THE NORTHWEST TERRITORIES HUMAN RIGHTS ADJUDICATION PANEL

IN THE MATTER OF the NWT Human Rights Act, S.N.W.T., 2002, c. 18 as amended

AND IN THE MATTER OF a complaint

**BETWEEN:**

**ELIZABETH PORTMAN**

Appellant

-and-

**THE GOVERNMENT OF THE NORTHWEST TERRITORIES (DEPARTMENT OF JUSTICE)**

Respondent

-and-

**NWT HUMAN RIGHTS COMMISSION**

## Introduction

Elizabeth Portman (Ms. Portman) filed human rights complaints under s. 44(1)(c) of the North West Territories Human Rights Act S.N.W.T. 2002, c 18 arising out of her employment. She then applied to the Legal Aid Services Board ("Legal Aid") for funds to retain counsel to assist in the advocacy of her human rights complaints. Legal Aid is a service of the Government of the North West Territories which is administered by the Department of Justice through the Legal Aid Services Board. She was denied funding by Legal Aid. Ms. Portman filed an additional human rights complaint (the Complaint) against Legal Aid alleging that the denial of coverage discriminates against her, as a person with a certain type of disability, by negatively and adversely affecting her access to the territories' human rights process. The Director of the NWT Human Rights Commission (the Director) dismissed her complaint prior to it reaching a tribunal. Ms. Portman appeals the Director's decision to this Tribunal. If the Complaint is referred to a hearing, I am to decide on the substantive merits of her Complaint.

## Relevant Legislation - The Human Rights Act

> 5. (1) For the purposes of this Act, the prohibited grounds of discrimination are race, colour, ancestry, nationality, ethnic origin, place of origin, creed, religion, age, disability, sex, sexual orientation, gender identity, marital status, family status, family affiliation,

political belief, political association, social condition and a conviction that is subject to a pardon or record suspension.

11(1) No person shall, on the basis of a prohibited ground of discrimination and without a *bona fide* reasonable justification,

(a) deny to any individual or class of individuals any goods, services, accommodation or facilities that are customarily available to the public; or

(b) discriminate against any individual or class of individuals with respect to any goods, services, accommodation or facilities that are customarily available to the public.

*(*2) In order for the justification referred to in subsection (1) to be considered bona fide and reasonable, it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship on a person who would have to accommodate those needs.

## Issues:

1. The purpose of the hearing is to determine the following issues:

   A. Should the decision of the Director of the Human Rights Commission (the "Director" ) dated May 6, 2014 to dismiss the complaint of Elizabeth Portman dated May 29, 2012 be overturned, and the complaint referred to a hearing?

   B. Did the Legal Aid Services Board of the Department of Justice, GNWT (the "Respondent") discriminate against Ms Portman on the basis of her disability, contrary to the Act?

   C. Does the denial of legal aid for human rights complaints in this instance constitute systemic discrimination against a person with a disability?

### Summary of Decision

### A. On the issue of whether the complaint should have been referred to a hearing:

The decision of the Director to dismiss the Complaint of Ms. Portman was unreasonable. The Director failed to apply the low threshold test appropriate to her gatekeeper role (reasonable basis in the evidence for sending the complaint to a hearing) and instead assumed an adjudicative role improperly deciding the case on its merits. There is compelling evidence at the Director's gatekeeping level that Legal Aid's policy to refuse funding for matters arising out of complaints to the Human Rights Commission, has a disproportionately negative effect on persons with certain disabilities because without legal assistance, access to the human rights complaint process is significantly more difficult for them than for persons without those disabilities. The Director also did not address the issue of adverse effect discrimination or the systemic nature of the alleged complaint, failed to identify the proper "service" in issue, and did not consider whether there was justification for the alleged discrimination.

**B**. **On the issue of whether the Respondent (Legal Aid Services of the Government of the NWT) discriminated against Ms Portman on the basis of her disability:**

The Complainant has met her onus to establish prima facie discrimination in the area of services contrary to the Act. The legislation states, (with some qualifiers,) that 'No person shall …deny …to any individuals… goods and services customarily available to the public.' The 'person' denying or discriminating is the GNWT, and the service in question is the human rights complaint process. In the NWT, Legal Aid funding, through the GNWT is the only way that persons with certain disabilities have genuine access to the human rights complaint process. The Complainant has shown that she has a disability that impairs her ability to represent herself in the human rights complaint process and that the Legal Aid Policy to deny funding for such complaints negatively affects her access to the human rights complaint process.

The Respondent has not provided any substantive justification for its blanket policy of refusing to fund complaints to the Human Rights Commission and accordingly has failed to demonstrate accommodation to the point of undue hardship.

A violation of the Human Rights Act has been made out and the Complainant is entitled to a remedy.

**C. On the issue of whether the denial of legal aid in this instance constitutes systemic discrimination against a person with a disability:**

The Human Rights Act provides the benefit of an accessible complaint process. This is an important benefit which makes it possible for complainants to represent themselves in hearings where complaints are heard by specially qualified adjudicators. However, to represent themselves, complainants must possess a certain abilities. Complainants must have sufficient cognitive skill to apply the facts of their circumstance to the Human Rights Act and Regulations and be able to communicate the nature and substance of their complaint in a manner that can be understood by the adjudicator. Further, they must have the ability to do so in an environment which is unfamiliar to them and in many instances face a legally trained opponent. The process is not accessible to persons whose cognitive functioning and ability to communicate is impaired by disability. In the NWT, Legal Aid is the only alternative for persons who cannot represent themselves and who cannot afford to pay to be represented.

