File 28-13

NORTHWEST TERRITORIES HUMAN RIGHTS ADJUDICATION PANEL

BETWEEN:

Elizabeth Portman

Complainant

-and-

The Legislative Assembly of the Northwest Territories

Respondent

-and-

Human Rights Commission

Reasons for Decision

Before: Adrian Wright, Adjudicator, Human Rights Adjudication Panel

Place of Hearing: Yellowknife NT
Date of Hearing: 25 to 27 May, 20, 22 and 28 July 2016

Elizabeth Portman, for herself
Sheila MacPherson, Counsel for the Respondent, Legislative Assembly of the Northwest Territories
Yacub Adam for Human Rights Commission

Authorities considered:

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

A. FACTS

[1] There is no significant dispute about the facts. There is also no dispute the Director of Human Rights ("the Director") had authority to refer this complaint for adjudication.

[2] The Complainant suffers from multiple sclerosis. This is a debilitating condition affecting the nervous system particularly stamina, coordination and ability to perform various physical activities. At the time of the hearing the Complainant used a cane to assist in walking. The Complainant's multiple sclerosis will impact her increasingly over time. She may in time require a wheelchair to assist with mobility.

[3] The Legislative Assembly building ("the Assembly building") is located in Yellowknife. It houses the chamber of the Respondent and supporting facilities including the legislative library, committee rooms, offices, and a cafeteria. It was designed by a local architectural firm ("the architectural firm") and was completed in about 1993.

[4] On 24 August 2011 the Complainant met for between 45 minutes and 1.5 hours with the Sergeant-at-Arms of the Respondent. She showed him (and confirmed in an e-mail dated 24 August 2011) the following aspects of the public portion of the Assembly building "relating to the accessibility of the building for all citizens and visitors":

1. Glass doors providing access to a small waiting area, public restrooms, cafeteria and legislative library were narrow, heavy[1] and not equipped with an automatic opener. The cafeteria door was often not fully propped open so the "narrowness" of the door was more of a problem.
2. The wooden door to the restroom for persons with disabilities was also heavy and not equipped with an automatic door opener.
3. The visitors' gallery to the chamber of the Assembly building had –
    a. No companion seating for those accompanying persons in wheelchairs
    b. No seats permanently in the "seat down" position for persons using (for example) crutches.

[5] The Sergeant-at-Arms was not then aware whether the Complainant had any disability.

[6] The Sergeant-at-Arms contacted the architectural firm by telephone on 25 August 2011 and then on 13 September 2011 forwarded it the Complainant's 24 August 2011 e-mail. He requested the architectural firm "… check to see if we meet the required criteria or if changes may be required."

[7] The architectural firm reported on 14 September 2011:

1. All glass doors swung inward and outward. They were only heavy to open in the first and last 10 degrees of their 90 degrees of swing. They were not equipped with a door-

[1] The Complainant uses the terms "heavy" and "heaviness"*;* the National Building Code uses the expression "door opening force". For the purposes of these reasons I consider them to refer to the same concept and use them interchangeably.

closing mechanism postponing and slowing the closing of the door to allow persons to pass through the door-opening on a wheelchair.

2. The door to the restroom for disabled persons swung inwards and had a door-closing mechanism both postponing and slowing door-closing to allow a person to pass through the door opening on a wheelchair.

3. Visitors' gallery:

    a. Permanent seating available within 3 metres of areas reserved for persons in wheelchairs;

    b. All permanent seating in "closed" position. Assistance would be required for a person with busy hands (such as on crutches) to hold down a seat.

[8] Around this time two seats in the visitors' gallery were adjusted by the Respondent's staff so they were permanently "open". This was to address item 3 b in the above list.

[9] The architectural firm sent a "detailed review" of the items identified by the Complainant with an e-mail to the Respondent dated 6 October 2011:

- Door-opening widths were 780 mm. For the glass doors this was contrary to both the National Building Code 1990 ("NBC 1990") and National Building Code 2010 ("NBC 2010")[2]). For the door to the washroom this was contrary only to NBC 2010[3]; and

- Door-closers in barrier-free paths of travel shall permit doors to open when a force of 22 Newtons (N) is applied to door handles, push-plates or latch-releasing devices. This does not apply if doors have power-door operators.[4] The architectural firm also noted "door power operators [were] not required; open force could be measured and possibly adjusted by a specialist if necessary."

