all these ways, such an approach may fail to identify — and, indeed, thwart the identification of — the discrimination at which s. 15 is aimed.

105. A comparative group analysis, although it might be helpful in some cases, is not required in all cases. In fact, as in the case here, a comparative group would not be found. As in Withler, the SCC has said not finding a comparative group should not doom a matter.

What is a Service Pursuant to s. 9(a) of the Act

106. The Respondent submits the *Midwives Regulation* was legislation that did not offer a benefit/service. They submit the complaint is a direct attack on the legislation.

107. The Board agrees that it does not have jurisdiction to hear an attack on legislation.

108. Human Rights statues are quasi-constitutional documents to be interpreted broadly to give the meaning intended by legislature. From the *Disability Rights Coalition* case,

> [109] Consistent with principles of interpretation that apply to human rights statutes as quasi-constitutional documents, "service" is to be interpreted broadly to give effect to the purpose of the *Act* as established by the legislature—as long as the plain meaning of the word is not strained. In *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 the Supreme Court of Canada confirmed a liberal approach is to be taken in considering what may constitute a "service":
>
> [7] A true purposive approach looks at the wording of the statute itself, with a view to discerning and advancing the legislature's intent. Our task is to breathe life, and generously so, into the particular statutory provisions that are before us.
>
> [110] The identification of the "service" is often determinative of the outcome of a discrimination complaint.

109. This is such a case. A broad interpretation is to be given to the definition of "services".

110. Here the Respondent provided a benefit/service being publicly funded and regulated midwifery to pregnant women in the Yukon.

111. When the Respondent was unable to provide a program, that is, the services of publicly funded midwifery, on April 15, 2021, the date the Regulation was effective, it also, because of the prohibition clause in the Regulation, prohibited private midwifery.

112. In doing so, it prohibited private midwifery until a program for midwifery was developed and in place. The private midwifery was prohibited for those unlicensed practitioners. Pregnant women in the Yukon were without access to midwifery. Private

113. It could be found that the Respondent had a right to prohibit private midwifery, but the Respondent did not have the right to deny the publicly funded midwifery it had just legislated to do.

114. By the Regulation it had provided a service.

115. The Respondent could not discriminate by denying the service unless the Respondent justified the denial.

116. This case is distinguishable from the *Auton v British Columbia (Attorney General)*, 2004 SCC 78 where parents were seeking the government provide a specific benefit of Lovaas therapy to their children.

> 35 In summary, the legislative scheme does not promise that any Canadian will receive funding for all medically required treatment. All that is conferred is core funding for services provided by medical practitioners, with funding for non-core services left to the Province's discretion. Thus, the benefit here claimed — funding for medically required services — was not provided for by the law.

> 41 … This court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is **not conferred in a discriminatory manner.** (Emphasis is the Board's.)

117. The treatment, Lovaas therapy, was sought for their children. The government did not fund that specific benefit. It funded a public health plan with core services and Lovaas therapy was not a core service. It was found that the government could decide and legislate what services it would fund. It had not decided that the Lovass therapy was on the list of services. The Tribunal did not find that it was included in a general way as a medical service.

118. Unlike the request for Lovaas therapy, the Respondent had already decided to confer the benefit of midwifery by enacting the *Midwives Regulation*. This gave a specific benefit of funded midwifery to women in Yukon. The Respondent could not now confer it discriminatorily by denying access to it.

119. In Karas v Health Canada, 2024 CHRT 133, the complainant contested the blood donation policy that prevents men who have sex with men from donating blood for a certain time after having had sex with a man. The CHRT found that the policy only regulated, a policy or term; it did not provide the services of blood donation, that is, donating of blood by men could continue if they had not taken part in sex with a man for a certain time period before donating blood. The service of donation continued. It was only limited in a specific way.

120. This is distinguished from the case at hand in that the Regulation provided the entire service, analogous to the donation of blood service, and did not merely provide a policy or term.

121. The definition of service is further described at para 45 of *Karas*:

> [45] … "Services" contemplate something of benefit being "held out" as services and "offered" to the public… Similarly, a "service" is characterized by its "transitive connotation", in which it "passes from the service provider and has been held out to the public"…. There is "a requisite public relationship between the service provider and the service receiver, to the extent that the public must be granted access to or admitted to or extended the service by the service provider"…. (Citations omitted)

122. In the case at hand, the service of publicly funded midwifery was offered to the public. But then the Respondent did not provide access or admittance to the publicly funded service of midwifery between April 15,2021 and February 12, 2024, and, again, later in time, with a partial suspension of the services.

123. In *Hogan v Ontario (Health and Long-Term Care)*, 2006 HRTO 32, the Ontario government unlisted medical services of sex change from funding. The majority of the Board agreed it was discriminatory but held it was justified because of finances. It allowed the medical service to be conducted privately though.

