

NORTHWEST TERRITORIES HUMAN RIGHTS ADJUDICATION PANEL

BETWEEN:

Elizabeth Portman

Complainant

-and-

City of Yellowknife

Respondent

Reasons for Decision

Before: Adrian Wright, Adjudicator, Human Rights Adjudication Panel

Place of Hearing: Yellowknife NT

Date of Hearing: 1, 2 and 3 December 2015

Elizabeth Portman, for herself

Michelle Thèriault, Counsel for the Respondent

Authorities considered:

***Human Rights Act*, S.N.W.T. 2002, c. 18, as amended: Sections 11 and 62**

[1] The complaint alleges the Respondent discriminated against the Complainant on the grounds of disability and social condition. The Complainant says the Respondent discriminated as follows:

a. Until December 1, 2015 users of the Respondent's disabled persons transit system (DTS) who could not travel on the regular buses were required to pay more to use DTS than either users of DTS who could use the regular bus system, or users of the regular bus system. This discriminated on the grounds of both disability and social condition.

b. The Respondent's Pool ("the Pool") did not replace or modify the door to the women's changing room; adequately maintain a handrail into the swimming pool; use an appropriate entry ramp in to the public access to the Pool; or either install a grab-bar or remove a ledge in the floor in a shower stall in the women's changing room at the Pool in the community. All this discriminated on the basis of disability.

[2] In response the Respondent does not dispute it discriminated in both cases on the basis of the prohibited grounds. It contends it accommodated the Complainant and any further accommodation would amount to undue hardship. Although the Respondent said it did not contest discrimination it argued it did not discriminate. As a result I address discrimination in this decision.

[3] The parties agreed I have jurisdiction to decide this complaint. I will deal with DTS first and then the Pool.

A. Disabled Persons Transport System (DTS)

1. *Facts*

[4] There was little dispute about the facts. The Complainant first contracted multiple sclerosis in about 1998 or 1999. She has a progressive form of the disease. This went into remission for many years and now affects her strength, flexibility, vision, and ability to walk. It also causes, fatigue, spasticity, and depression. She lives on social assistance and resides in a two-room apartment in the community.

[5] DTS is a door-to-door system for persons who cannot use the regular transit system due to disability. Persons must answer questions about their physical condition and be evaluated by a health care professional as to their temporary or permanent physical or functional inability to use regular transit. The Complainant started using DTS on February 12, 2014.

[6] Qualified persons may use DTS the following ways:

- up to three regular times per week;
- up to 3 pm if booked the day before; or
- on request the same day if available.

[7] Until 1 December 2015 there were three fare options for transit users:

	2005 to September 2014	September 2014
Single Ticket		
1. Adults 18 to 65	\$2.50	\$3.00
2. Adults 65 and over	\$1.50	\$2.00
3. Persons with Disabilities		
Public Transit	\$1.50	\$2.00
DTS	\$2.50	\$3.00
Monthly pass (unlimited rides)		
1. Adults 18 to 65	\$62.00	\$75.00
2. Adults 65 and over	\$40.00	\$50.00
3. Persons with Disabilities		
Public Transit (NOT DTS)	\$40.00	\$50.00
DTS		
Punch Pass (eleven rides for the price of ten)		
1. Adult 18 to 65	\$25.00	\$30.00
2. Adults 65 or over	\$15.00	\$20.00
3. Persons with Disabilities		
Public Transit	\$15.00	\$20.00
DTS	\$25.00	\$30.00

[8] The annual operating cost, passenger revenue and revenue cost ratio for the regular transit system and for DTS in 2013 and 2014 is shown below:

DTS	2014	2013
Annual operating cost	\$272,953.02	\$235,282.00
Passenger revenue	\$15,193.05	\$12,645.00
Revenue/cost ratio	5.57%	5.37%
Conventional transit		
Annual operating cost	\$1,041,150.54	\$897,497.00
Passenger revenue	\$334,108.00	\$297,430.00
Revenue/cost ratio	32.09%	33.14%

[9] Until December 2015 there were no monthly DTS passes. These were first available on 1 December 2015. They cost the same as regular bus passes and could be used on DTS and regular buses.