[10] The Sergeant-at-Arms gave the following evidence:

- The pressure needed to open the doors was measured by the architectural firm using rudimentary equipment to "get an idea of where it was" before any renovations.

- A possible adjustment of this pressure was discussed with the contractor who originally supplied the doors.

- The architectural firm advised the pressure required to open the door was not so heavy as to require a change to the hardware in this door.

[2] NBC 1990 paragraph 3.7.3.3 (1); NBC 2010 paragraph 3.8.3.3 (1)
[3] NBC 1990 paragraph 3.7.3.8 (1)(b)(ii) ; NBC 2010 paragraph 3.8.3.8 (1)(b)(ii)
[4] NBC 1990 paragraph 3.7.3.3 (7); NBC 2010 paragraph 3.8.3.3 (7)

[11] The Clerk testified the Respondent (before carrying out these renovations) considered installing automatic openers on the doors identified by the Complainant. It did not do so because

- Since the Assembly building opened there had been no complaints of persons not being able to access the building.

- It was then concerned with non-compliance with the NBC. Since the Respondent determined automatic door-openers were not required by the NBC they were not an essential change. It funded the new doors from its own budget – without a supplementary appropriation. Automatic door-openers would have required an additional appropriation. They also were a more significant architectural undertaking.

- It was considering going to an electronic security system ("a lock-down system") requiring fobs for entry into the non-public portions of the building. It wanted to do this at the same time it installed automatic door-openers. Both the 15th (2003 to 2007) and 16th (2007 to 2011) Assemblies rejected a lock-down system. Such a system received no support in the Legislative Assembly until the attack on the Parliament buildings in Ottawa in October 2014.

[12] A Request for Tenders Services was issued on 20 June 2012 to address the following violations of the National Building Code:

1. Replace glass doors, sidelights and transom panels so door openings would be 800 mm.

2. Renovate the door, frame and surrounding wall to the washroom for disabled persons to provide a door opening of not less than 800 mm. The replacement door was a 45 mm solid wood door 20 mm wider than the replaced door.

[13] The Canadian Standards Association publication "Accessible design for the built environment" B651-04 (CSA Standard) requires the clear opening width of doorways be at least 810 mm. [5]

[14] The Sergeant-at-Arms advised the Complainant by e-mail dated 26 July 2013:

> "We have recently completed a renovation project that addressed issues related to code items that our technical design team had identified. The building now meets the 2013 code requirements."

[15] On 16 November 2013 the Complainant attended a meeting on the second floor of the Assembly building. This meeting was not related to the issues in this complaint. She then used crutches because she had a broken foot. She had assistance entering the building. During a break she used the elevator to descend to the main floor and passed with difficulty through a set of glass doors to get to the door to the restroom for disabled persons. There was no automatic

[5] Paragraph 4.1.3.1

door-opener and the door was as heavy as it had been before the renovations. She could not open it with her one free arm and was concerned about being able to get out of the restroom. As a result she went into the adjacent women's restroom. She had to use the bottom of the stall door to lift herself from the toilet (because there was no grab bar in the stall). She then had difficulty getting out of the stall and the washroom and almost lost her balance a few times. She was concerned because this was a Saturday and it was unlikely anyone would come to rescue her.

[16] On 4 December 2013 she filed a complaint ("the complaint") with the Human Rights Commission ("the Commission") listing all the issues in her 24 August 2011 e-mail and describing the 16 November 2013 incident. The Respondent initiated a two-phase renovation of the building which will be finally completed in 2016. By about 31 March 2015 it had completed the following renovations to the items identified by the Complainant:

1. Glass doors:
    a. Removed the glass door to the hallway restrooms
    b. Propped open the doors to the waiting room and cafeteria – automatic door-openers could not be installed
    c. Installed an automatic door-opener to the library

2. Restroom for persons with disabilities – automatic door-opener installed.

3. Visitors' Gallery
    a. No new companion seating for wheelchair-users. Such seating remains the row closest to the area reserved for wheelchairs. It is no further than three metres from the areas reserved for persons in wheelchairs.
    b. As mentioned above, two seats were adjusted by the staff of the Respondent so they were permanently "open". Since the Complainant agreed this satisfied her concern and was completed soon after her 24 August 2011 e-mail I will not address this further in this decision.

[17] The Complainant agrees the changes to the glass doors and door to the restroom for persons with disabilities satisfied her concerns – they will be accessible to persons with her disability when complete. She contends the companion seat is not satisfactory – it is not close enough to the area reserved for persons with wheelchairs. She also maintains areas for persons in wheelchairs could be located in various areas in the viewing gallery.