124. In the case at hand, funded midwifery services are analogous to medical services offered to transgendered persons in Ontario. In *Hogan*, it was ruled that the government could not simply delist transgender services unless it provided justification. The Ontario government provided evidence of financial inability to continue with the service. This was accepted by the Tribunal, and the government was permitted to delist the service, save for those who were already part way through treatments.

125. The Respondent here did not offer evidence of financial needs or other justification for not providing the service, save for a letter to the Complainant stating the midwifery

program was being developed. It did not offer evidence as to why it wasn't already developed and in place.

126. The letter did not establish a reasonable cause as per s.10 of the *Act*. It did not provide a justification for the discrimination.

127. In *Dorey et al. v Employment and Social Development Canada,* 2023 CHRT 23

> [41] If a respondent that provides services customarily available to the general public does so in a way that effectively **denies access** or makes an adverse differentiation based on a prohibited ground, the complaint could fall within s.5 of the *Act*. But if a respondent is applying legislated criteria, the challenge is not to the provision of services but to the legislation itself. (Emphasis is the Board's)

128. The complainants in the *Dorey* case had aged out of further contributing to the Registered Disability Savings Plan. The Tribunal found that the qualification of age was the substance of the legislation. As such the complaint was targeting the legislation itself.

129. Here there is no complaint made against the Regulation. It is in the application of the Regulation. Once the Respondent offered a service (midwifery) it could not confer it discriminately, that is, it could not deny access to it.

130. The discrimination here is in how the service was applied. It prohibited both private and public midwifery without providing accommodation or justification/*bona fide* reasons. The Respondent suspended full services of midwifery from April 15, 2021 to February 2, 2024 without providing accommodation or justification. The government denied the service of midwifery by not providing a program for it.

131. Further it then temporarily suspended some of the service, again, providing no evidence to justify doing so, nor a *bona fide* reason.

Does the Regulation regulate a profession or provide a service?

132. The *Midwives Regulation does the following:*

- It mandates that midwives be registered and licensed. s.3.
- It sets out criteria that must be met to be registered.
- It sets out the **scope of practising** both core and advance practices.
- It appoints an advisory committee to advise on standards of practice.
- It sets out the **scope of midwifery in s.12.**
- It identifies the **core midwifery services in s.13.**
- **It identifies advanced midwifery services listed or referred to in s.14.**

133. As can be seen, the Regulation both regulates the midwifery profession and offers the service of midwifery.

134. The Respondent, itself, refers to the Regulation as providing a service.

135. Ex. 1, Tab 6, is an e-mail from the Respondent which states that they “could no longer provide the level of service required to safely offer births to Yukoners.”

136. In Ex. 1, Tab 3 the Respondent wrote: "… regulated midwifery services…” and at Ex. 1, Tab 6 "… level of service…'' and “… provide some prenatal and full post-partum care….”

137. In the case at hand, the service is midwifery authorized by law being the *Midwifery Regulation*.

Public Relationship

138. To find a “service”, there must also be a public relationship.

139. To determine whether a s. 8 of the Yukon *Human Rights Act* is engaged, the Board must first "… identify the service in question, and then... determine whether that service gives rise to a public relationship between the service provider and the service user.” (*Gould*, paragraph 58)

140. Gould was refused membership in the Yukon Order of Pioneers based on her gender, being female.

141. The Supreme Court of Canada (SCC) invoked s.9(c) of the Yukon *Human Rights Act*,

> … in connection with any aspect of membership in or representation by any trade union, trade association, occupational association or professional association…

and found that the Yukon Pioneers did not come under this section as it did not offer any of the enumerated services.

142. The SCC found there was discrimination, but that it was not prohibited as the Yukon Pioneers did not offer a service to the public. It found that membership in the Yukon Pioneers was not an enumerated discrimination.

143. Here the majority of the Board found discrimination of the enumerated factor of sex, including pregnancy, and has made a finding that the Regulation provided a service.

144. As a side note, cases have referred to “services customarily provided” but the Yukon *Human Rights Act* does not use the word “customarily” as, for example, the BC Human Rights Act does.

145. As relates to “service” the following is required to be proven:

- that it was a service offered to the public, and
- that there is a relationship between the service provider and the service receiver.