[10] The Complainant can only travel by DTS or taxi because she can neither walk to nor wait at a bus stop. The Respondent produced a record¹ of the Complainant's use of DTS between February 2014 and November 2015: she used DTS between 19 and 38 times per month.

Issues

¹ Exhibit 1 Tab 11

- Did the Respondent discriminate on the basis of disability, social condition or both by not making monthly DTS passes available to the Complainant?

- Would providing monthly DTS passes to the Complainant cause undue hardship to the Respondent?

2. *Discrimination*

[12] Complainants must prove the matters italicized in the list below to establish *prima facie* discrimination under section 11 of the Act.² My analysis follows each factor.

1. *A characteristic protected from discrimination.* There is no dispute the Complainant's multiple sclerosis is a "disability" and her receiving social assistance is a "social condition"³. Both are prohibited grounds of discrimination.

2. *Experience of an adverse impact with respect to a service customarily available to the public.* The Respondent argues DTS is different than regular transit: it is only available to those who qualify so it is not public. I refer to the following cases:

a. *Moore v. British Columbia (Education)*⁴ –remedial help for a dyslexic student allowed the student to obtain meaningful access to general education available to all students in British Columbia. It was not "special education" so its denial was *prima facie* discrimination.

b. *Eldridge v. British Columbia (Attorney-General)*⁵ – the health care system's not paying for sign language interpretation for deaf persons impaired their ability to communicate with health care providers and therefore their access to the system. As a result the non-payment was *prima facie* discrimination.

c. *Hall v. Ministry of Environment (No. 5)*⁶ –applying the prohibition from hunting using a motor vehicle in designated areas to a disabled person who required a motor vehicle adversely affected his ability to hunt and was therefore *prima facie* discrimination.

[13] Public transit must be available to all community residents. The Respondent's position is DTS is separate from the regular system due to its significantly higher per-user cost.

[14] If DTS is "different" or "special" transportation there are two transit systems – one for regular users; another for DTS users. Those using the transit system should have equal access whether disabled or able-bodied. The Supreme Court of Canada determined⁷ treating persons requiring some services as the result of their disability differently than those not requiring those

² *Moore v. BC Education*, 2012 SCC 61 at paragraph 34

³ *Human Rights Act*, section 2

⁴ Preceding foot note

⁵ [1997] 3 S.C.R. 624

⁶ 2009 BCHRT 389 (Can LII)

⁷ *Moore v. BC (Education)* footnote 1, paragraph 30

services is treating them separately from those users but equally amongst those using the services as the result of their disability. This “separate but equal” treatment has been repeatedly rejected. Public transit must be made equally available to all users. This discrimination affects all persons with disabilities whatever their financial circumstances.

3. *The protected characteristics were a factor in the adverse impact.* This is addressed in part in the discussion of “adverse impact” above. In addition the Complainant satisfied me she, like other persons with disabilities, may only travel from home using a door-to-door service. If the only services in the community are DTS and taxis, the higher cost limits her access to public transit, is not experienced by regular users and affects all persons with disabilities not just those in the Complainant’s social condition. This aspect is satisfied.

[16] The Complainant has made out her claim of *prima facie* discrimination under section 11 (1) of the *Human Rights Act*. The burden now shifts to the Respondent to justify this discrimination.

3. *Bona fide and reasonable justification of discrimination: reasonable accommodation and undue hardship*

[17] The Respondent must show the following to make out reasonable accommodation⁸. My discussion follows each factor:

1. *Rational connection to the function being performed* – there is such a connection because The Respondent has established the per-user cost of DTS is significantly higher than the analogous cost of regular transit. The higher fares are therefore rationally connected to the higher cost of DTS.