B. ISSUES

1. Did the Respondent discriminate against the Complainant or others with respect to any services or facilities customarily available to the public?

2. If the Respondent did discriminate did it have a *bona fide* and reasonable justification – that is did it accommodate the persons suffering discrimination to the point of undue hardship?

3. If the Respondent did not accommodate to the point of undue hardship what remedy should be imposed?

C. ANALYSIS

1. Discrimination

[18] I rely on the criteria italicized in the list below to determine *prima facie* discrimination under section 11 of the *Human Rights Act* ("the *Act*").[6] I discuss this by reference to the state or condition of the various areas identified in the complaint and not the way they were at the time of the 24 August 2011 e-mail. My analysis follows each factor.

a. A characteristic protected from discrimination.

[19] There is no dispute the Complainant's multiple sclerosis is a "disability"[7]. She had less than full function in her foot because it was broken so this disability was caused by bodily injury and is also a "disability". Disability is a prohibited ground of discrimination.

b. Experience of an adverse impact with respect to a service customarily available to the public.

[20] I address the door to the restroom for disabled persons first since it gave rise to this complaint. I then address the glass doors and finally the proximity of the companion chair to the section for wheelchair-users in the visitors' gallery.

i. Door to the restroom for disabled persons

[21] The Assembly building is open to the public. Any difficulty opening doors affects the Complainant – she cannot access the Assembly building as readily as members of the public without her disability. The Complainant indicated in both evidence and argument all the doors she identified were heavy.

[22] The replacement door for the restroom for disabled persons was 20 mm wider than the replaced door but otherwise apparently of the same dimensions and material. The architectural firm determined using "rudimentary equipment" the pressure required to open this door was not a sufficient problem to cause any change to the door or its hardware. On 16 November 2013 the Complainant found the replacement door to the restroom for disabled persons heavy enough she instead entered the women's washroom where the incident giving rise to this complaint occurred.

[23] I conclude the Complainant was not comfortable going into the restroom through this door by herself. I note this door opens inward so if it felt heavy to her going in it was reasonable for her to be concerned it would feel at least as heavy if not heavier when she went out. She could have sought assistance but the only available person was a security guard in the building's lobby. His assisting her would have required him to wait outside until she was finished. All this

[6] *Moore* v. *BC Education,* 2012 SCC 61 at paragraph 34

[7] *Human Rights Act* section 2 - definition of "disability"

could be expected to affect her dignity, feelings and self-respect. As a result the heaviness of this door on 16 November 2013 adversely impacted her.

ii. Other glass doors

[24] On 16 November 2013 the Complainant was able to open the glass doors allowing access to the hallway to the main floor restrooms – but with difficulty. Again, this could be expected to affect her dignity, feelings and self-respect. This would apply to any of the other glass doors identified by the Complainant in her complaint.

[25] As a result all the doors she identified in her complaint adversely impacted her ability to access the public portions of the Assembly building – a service customarily available to the public.

iii. Seating for wheelchair users and their companions

[26] The architectural firm concluded the seat for companions of those using wheelchairs was no more than three metres from the section of the gallery set aside for wheelchair-users. This is not addressed in any of NBC 1990, NBC 2010 or the CSA standard. I have no evidence of any problems this might cause for users of wheelchairs. As a result I cannot find this is *prima facie* discrimination. I dismiss the complaint as it relates to this issue.

[27] The Complainant also contended spaces for wheelchair-users should be located in various places throughout the viewing gallery as is contemplated in the CSA Standard[8]. This is not addressed in her complaint. Since the Respondent did not have a reasonable opportunity to respond or to address this matter before the hearing I cannot deal with it in this decision.

c. The protected characteristics were a factor in the adverse impact.

[28] Unlike the Complainant and persons with her disability able-bodied users of the Assembly building could open any of the glass doors without difficulty and, in the case of the door to the restroom for disabled persons, without assistance. As a result the Complainant's disabilities are factors in the adverse impact.

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

2. *Bona Fide* and Reasonable Justification – Accommodation to the point of undue hardship

[30] The Respondent must show the following to establish accommodation.[9] My discussion follows each factor:

[8] Paragraph 4.6.3.3

[9] *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights),* [1999] 3 S.C.R. 868 at paragraph 20

1. *The standard was adopted for a purpose or a goal rationally connected to the function being performed*

[31] The Assembly building is the physical location where legislation is created in the Northwest Territories. This is a public function so the building must be accessible to as much of the public as is reasonably possible. The goal of the areas in the building identified by the Complainant is to make the building accessible to the public including persons with disabilities similar to the Complainant's. The standard used was NBC (2010). Using NBC (2010) to make the Assembly building accessible to persons with disabilities is rationally connected to the Assembly building's function.