146. In *Gould*, at paragraph 55:

> What is to be gleaned from these various provisions is that they all prohibit discrimination with respect to services that are offered to the public, or to which the public has access or to which it is admitted. There is, therefore, a requisite public relationship between the service provider and the service receiver, to the extent that the public must be granted access to or admitted to or extended the service by the service provider. There is a transitive connotation from the language employed by the various provisions; it is not until the service, accommodation, facility, etc. passes from the service provider and has been held out to the public that it attracts the anti-discrimination prohibition. (Specifically, the Yukon Act speaks of “when” the services, goods of facilities are provided to the public.)… This is all the more compelling when one recalls the importance of developing an interpretation that is consistent with other Canadian human rights statutes. This is consistent with and reinforced by the common purpose that underlies these provisions: the elimination of discrimination in enterprises that serve the public. In relation to this common purpose, it needs to be said, however, that an enterprise need not purport to serve the public before a service it offers to the public is caught within the scope of s. 8(a), or analogous provisions. For, indeed it would be simple for an enterprise to purport to serve the public, and then to engage in the provision of services to the public in a discriminatory manner. The intention of the enterprise should not be determinative of whether a service offered by the enterprise is in fact offered to the public. What is equally important is that a determination under s. 8(a) should not be centered upon the nature of the enterprise of the service provider, but more accurately, upon the service being offered. In this regard, the analysis becomes service-driven.

147. The service of midwifery had been identified, and it is clear it gives rise to a relationship with the user, the Complainant being a female (sex) who is pregnant, who would use the service of a midwife.

Justification, Accommodation, Reasonable Cause

148. Having found the Complainant met the *Moore* test of discrimination, did the Respondent offer a *bona fide* and reasonable justification, accommodation, or reasonable cause for the discrimination?

149. S.10(d) 0f the Act reads:

> It is not discrimination if treatment is based on
>
> (d) other factors establishing reasonable cause for the discrimination.

150. In *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights),* [1999] 3 SCR 868

> 19 Once the plaintiff establishes that the standard is *prima facie* discriminatory, the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard is a BFOR or has a *bona fide* and reasonable justification. In order to establish this justification, the defendant must prove that:
>
> (1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
>
> (2) it adopted the standard in good faith, in the belief it is necessary for the fulfillment of the purpose or goal; and
>
> (3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

151. Although the Respondent offered no evidence of justification, accommodation, or reasonable cause, there was evidence through the Commission's case that the

Respondent did provide the insured services policy for medical travel for midwifery. This must be reviewed to ascertain if it provided justification.

152. The purpose of the policy (Ex. 1, Tab 9, page 2), as stated, was:

> PURPOSE:
>
> As midwifery births by a Registered Midwife are not currently available in Yukon, this temporary policy is to provide travel and subsidy for the pregnant individual and their partner/escort to travel to another jurisdiction in Canada to access publicly funded midwifery services during the interim period of April 15, 2021 — April 14, 2022.

153. This would appear to show the Respondent was aware the Regulation provided a service of midwifery and attempted to accommodate the program by permitting travel outside of the Yukon to procure midwifery services.

154. The policy did not provide for actual midwifery services outside of the Yukon. It only provided the opportunity to apply for travel for same. The onus was on the Complainant to find midwifery services outside of the Yukon. The evidence was that it would have been difficult to find a midwife in another jurisdiction as it would likely be for the birth only. Several months would need to be spent outside of the Yukon to have the full benefit of a midwife. As well, midwives were difficult to find.

155. Further it appears that the purpose of having a midwife would not be met by merely travelling outside of the Yukon for a brief designated time.

156. The travel policy did not provide an accommodation for midwifery services.

157. The Respondent provided a letter to the Complainant advising it was developing the midwifery program (Ex. 1, Tab 3). It did not provide any evidence as to why the program was only in the development stage or how it was being developed.

158. This letter did not provide justification.

159. Nor did the Respondent enact other means to provide midwifery through, for example, a transition clause or other manner to allow private midwifery while the program was being developed.

160. For example, in Ontario the Midwifery Act was passed in 1991, but not in force until December 31, 1993. During the time between the passing of legislation and the coming into force, midwives were permitted to practice unregulated. On the coming into force date of January 1,1994, midwives' registrations were immediately activated.

161. The justification offered by the Respondent as to the suspension of midwifery from January 12, 2023, to February 12, 2024 was found in Ex. 1, Tabs 5 and 6 letters/e-mails. The ministry staff stated there was a shortage of midwives. There was no further evidence of why the shortage occurred and what *bona fide* efforts the Respondent did to rectify the shortage.

162. The services of Solstice Maternity were offered, but it did not provide home birthing services. Home birthing is an essential part of midwifery.

163. This did not provide justification or reasonable cause for discrimination or accommodation.

164. The Complainant gave evidence that she had searched for job postings for midwives in the Yukon and found no postings. The Complainant offered the following suggestions to the Respondent by e-mail, on January 21, 2023 (Ex. 1, Tab 4):

- Posting a job listing for midwives with a salary greater than what was offered in the NWT;
- Permitting private practice of midwifery;
- Sending just one midwife to attend births rather than two as mandated in the Regulation; or
- Sending a nurse along with a midwife to a birth.

165. However, there was no evidence led that these options were relied on by the Respondent.

166. The majority of the Board found that the Regulation provided a service but denied access to it from April 15, 2021 to February 2, 2024. The Respondent did not provide a *bona fide* justification, accommodation, or reasonable cause.