3. *The distinction is made in good faith, in the belief it is necessary to fulfill the purpose or goal.* I accept the decision to require higher fares for DTS users was made in good faith.

4. *The standard is reasonably necessary to accomplish its purpose or goal.* The Respondent argues it cannot accommodate persons with the Complainant’s characteristics without undue hardship. It contends DTS users having bus passes would produce even less revenue for a system already operating with a substantial deficit.

[18] The Respondent has not satisfied me on a balance of probabilities this is undue hardship. Justice Abella of the Supreme Court of Canada noted it will always seem significantly less expensive to not eliminate a discriminatory barrier. The issue is whether the cost constitutes undue hardship.⁹ The Respondent did not do this. Instead it showed the per-user cost of operating a transit system for transit persons in the community is higher than the similar cost for the regular system. The Respondent did not present any evidence or argument on the impact of its 1 December 2015 DTS passes on the per-user cost of the system: it did not present evidence or argue the service would end or be limited if DTS users used DTS for the same cost as regular

⁸ British Columbia (Public Service Employee Relations Commission) v. BCGSEU 1999 CanLII 652 (SCC) at paragraph 54

⁹ *Council of Canadians with Disabilities v. Via Rail* 2007 SCC 15 (Can LII) at paragraphs 225 and 226

users use the regular transit system. It also did not present evidence or argue other services would not be offered if those using DTS paid the same fares as those using regular transit.

[19] This is not a case (like *Via Rail* or *Wozenilek*) where the respondent had to modify the vehicles providing transportation to make them accessible to persons with disabilities. In both cases the decision-maker found it made sense to do the modifications over time to reduce the impact on the whole system. Here the only impact is on the operating deficit the Respondent incurs from running both regular and transportation for disabled persons.

[20] An operating deficit alone is not undue hardship – there must be something more such as a significant impact on other services offered by the Respondent.

[21] As a result I find the Respondent did not accommodate the Complainant to the point of undue hardship. I will deal with remedy later in these reasons.

B. The Pool

I. Facts

[22] The Complainant regularly uses the Pool for both fitness and relaxation. She says her access to the pool building is limited by

- i. a door closing too quickly for her to safely get in and out of the women’s changing room;
- ii. a railing (“the handrail”) into the swimming pool itself not being tightly secured to the Pool floor;
- iii. the absence of a grab bar in the shower room;
- iv. a ledge in the floor at the entry to the shower; and
- v. the exterior ramp (grating) to the entrance being slippery when either wet or dry and being otherwise unsafe;

[23] The Complainant first raised concerns about the accessibility of the Pool in an e-mail to the Respondent dated 3 March 2014. As a result the Respondent made the following changes to the Pool:

- i. Installed automatic door openers for the set of three doors from the outside to the inside of the Pool.
- ii. More securely attached the handrail to the floor of the swimming pool;
- iii. Installed a bench connecting a hose to the shower head in a shower stall in the women’s changing room. The hose allows users to pull the shower head down; and,

- iv. Replaced the exterior ramp grating providing access to the Pool from the parking lot shortly before the hearing.

[24] The Complainant appreciates these changes but complains

- i. the door to the shower room closes too quickly so she feels she cannot safely navigate it;
- ii. the handrail is still unstable. She has learned to rely on the loose railing but she still feels it is unsafe;
- iii. a grab-bar should be fixed to the wall of the shower stall to improve the ability of those using the stall to steady themselves;
- iv. the ledge in the entry to the shower should be made less hazardous; and
- v. the exterior grating is still slippery and the openings in the grating are wide enough to catch her shoes.

[25] The Respondent contends it modified the areas it could at the Complainant's request. Further the Respondent says the Complainant did not advise it of her concerns about the modifications it made. As a result it did not accommodate her any further.