2. *The standard was adopted in good faith, in the belief it is necessary to fulfill the purpose or goal.*

[32] I accept the Respondent adopted NBC (2010) in good faith believing it was necessary to make the Assembly building accessible to persons with disabilities.

3. *The standard is reasonably necessary to accomplish its purpose or goal*.

[33] The focus shifts to the means ("the standard") the Respondent uses to achieve the purpose or goal. The Respondent must show it could not accommodate the Complainant or persons with disabilities similar to hers without undue hardship.

[34] As indicated the standard used to achieve reasonable accessibility to the Assembly building is NBC (2010). The Respondent contends NBC 2010 incorporates accessibility requirements so compliance with it should make the building accessible. The Respondent's position is

- NBC (2010) is a "minimum" standard for accessibility; and
- the 16 November 2103 incident was a specific failure to accommodate on that day.

[35] In her 24 August 2011 e-mail the Complainant complained about both the "narrowness" or insufficient width of the doors she identified and their heaviness. The Respondent's renovation to comply with NBC (2010) addressed the insufficient width of the doors; the renovation does not deal with the force required to open them. Indeed as the Complainant argued the renovations caused the Respondent to install larger doors which if anything required more force to open than those they replaced.

[36] Although the architectural firm mentioned NBC 2010 required the door-opening force not exceed 22 N it did not determine whether either the replaced doors or their replacements satisfied this standard. Instead according to the Sergeant-at-Arms it used rudimentary equipment to "get an idea" of the pressure needed to open the doors. It used this to decide the opening force was "not significant enough" to require changing the hardware on these doors. As a result the architectural firm – and therefore the Respondent - did not determine either whether any of these doors could be opened with 22 N; or whether either 22 N or the pressure needed to open these doors on 16 November 2013 was a barrier for persons with disabilities.

[37] The Respondent has therefore not established whether these doors complied with the door-opening force requirements of NBC (2010). It was the force required to open these doors which contributed to the incident giving rise to this complaint. As a result even if NBC (2010) is reasonably necessary to make the Assembly building accessible it does not assist the Respondent if it cannot demonstrate it met the standard. The result is the Respondent cannot establish it accommodated the Complainant and others with her disability. If the Respondent could prove the doors met or exceeded NBC (2010) it may be able to convince me this standard was reasonably necessary to make the Assembly building reasonably accessible. It cannot prove the doors satisfied this standard. As a result the Respondent is unable to demonstrate it accommodated the Complainant to the point of undue hardship.

[38] The Respondent also presented some evidence of various financial issues contributing to the decisions it made. These included funding the NBC renovations internally rather than seeking a further appropriation and wanting to install automatic door openers at the same time it added a lock-down system. I understood this evidence was a response to the Complainant's criticism of the time it took to make the changes to the building and not a *bona fide* and reasonable justification for not making them. This would be consistent with its indication at the 8 October 2015 pre-hearing conference - the cost of changes to the Assembly building would not be present as a *bona fide* and reasonable justification for not making them.

Conclusion on undue hardship

[39] The Respondent has not shown it could not accommodate the discrimination suffered by the Complainant or persons with disabilities similar to hers without undue hardship.

D. RESULT

[40] I find the Complainant's complaint about the doors to the restroom for disabled persons and the glass doors to the hallway giving access to this restroom has merit as required under section 62 (1) of the *Act.* I also find the Respondent has since the Complainant made the complaint remedied all the discriminatory issues with the Assembly building raised by the Complainant in her complaint. Before I deal with remedy I address some other issues raised at the hearing.

<u>The Respondent should have consulted the Complainant</u>

[41] The Complainant contends the Respondent should have consulted her on the changes it made arising from her 24 August 2011 e-mail. The Respondent submits it has no such duty and relies on *National Capital Commission* v. *Brown and others*[10]. I agree with the Respondent – it had no duty to consult the Complainant but was obliged to "consider and reasonably assess all forms of accommodation."[11]

[10] 2008 FC 733

[11] *National Capital Commission* v. *Brown and others* at paragraph 108

Time taken to address concerns in the complaint

[42] The Complainant complained about the time it took the Respondent to address her concerns. I agree the Respondent should not have waited until 2014 to deal with these issues but should have commenced as soon as possible after the 24 August 2011 e-mail. It is not an answer to say it addressed the NBC issues before deciding what to do next: as I have indicated it has not satisfied me it addressed all the potential NBC violations in that renovation and not making these changes in 2011-2013 was caused by undue hardship.