167. Further, the majority of Board found that no *bona fide* justification, accommodation, or reasonable cause was provided for the suspension of services from January 2023 to February 2024.

Paramountcy

168. S. 39 of the *Act* reads:

> This Act supersedes every other Act, whether enacted before or after this Act, unless it is expressly declared by the other Act that it shall supersede this Act.

169. The *Midwives Regulation* does not expressly declare it supersedes the *Act*.

170. However, the paramountcy clause did not have to be considered in this matter. The complaint is not directed at the legislation, that is, the Regulation, but to the discriminatory application of the legislation by the temporary denial to the service of midwifery that the legislation provided.

Jurisdiction

171. The Board found *prima facie* discrimination had been shown on a balance of probabilities: the Complainant had a characteristic protected from discrimination under the Act; the Respondent, through the *Midwives Regulation*, provided a service; and that the Complainant experienced an adverse impact with respect to the service.

172. The Board found the *Midwives Regulation* provided a service of midwifery.

173. This was not a term of the *Midwives Regulation* that was being sought to be changed. If so, this would have been an attack on the legislation.

174. In *Child (L) v BC Ministry of Education*, 2025 BCHRT 27 it was found that it was not discrimination to deny a child a RESP where that child exceeds the age permitted in the regulation to apply. The age was deemed a term. The Tribunal found that the complainant was seeking to change the term in a regulation and, therefore, was seeking to change the legislation.

> [20] Her challenge is to the eligibility criteria itself, which is set out in the Regulation. It is not to the provision of any services under the Regulation. To allow her complaint would require the Tribunal to re-write the Regulation, which it cannot do.

175. The Complainant here is not seeking a change in the legislation; she is seeking its application which she was denied. She was denied access to a service provided by the Respondent through the *Midwives Regulation*.

176. The Board found it had jurisdiction to hear and decide the matter.

Systemic Discrimination

Did the Respondent engage in systemic discrimination?

177. In the Commission's submissions, they seek a remedy of declaratory relief.

178. The definition of systemic discrimination in the *Act* is at s.12:

> Any conduct that results in discrimination if discrimination.

179. This is not particularly helpful.

180. Systemic discrimination was defined, in *Association of Ontario Midwives v Ontario (Health and Long-Term Care),* 2014 HRTO 1370, as follows:

> [30] … Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics…
>
> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionally negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

181. In the *Disability Rights Coalition* case, four applicants who were under the auspices of social assistance sought remedies for their protracted housing in institutions which were lock ups. These individuals had been approved by medical services for housing in the general public. The housing was denied for reasons of unavailability and finances.

182. The individual complainants sought remedies personal to them for the discrimination suffered and received monetary remedies. From the *Disability Rights Coalition* case,

> [208] … The systemic complaint of the DRC requested broad remedies intended to alleviate practices and policies that were said to disadvantage a large number of persons with disabilities.

183. In the *Disability Rights Coalition* case, the Nova Scotia Court of Appeal returned the matter to the Tribunal for a hearing, specifically on the issue of systemic discrimination. The DRC was seeking broad remedies to alleviate discrimination.

> [208] Having considered its reasons, we are satisfied the Board erred in conflating the individual and systemic discrimination complaints. The individual complainants sought remedies personal to them for the discrimination suffered. The systemic complaint of the DRC requested broad remedies intended to alleviate practices and policies that were said to disadvantage a large number of persons with disabilities. It did not seek compensation or a similar personal remedy for any individual member of the group.

184. The Complainant in our case is not seeking remedies to alleviate systemic discrimination.

185. The evidence provided to the Board is that the *Midwives Regulation* was fully in effect February 12, 2024.

186. There was no evidence provided that it was not.

187. There is no need for the Board to make a declaration of relief that would declare that the services of midwifery are to be instituted or in some way provided.

188. In the *Disability Rights Coalition* case, a declaration of systemic discrimination was sought. It was required so that an order could be made to have the respondent change their policy.

189. In our case, the policy or application had been changed. The midwifery program is fully in effect. There is no need to make a finding of systemic discrimination.

190. A finding of systemic discrimination is not essential to the findings necessary to decide this complaint.

> [193] ... as the Supreme Court of Canada noted in *Moore*, a finding of discrimination with respect to an individual complaint does not open the door to granting of broad systematic relief. *Disability Rights Coalition v Nova Scotia*, para 193

Conclusion

191. The majority of the Board finds, on a balance of probabilities, the following:

- That the Complainant had a protected characteristic of sex, including pregnancy.
- That the Complainant experienced an adverse impact, that being the lack of midwifery services.
- That the Regulation provided a service, that of midwifery
- That the adverse impact the Complainant experienced resulted from the discriminatory conduct of the Respondent in denying the Complainant access to the services by not providing a program for the services, prohibiting the private services of a midwife, and further, at a later date, partially suspending the services.
- That the Respondent did not justify their conduct.