[26] I first examine whether the three factors necessary to establish *prima facie* discrimination have been made out by the Complainant. I then determine whether the Respondent satisfied the elements of *bona fide* and reasonable justification for any discrimination. I will deal with the remedy at the end of this decision.

2. *Discrimination analysis*

[27] The Complainant's multiple sclerosis is a protected characteristic; the issues she has identified all affect her accessibility to the Pool because she does not have the same mobility, balance or strength as those without her disability; the Pool is a service customarily available to the public; and her disability which affects her mobility, balance and strength is a factor in the adverse impact. As a result the issues she has identified are *prima facie* discrimination.

3. *Accommodation analysis*

[28] I now look at the factors set out in *Via Rail*¹⁰ as outlined at paragraph 82 of *Portman v. UNW*¹¹: the nature of the complainant, the application, the environment in question, the remedial options required and those reasonably available. As indicated above Mr Portman both suffers from a disability affecting her mobility and balance and wishes to use the pool. She has asked for modifications to make the pool more accessible. Some of the areas she identified (the pool floor, shower stall and exterior entrance) pose challenges for her because they are slippery and therefore make her more inclined to fall. Reasonable measures to reduce this risk are needed.

¹⁰ See footnote 5

¹¹ 2014 Can LII 49096 (NT HRAP)

The shower door poses a different problem – the Complainant does not move quickly enough to pass through the doorway.

[29] The issue is whether the requested remedial options are reasonably available.

a. *Changing-room door*

[30] The Respondent presented no evidence it could not make this door more accessible – either by adjusting its closing speed or by using an automatic opener. Its position was after the Complainant sent an e-mail to the Respondent on 25 April 2014 she did not again mention the door as a continuing problem. As a result nothing had been done to address this concern. The Respondent contends “the individual seeking accommodation has an obligation to cooperate in the identification and implementation of reasonable accommodation”¹². The Complainant responds she became weary of communicating with the Respondent regarding issues with the Pool and as a result did not continue to follow-up.

[31] I am satisfied the Complainant sufficiently made the Respondent aware of her concern by identifying it both in her complaint (dated 20 March 2014) and an e-mail dated 24 April 2014. She did not abandon this issue nor did she fail to cooperate in reasonable accommodation. It was up to the Respondent to decide both whether the door did limit access of persons with disabilities to the Pool and what it had to do to reasonably accommodate them. The Respondent owns the Pool; the Pool is a service customarily available to the public; the Respondent must ensure persons with disabilities can use the Pool so long as this does not pose an undue hardship.

[32] The Complainant’s evidence is the closing speed of the door from the Pool lobby to the women’s change room is a problem for her. She finds it difficult to pass through the door opening before the door closes and this can be a safety hazard. As a result, the closing of this door causes *prima facie* discrimination for the Complainant and the Respondent did not reasonably accommodate this discrimination. I find the Complainant’s complaint about this door has merit.

b. *Handrail*

[33] The handrail is in an environment – the swimming pool itself - where anyone may lose one’s footing, fall and suffer an injury. This is particularly so for someone like the Complainant with balance and mobility issues. Although the Complainant has adapted to this wobbly railing she is concerned she will lose her balance when relying on it. The handrail is adjacent to a ramp at the shallow end of the pool where a disabled person is most likely to enter the water. As a result the Respondent should take the necessary steps to ensure it is in good repair.

[34] The Respondent does not claim it has provided reasonable; it says it is still trying to find a solution. The goal of the duty to accommodate is to allow all – whether with physical disabilities or not – equal access to public facilities.