[43] I acknowledge the Respondent renovated the Assembly building promptly after the Complainant's complaint. I accept the Respondent's evidence and position the system for obtaining approval for further funding takes a certain time. After the complaint the Respondent acted as quickly as the system permitted to obtain approval and then complete the renovations.

[44] The Complainant contended the Respondent could have obtained funds from the dissolution of the Legislative Assembly Building Society established to construct the building to do these renovations. I accept the Respondent's position these funds could not have been available any more quickly than it took to proceed through the usual channels. The funds had to be returned to the Consolidated Revenue Fund and then accessed in the same way as the Respondent obtained funding.

[45] The Complainant also submitted the Respondent could have applied for funding for these renovations through the Enabling Accessibility Fund operated by Employment and Social Development Canada. I accept this funding may be available to the Respondent. There is no evidence any such funds would have been available any sooner than those the Respondent obtained.

Absence of previous complaints

[46] The Respondent also suggested the absence of any complaint about accessibility from 1993 to 2011 is relevant to the actions it took in 2011-2013. I disagree for the following reasons:

- The Respondent cannot use the apparent absence of previous complaints as a reason to not properly investigate concerns when raised.

- The *Human Rights Act* came into force in 2004 – long after the Assembly building was complete and long before the Complainant's 24 August 2011 e-mail. The Respondent also occupies a central role in the administration of the Act (it receives an annual report from the Commission[12] and Director and appoints the Commission, Director and all adjudicators). As a result it should have examined the impact of the *Human Rights Act* on it. Amongst other things it should have determined the extent to which the Assembly building complied with the *Act* – this would include the extent to which the building was reasonably accessible to persons with disabilities. It should not have waited for a complaint or – as it appears to have done here - determined one complaint was not

[12] *Human Rights Act*, section 21

sufficient to fully investigate whether the building was reasonably accessible to disabled persons.

Remedy

[47] The Complainant requests I require the Respondent's staff and members themselves to participate in Human Rights/ accessibility training. She also requests I require the Respondent to conduct an accessibility audit of the Assembly building and any other premises it uses in the Northwest Territories for committee meetings or other functions.

[48] 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). On the facts in this case I cannot find the authority to impose either of the orders requested by the Complainant in any of the listed remedial powers in section 62 (3).

[49] I am aware of the 8 March 2013 decision of Adjudicator Posynick - *Thorson* v. *Government of the Northwest Territories* in which the Respondent was ordered to ensure supervisors receive training in the duty to accommodate persons with disabilities[13]. That decision is not binding on me and I decline to follow it.

[50] At the close of the hearing I asked counsel for the Respondent if the Respondent would ensure its staff participated in human rights training without my having to require it. Counsel for the Respondent has assured me the Respondent will do this. I am satisfied with this commitment.

[51] Counsel for the Respondent also argued I should observe the principle of parliamentary privilege and not order the Respondent to conduct an accessibility audit as this would have the effect of telling the Respondent how to run its proceedings. For the reasons I have given about the jurisdiction give me by section 62 (3) of the Act I need not decide this point because I conclude I do not have jurisdiction to make the order requested.

[52] The Respondent's actions in not recognizing the import of the issues raised by the Complainant in the 24 August 2011 e-mail and not acting promptly to fully address them contributed to her humiliating experience on 16 November 2016. Furthermore the Respondent has reacted as though it was wrong of her to raise these issues and to push them to resolution. All this has caused her to suffer injury to feelings, dignity and self-respect. I award damages in the amount of $10,000 under section 62 (3) (v).

[13] Paragraph 152

[53] I order as follows:

1. The Respondent discriminated against the Complainant by denying her access to the restroom for disabled persons and the public portions of the Assembly building accessed by the glass doors listed in her complaint without reasonable accommodation

2. The Respondent will pay the Complainant $10,000.00 as compensation for injury to dignity, feelings and self-respect within thirty days of the date of this decision.

[54] I remain seized of this complaint to address any issues arising from this decision.

_____

Adrian Wright
Adjudicator
22 September 2016