192. Discrimination did occur.

193. It appears the Respondent did not intend to discriminate. The midwifery program was put fully in place at a later date.

194. There was no evidence the Respondent did not desire to implement the program. Rather it appears the intention was to assist Yukon females with publicly funded midwifery but there were challenges in providing the program.

195. The Respondent did deny the Complainant all midwifery services, including private midwifery.

196. Unfortunately, the Respondent did not provide sufficient evidence to justify this. The Board can only act on the evidence before it.

197. The Respondent is responsible to the Complainant to provide a remedy for her denial to midwifery services.

Analysis of Remedy

198. The Complainant is seeking the following:

- actual coats of $837.28, (Ex.1, Tabs 10 and 11)
- general damages of $37,751.83, and
- that the Commission be awarded costs.
- A declaration of systemic discrimination

Legislation Referring to Remedy

199. In the *Act*,

> 1 (1) The objects of the Act are…
>
> (c) to promote recognition of the inherent dignity and worth and of the equal and inalienable rights of all members of the human family…

and

> (24)(1) If the complaint is proven on a balance of probabilities, the board of adjudication may order the party who discriminated to…
>
> (c) pay damages for any financial loss suffered as a result of discrimination;…
>
> (d) pay damages for injury to dignity, feelings, or self-respect;…
>
> (f) pay costs.

200. There are no limitations in the *Act* or *Regulations* on the amount of general damages that can be awarded.

Costs

201. The Commission seeks costs from the Respondent.

202. Some submissions had been made during the hearing on costs. The Board requires more information.

203. The issue of costs will be set over to a date yet to be determined for the Commission and Respondent to present submissions on the issues of:

- Why costs should be ordered;
- What costs should be ordered; and
- To the amounts.

Systemic Discrimination

204. A party may seek a declaration of systemic discrimination so that an order that the Respondent cease the discriminatory practise may be made.

205. Here the discriminatory practise has ceased. The midwifery program is fully in effect. There is no requirement that a declaration of systemic discrimination be made.

Actual Damages

206. Actual damages for financial loss, suffered as a result of the discrimination, was $837.28, as per Ex. 1, Tabs 10 and 11, for birthing supplies.

General Damages

207. General damages are compensatory awards. They are not punitive awards. They are intended to restore the Complainant to the same position the Complainant occupied had the discrimination not occurred. The Complainant here cannot be restored to the position she was in prior to the discrimination, but can be compensated for injury to dignity, feelings, and self-respect.

208. In *Hureau v. Yukon Human Rights Board of Adjudication*, 2014 YKSC 21, the Yukon Supreme Court recently reiterated the basic principles governing human rights remedies, quoting a passage from the 2008 case of *MacTavish v. Prince Edward Island* (2009), 288 Nfid & P.E.I.R. 108 (P.E.I.S.C.), at para. 49, as follows:

> . . . General damages in human rights cases are not intended to punish the wrongdoer. They reflect a recognition by society that one has been harmed by the actions of another. The harm we speak of with respect to general damages in these cases is not monetary harm. **It is harm to the dignity and self-respect of the victim.** We must be realistic and consider whether any award bears a reasonable relationship to other awards for similar discrimination.

209. The approach to general damages can be described as a two-part approach considering

- The objective seriousness of the discrimination; and
- The particular effect on the complainant. (*Walsh*, para 58)

Facts as to Injury, Dignity and Self Respect

210. This complaint is based on the legal issues of

- whether the Board has jurisdiction to hear the matter; and
- whether this is discrimination,

as such few facts from the Complainant's testimony have been referred to.

211. Having found discrimination, and in considering the remedy, it is now important to review the Complainant's testimony and the effect the discrimination had on her.

212. Marsha Cooke (Complainant) testified that she wanted to have a home birth for her first child and that she wanted a water birth for a variety of reasons, including that

- water births were safer for the baby,
- there were less interventions, for example, the use of forceps or vacuums,
- there were less risks than hospital births
- there was a risk of unnecessary C-sections in birthing in a hospital
- it was a warmer, quieter, and friendlier environment with a midwife and her husband present versus a sterile hospital environment with many interruptions, noise, and unnecessary procedures such as ultrasounds.

213. During Ms. Cooke's first birth at home, she experienced complications and was required to go to the hospital for care and treatment. She testified that she had five children, and that this was her first birth at home with a midwife. Due to complications, that being that she had placenta previa (where the placenta covers the cervix), which led to further complications during delivery, her family doctor recommended a C-section, to

which her midwife disagreed and recommended a home birth. Ms. Cooke chose a home birth with her midwife.