¹² *McDonald v. Cornwall* 2011 HRT0 1323 at paragraph 36; also *Central Okanagan School District No. 23 v. Renaud* 1992 CanLII 81 (SCC)

[35] The Respondent has not persuaded me it has tried all reasonable ways to make the handrail less unstable and thereby more accessible. It seems to have done nothing to improve the handrail since the annual shutdown of the Pool in the fall of 2014 when it tightened the connection to the swimming pool floor so that – for a time- the handrail was more stable. I find on a balance of probabilities Yellowknife’s efforts to maintain this handrail are not a reasonable accommodation of the Complainant’s disability. As a result the Complainant’s complaint about the handrail has merit.

c. *Shower room – grab-bar, ledge, temperature controls and bench*

[36] There is no grab-bar to assist women with disabilities using a shower stall (“the shower stall”) in the women’s changing room to support themselves. The grab-bar in this area is as important to the Complainant as the handrail in the swimming pool in assisting her to maintain her balance. There is also a ledge separating the shower stall from the remainder of the shower room. This makes it difficult for women with disabilities – who must step over this ledge to enter this stall.

[37] The issue is the reasonableness of the remedial options available. The Respondent maintains it cannot install a grab-bar in the shower room – the construction in that area does not allow for a grab-bar. It has tried test holes in the wall of the shower stall. It does not want to attach one to the wall because it is concerned it may give way and someone may be hurt. I accept Yellowknife’s evidence; on the other hand persons with disabilities should be able to safely have a shower. The absence of a grab-bar may cause them to be unable to shower safely. I am not satisfied the Respondent has explored all reasonable options. I will deal with this further in the remedy portion of these reasons.

[38] At the hearing the Complainant also raised issues about the temperature control in the shower room and the soap dish. These were not addressed in her original complaint to the Director of Human Rights. It would be unfair to address these in this hearing because the Respondent has not had an adequate opportunity to respond. As a result I do not address either in these reasons.

d. *Exterior grating*

[39] The Complainant maintains the metal grating used as the main entrance ramp to the Pool at the time of her complaint from outside was smooth and therefore slippery especially in colder conditions. This grating is similar to that used in many northern applications as a means of reducing the accumulation of snow and ice on heavily traveled surfaces. The Complainant is sufficiently concerned about this grating to avoid it entirely – even though it is supposed to offer disabled individuals such as her more ready access to the Pool. Instead she uses the nearby stairs – which are primarily intended for able-bodied users of the Pool.

[40] The Respondent produced a 2 October 2015 e-mail by an employee in its Building Inspections division. This indicates the grating the Complainant complained about generally complies with the 1985 National Building Code in force at the time the Pool was constructed in the late 1980’s. On the other hand the grating did not comply with the present requirements - it

be slip-resistant, continuous and have an even surface. On 2 October 2015 the grating was worn in many areas and the surface was not slip-resistant. The grating was easily replaced and The Respondent did not argue the grating should be “grandfathered” so it would only be subject to the requirements of the National Building Code in 1985. I understand this 2 October 2015 e-mail caused the Respondent to replace the grating shortly before the hearing.

[41] I have limited information about the replacement grating (likely because of the shortness of time between its replacement and the hearing) so I cannot make any determination about it. The Complainant maintains the replacement ramp is slippery and the grating is dangerous. She points to the gaps on the metal grids being large enough to catch her shoes. I deal with this as well in the remedy portion of these reasons.

e. Training in accommodation

[42] The Complainant requested the City be required to train its staff on the duty to accommodate. My authority to fashion a remedy comes from section 62 (3) of the *Act*. This section gives me specific authority to impose specific remedies. There is no broad remedial provision in the *Human Rights Act* similar to section 45.2 (1) 3 of the Ontario Human Rights Code. I only have authority to impose the specific remedies listed in section 62 (3).

[43] On the facts in this case I cannot find the authority to require the Respondent to train its staff on the duty to accommodate in any of the listed remedial powers in section 62 (3).

[44] I am aware of *Thorson v. Government of the Northwest Territories* (8 March 2013) in which Adjudicator Posynick ordered the Respondent ensure supervisors be trained in the duty to accommodate persons with disabilities¹³. That decision is not binding on me and I decline to follow it. As a result I decline to make such an order.