214. She also testified that, although her first born was born at home with her midwife, afterwards she had to go to the hospital as the placenta did not come out naturally. Her treatment at the hospital was not acceptable. She stated she had bruising up both arms due to all the needles administered, a catheter inserted, and a spinal tap that didn't work and, as a result, was sedated by gas. She stated she had an episiotomy and was stitched up while unconscious and dealing with hemorrhoids.

215. Her second child was born August 27, 2019, with a midwife, as well, as she was happy with the services that the midwife provided. She also testified that she chose a home birth due to her experience at the hospital after her first child was born at home, and the complications she experienced.

216. Ms. Cooke, again, had complications during the delivery of her second child, and was advised to call the paramedics. During the second stage of pushing, chunks of meconium (baby's poop) appeared and the baby was breech. The baby was initially born not breathing, however, was able to breathe under the care of her midwife. She testified that she was satisfied with the birth and her midwife's services. She also testified that if she had gone to the hospital, she would have received a C-section and that, in the Yukon, vaginal births were not allowed after two C-sections.

217. She testified that she found out she was pregnant with her third child on Christmas Day, 2020. She anticipated having her third child at home with people she loved and trusted, including her midwife. She said she contacted her midwife and was told her

midwife could not be present for her third child as YG (Respondent) put regulations in place. She experienced anger, helplessness, vulnerability, and days when she was furious and days when she cried all day. She stated that the government took away her right to choose how to birth her third child.

218. She also testified that, and provided evidence that, she contacted Health & Social Services of the Government of Yukon and advised them that it was her human right to birth at home and to have a midwife.

219. Evidence also demonstrated that Ms. Cooke provided options for the government, in her e-mail of January 21, 2023, to:

- post midwifery job listings immediately with a salary greater than NWT;
- allow midwife private practices;
- permit one midwife, rather than the mandatory two, to be present at births; and
- allow a nurse to be the second medical person at a birth.

220. These options were not considered, and Ms. Cooke felt propelled to

1. have a hospital birth;
2. take advantage of the interim policy regarding travel down south (she was six months pregnant at the time); or
3. have an unattended birth at home without medical expert.

221. Ms. Cooke sent several correspondences to the government advising them of her rights and requesting medical expertise at her home birth. The government responded, on August 11, 2021, advising that they could not provide a doctor or a midwife to support a birth at home. By this time, she was unable to fly given her stage in pregnancy, and she

had no choice but to have her fourth child at home without medical expertise and with only her mother and husband present to assist.

222. Again, there were complications as the baby was breech. Paramedics were called, and the baby was delivered naturally even though it was a breech birth. She described feelings of being scared but thankful her midwife had taught her how to deliver a breech baby. During this birth, her baby presented with a neutral arm where the head was born but the arm was still inside the birth canal. The baby was able to pull its own arm out. Ms. Cooke stated that if she had been unable to push the baby out in seven minutes, it could have resulted in shoulder damage and/or death. The baby was delivered naturally, and there were no long-term effects.

223. Ms. Cooke found out she was pregnant with her fourth child in October 2022. She stated that she was excited as, by this time, the Midwifery Program was in effect, and her application had been approved. She was to receive pre-care, birthing care, and post-natal care from a midwife. Subsequently, she received a phone call stating that the program was temporarily suspended. She testified that she was devastated and could not pick up her children from daycare. She was angry, sad, scared, and she felt betrayed. She was very stressed, couldn't sleep, cried all the time, and could not go to work. Her only options were to have a hospital birth or a home birth without medical expertise. Given her experience in the hospital with her first child, she chose to have the baby at home with only her husband and her mother present, both of whom had no medical expertise. She knew she had a precipitous birth again where the birth is less than two hours. Paramedics were called and arrived after the birth. This was the first birth that went well, and the placenta came out naturally. There was no need to go to the hospital.

224. Ms. Cooke's fifth child was also born at home with her husband, two midwives, and a Registered Nurse from Emergency attending to learn more about the birth process. Her fifth child was also a natural birth and, again, there were no complications.

225. Ms. Cooke had provided options for the Government of Yukon to consider, none of which were accepted as viable options. Given the adverse effects Ms. Cooke experienced during her first delivery, Ms. Cooke elected to have a private midwife and a home birth for all of her children. She suffered post-traumatic stress syndrome after the care she received after her first baby was delivered. She provided evidence of the benefits of having a home birth with a midwife versus a hospital birth. During her third pregnancy, she testified she was scared, distraught, distressed, and suffered adverse effects when she was advised that she could not have a private midwife for her third delivery. Her testimony included that she experienced similar effects when the midwifery program was temporarily suspended for her fourth delivery.

226. Ms. Cooke and her babies were in near death situations for her third and fourth deliveries.

227. The government did not consider any of the accommodation requested by Ms. Cooke that would have provided medical expertise during her third and fourth deliveries.

Objective Seriousness of the Discrimination

228. This matter is about taking away the choice to have a midwife and home birth. The Complainant wanted a home birth.

229. She had paid for the private services of a midwife with her first two births. The Respondent denied her the choice of a midwife, either a private or a publicly funded one. The Complainant had no choice of having a midwife. The Respondent placed her in a precarious situation of birthing without medical care.

230. Ms. Paulette, an expert on midwifery, gave the following evidence:

> … that a woman feels disempowered when denied the autonomy to decide where and with whom she will give birth, which is recognized both nationally and internationally as being integral to women's reproductive rights and freedoms. If she gives birth in hospital, she is likely to have a more negative and less empowering experience than the one she had anticipated at home. The woman wishing to birth at home with a midwife who is unable to access this care…. encounters feelings of isolation, a lack of support and the negative attitudes or controlling behaviours of health care providers. Stress and feeling a lack of control in the prenatal period are also identified as risk factors for postpartum anxiety and depression.

231. The Board found that leaving the Complainant without the choice of a midwife deprived her of inherent dignity and worth.

232. She was left with Respondent creating her choices for her.

The Particular Effects on the Complainant

233. When finding out she could not have either a private or a publicly funded midwife for her third birth, the complainant experienced helplessness, vulnerability, anger, and crying.

234. She wrote to the Respondent seeking exceptions or ways to be permitted to access the services of a midwife. She did try to advise the Respondent of the issues. When the suspension occurred during her fourth pregnancy she was devasted, sad, betrayed. stressed, not sleeping, and unable to go to work.

Reasoning as to Amount

235. The Commission sought damages of $37,751.83 based on the *Hogan v Ontario (Health and Long-Term Care),* 2006 HRTO 32 case where the government was seeking to delist transgender medical procedures. The Tribunal awarded general damages of $25,000 to complainants who had their funding taking away while in mid transition. With inflation that amount would be approximately $37,000 today.

236. In 2013, the Alberta Court of appeal held the following, (*Kvaska v Gateway Motors (Edmonton) Ltd.,* 2020 AHRC 94):

> [66] Damage awards from this Tribunal have been increasing since the Alberta Court of Appeal's decision in *Walsh*, in which the court emphasized the need for adequate and meaningful damage awards for discrimination:
>
> Damage awards that do not provide for appropriate compensation can minimize the serious nature of the discrimination, undermine the mandate and principles that are the foundation of human rights legislation, and further marginalize a complainant. Inadequate awards can have the unintended but very real effect of perpetuating aspects of discriminatory conduct.
>
> [67}….Historically, awards for general damages in the human rights context have been low, arguably nominal.

237. In *Sunshine Village Corporation v. Boehnisch*, 2020 ABQB 692, the court stated that the award of $25,000 was a low award for the complainant having lost her employment as a ski patroller. From *Kvaska*

> [71] In *Sunshine Village*, Chair Munn awarded $25,000 in damages to dignity after the employer refused to rehire the complainant as a ski patroller due to injury, and then refused to allow her to provide evidence of fitness. On judicial review, the Court of Queen's Bench of Alberta recognized the significance of discrimination on complainants:
>
> Discrimination can alter lives and its injury to the victim's dignity can leave a lasting psychological legacy... As the Court of Appeal noted in Walsh, **nominal damages risk trivializing both the impact and the magnitude of social wrong that has been perpetrated in such cases. (**Emphasis is the Boards's)

> [72] Although it upheld the Tribunal's damage award, the Court of Queen's Bench suggested that $25,000 in general damages in that case was on the low end of an acceptable award:
>
> A larger award for general damages may have been legally and factually justified in this case. A lower amount would have treated Boehnisch's mistreatment and the resulting anguish as virtually meaningless. This Court would do an injustice, and materially misinterpret the letter and spirit of the *AHRA*, if it acceded to this employer's request to reduce the damages in this case to a more minimal sum.

238. In the *Sunshine* case, a loss of employment saw a general damage award of $25,000 by the Tribunal. The Appeal Court of Alberta stated it was low. They would not disturb it as they were a reviewing court not a deciding court.

239. General damages awarded in each case is to be decided on the facts before the Board. More serious consequences will garner a higher amount in general damages.

240. The evidence of the Complainant shows a serious discrimination which had devasting effects on her wellbeing.

The Remedy

241. The Respondent shall pay general damages of $35,750.00.

242. The Respondent shall pay actual damages of $837.28.

243. A further hearing will be conducted to hear further submissions on costs.

244. This will be via video conferencing at a date set after conferring with the parties as to their availability.

Whitehorse, Yukon, January 12, 2026

Chief Adjudicator Judith Hartling
Yukon Human Rights Panel of Adjudicators

for Roxane Larouche

Adjudicator Roxane Larouche
Yukon Human Rights Panel of Adjudicators

Dissenting Written Reasons

245. This is not the decision/judgment. It is a dissenting opinion.

246. I have had a chance to review the decision from my fellow Board members, and would like to respectfully reflect my dissenting view on this case.