C. Remedy

[45] As required by section 62 (1) of the *Human Rights Act* I find there is merit to the Complainant’s complaint. My authority to impose a remedy comes from section 62 (3) of the *Human Rights Act*.

1. DTS fares

[46] The Respondent will compensate Elizabeth Portman for expenses she incurred as a result of the discriminatory fare structure used from 12 February 2014 when she first used DTS under the previous fare structure until 1 December 2015 when bus passes first became available to users of DTS. The amount to be paid will be the difference between what the Complainant actually paid for riding DTS between 12 February 2014 and 1 December 2015 and the cost of

¹³ Paragraph 152

monthly bus passes over that time. The amount she paid will be determined using the document under tab 11 in Exhibit 1. This shows Ms Portman paid \$2505.50 over that time. The monthly cost of bus passes was \$62.00 until 1 September 2014 and \$75.00 thereafter. This amounts to \$1,487.00. The difference is \$1,018.50.

[47] The Complainant's social condition and disability cause her to require DTS for transportation around the community. The Respondent's not making this service available to the Complainant at the same rate as the regular service made her feel like a lesser person. As a result it affected her self-respect and dignity. It will pay damages in the amount of \$7,500.00.

[48] The total to be paid by the Respondent to the Complainant is \$8,518.50.

2. *Order*

a. *DTS*

[49] I order the Respondent to:

- i. cease using a fare structure for public transit discriminating against persons using public transit on the basis of disability and social condition;
- ii. refrain in the future from using a fare structure discriminating against persons using public transit on the basis of disability and social condition;
- iii. pay the Complainant \$8,518.50 within thirty days of the date of this order.

b. *The Pool*

[50] I further order the Respondent to

- i. cease allowing the handrail identified by the Complainant in her complaint to be loose, wobbly or unstable;
- ii. refrain in the future from allowing the handrail identified by the Complainant in her complaint to be loose, wobbly or unstable;
- iii. maintain the handrail in the pool so it is no longer loose, wobbly or unstable;
- iv. cease allowing the internal doors in the Pool to close at a speed so they are a hazard to the Complainant and those with her disability;
- v. refrain in the future from allowing the internal doors in the Pool to close at a speed so they are a hazard to the Complainant and those with her disability;

- vi. ensure the internal doors in the Pool are maintained in such a way as to allow persons with disabilities to use them safely, without assistance and without fear of being struck by a door;
- vii. cease allowing the shower stalls for persons with disabilities at the Pool to not have grab bars to assist persons with disabilities to support themselves in those stalls;
- viii. refrain from allowing the shower stalls for persons with disabilities at the Pool to not have grab bars to assist persons with disabilities to support themselves in those stalls;
- ix. install grab bars in the shower stalls for persons with disabilities;
- x. cease allowing the shower stalls for persons with disabilities at the Pool to have a ledge in the floor of the entry to those stalls limiting the accessibility of those stalls to persons with disabilities;
- xi. refrain in the future from allowing the shower stalls for persons with disabilities at the Pool to have a ledge in the floor of the entry to those stalls limiting the accessibility of those stalls to persons with disabilities;
- xii. modify the floor to the entry to the shower stalls for persons with disabilities at the Pool to make those entries accessible to the Complainant and persons with disabilities similar to hers;
- xiii. cease allowing the exterior grating ramp to the public entry to the Pool from the parking lot to not comply with the applicable version of the National Building Code and to otherwise not be accessible to the Complainant and persons with disabilities similar to hers; and,
- xiv. refrain from allowing the exterior grating ramp to the public entry to the Pool from the parking lot to not comply with the applicable version of the National Building Code and to otherwise not be accessible to the Complainant and persons with disabilities similar to hers.

The Respondent shall have six months from the date of this order to make all renovations to the Pool necessary as a result of this order. I remain seized of this complaint to resolve any disputes arising from the order.



Adrian Wright
Adjudicator
Human Rights Adjudication Panel
22 September 2016