247. In my opinion, I believe this complaint is based on two separate time events, and they should be dealt with separately instead of viewing them on a continuum basis.

248. The first event was when the *Midwives Regulation*[1] under the *Health Professions Act*[2] came into force on April 15, 2021[3]. This Regulation prohibits any individuals practicing midwifery unless they are registered and hold a licence as provided by the Regulation[4]. This provision ultimately barred any individual previously practicing midwifery in Yukon on the effective date. While the Respondent did not introduce any evidence at the hearing, the Panel inferred from the evidence from the Commission that the registration system was not ready on April 15, 2021 (hereafter effective date). I asked the Respondent if the Registrar was in place on the effective date to carry out the registration and licensing as per Part 3 of the Regulation, and could not get the answer as no evidence or witnesses were produced by the Respondent.

249. During this time, the Complainant was having her third pregnancy and her former midwife (with whom she had entered into a private contractual arrangement for her first two pregnancies) advised her that she could not perform any midwifery services in

[1] (MR), O.I.C. 2021/008
[2] SY 2003, c.24
[3] Supra, MR section 55
[4] Ibid, section 3(1)

anticipation of the said Regulation. Ms. Kaiser was ultimately registered and licensed as a midwife over one-and-a-half years post the effective date. She was then employed by the Yukon Government under the Yukon midwifery program since and testified at the hearing.

250. It is well established that the Panel does not have the jurisdiction to adjudicate government legislation and regulations as in many legal cases cited by the learned Chair, and that the government can pass any legislation and regulation governing any professions in its jurisdiction. The Panel does not have jurisdiction to reweigh policy considerations, and I find the Regulation does not provide any temporary relief or grandfather provisions for the effective date. While I agree with the Commission that, the Respondent imposed an effective date restricting an existing profession knowing that the registration and licensing process were not ready, such decision could reasonably lead to adverse impacts to the existing and potential clients of midwifery services. However, this could only mean the government might have made a bad policy decision or failed to implement a licensing/registration program. This action, in my opinion, does not mount to discrimination on prohibited grounds as in the section 7 of the *Human Rights Act*[5]*.* If there are any challenges to the *Charter of Rights and Freedoms*[6]*,* this Panel is forum non conveniens.

251. The second event took place in January 2023 when the Complainant was advised that the Yukon midwife program was temporarily suspended due to staffing shortage. The Panel heard that the scope of service under this program was reduced to pre- and post-

[5] RSY 2002, c.116

[6] (Charter), s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), c 11

natal services, and the services were transferred to Solstice Maternity. No home-births attending services would be provided until further notice.

252. The Yukon midwifery program is funded by the Yukon government, and thus the government has the discretion to allocate resources for their policy decisions and priorities. While I feel for the Complainant in her experience of the inconsistent service delivery the government provided, I could not be satisfied that the broken service promises equated to discrimination based on her sex and pregnancy.

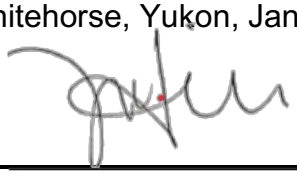
253. This service disruption occurred during the Complainant's fourth pregnancy. She applied and was admitted as an eligible client under the Yukon midwife program. Is a reduction in service level discriminatory in this case? The Board was disadvantaged as the Commission did not raise the point of duty to accommodate to the point of undue hardship, and the Respondent did not introduce any evidence.

254. While neither party brought up the duty to accommodate point, I have considered whether the Respondent failed to provide accommodation to the Complainant when offering services. As the midwifery services could be provided either by Yukon government employees (under the Yukon midwifery program) or by individual licensed practitioner (with private insurance), I do not see that the "midwifery service" is solely relied squarely upon the Respondent. While the Complainant was admitted into the Yukon midwifery program as an eligible client, the service level was reduced due to the Respondent's insufficient staffing. I can see this renege caused adverse impact on the Complainant in that she would not receive the full midwifery service free of charge, but this renege, itself, is not a discriminatory based on the Complainant's characteristics. The

Regulation does not create a positive obligation or right to the Complainant for the midwifery service, and the Complainant could have secured a privately licensed practitioner for this service (although the availability of such practitioner is questionable). But again, human rights do not equate to positive rights to optional services and/or alternative choices.

255. As a result, I do not find both events were discriminatory to the Complainant based on her sex and pregnancy. As I disagree with the majority of the Panel, I will not further comment on the remedy discussion.

Whitehorse, Yukon, January 12, 2026



Adjudicator Victoria Chan
Yukon Human Rights Panel of Adjudicators