The Legal Services Board's policy is systemically discriminatory. Legal Aid's refusal to fund matters arising out of human rights complaints has a disproportionate and negative effect on persons with certain disabilities, because it negatively impacts their access to the human rights complaint process, as well as their likelihood of success within that process.

## Facts

2. This matter proceeded by way of an Agreed Statement of Facts:

## Agreed Statement of Facts

1. This is an appeal pursuant to s.45 of the *Human Rights Act* ('The Act"). The Complainant alleges that the Northwest Territories Legal Services Board's denial of legal aid for human rights matters is discriminatory against the Complainant.
2. The Complainant suffers from episodic multiple sclerosis.
3. The Complainant has filed human rights complaints against both the Government of the Northwest Territories ("GNWT") and Sun Life Assurance Company of Canada, relating to her employment with the GNWT. These complaints remain unresolved.
4. On September 22, 2011, the Northwest Territories Legal Services Board ("Legal Services") passed Resolution 2011-B-4 which states:

   "*Resolved that given the lack of expertise and funding limitations the LSB will not fund matters arising out of WSCC claims or complaints to the NWT Human Rights Commission."*

   Attached as Document "A" is a copy of Resolution 2011-B-4.
5. On December 5, 2011, the Complainant applied for legal aid from the Legal Services Board, seeking representation for her two human rights complaints (as described in para. 3 herein).
6. In response to her application for legal aid, the Board sent Ms. Portman a Notice of Denial dated January 25, 2012. The Notice of Denial stated that Ms. Portman's application for legal aid was denied because the Legal Services Board does not provide counsel for human rights matters. Attached as Document "B" is a copy of the Notice of Denial.
7. On February 20, 2012 Ms. Portman emailed Ms. Kathleen Wheaton, Civil Law Administrator with the Board, indicating that she wished to appeal the decision.
8. On February 24, 2012, the Complainant was notified that her appeal was denied at the Executive Director level because the Legal Services Board does not provide legal aid for human rights matters. On March 19, 2012 Mr. Louis Sebert, Chair of the Legal Services Board, wrote a letter to the Complainant explaining the Legal Services Board's position, and why her application was denied. The letter informed the Complainant of her right to appeal the decision to the final level under the Legal Services Act. Attached as Document "C" is a copy of the March 19, 2012 correspondence.
9. On April 10, 2012 the Complainant submitted her written appeal to Ms. Lucy Austin, then the Executive Director of the Legal Services Board.
10. On or about May 29, 2012, the Complainant filed the complaint which forms the subject of this appeal with the Northwest Territories Human Rights Commission ("the Commission"). The complaint alleges that the Legal Services Board's denial of the Complainant's legal aid application discriminated against her based on the protected grounds of disability, contrary to s.s. 5 and 11 of the *Act.* Attached as Document "D" is a copy of the complaint.
11. On July 11, 2012, GNWT filed its response with the Commission. Attached as Document "E" is a copy of the GNWT's response.

12. On October 18, 2012 Mr. Louis Sebert, Chair of the Board, notified the Complainant that her appeal had been heard by the Board on October 16, 2012 and was denied. The Legal Services Board relied on Resolution 2011-B-4 to support the denial. Attached as Document "F" is a copy of the October 18, 2012 correspondence.
13. Ms. Gloria Iatridis, Deputy Director of the Commission, wrote a letter to the parties dated July 8, 2013 to inform them that she was recommending that the Director of the Commission dismiss the appeal under s. 44(c) of the Act (the "Opinion letter"). Attached as Document "G" is a copy of the Deputy Director's Opinion letter.
14. On September 8, 2013, the Complainant responded to the Deputy Director's Opinion letter. Attached as Document "H" is a copy of the Complainant's September 8, 2013 correspondence.
15. On September 27, 2013, the GNWT responded to the Deputy Director's Opinion letter and Ms. Portman's letter of September 8, 2013. attached as Document "I" is a copy of the GNWT's September 27, 2013, correspondence.
16. On May 6, 2014 Deborah McLeod, the Director of the Commission, delivered her decision to dismiss the complaint to the parties under ss. 44(c) of the NWT *Human Rights Act.* Attached as Document "J" is a copy of the Director's decision.

**A. Should the decision of the Director to dismiss Ms. Portman's complaint be reversed and the complaint referred to a hearing?**

**Complainant's Argument***

***** Ms. Portman's submission was prepared by Professor Laverne Jacobs, Faculty of Law, University of Windsor, who acted entirely on a pro bono basis. However, Professor Jacobs was not available to represent Ms. Portman during the hearing.*

3. Based on the authority of *Ontario (Human Rights Commission) v. Simpson-Sears Ltd.* [1985] 2 S.C.R. 536 a policy that appears to be a neutral rule, applicable to all, may have a discriminatory impact on an individual possessing protected human rights characteristics. In *Simpson-Sears,* a rule that all employees work on Fridays was found to discriminate against an employee because it conflicted with her religious beliefs.

4. Although later Supreme Court of Canada decisions such as *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees' Union (B.C.G.S.E.U.) ("Meiorin")* [1999] 3 S.C.R. 3 have attempted to unify direct and adverse effects discrimination, the concept of adverse effects discrimination has not been eliminated and remains at the heart of systemic discrimination (see *C.N.R. v. Canada (Human Rights Commission)*, [1987] S.C.J. 42, [1987] 1 S.C.R. 1114.)

5. The Director and Deputy Director erroneously assumed that there needs to be "a connection between the complainant's disability and the denial of service." The director referred to *Hinds v. Legal Services Society* 2010 BCHRT 76 as an example and in particular *dicta* stating that the complainant must establish that the denial of service arose because of disability. According to the Complainant, this does not mean that the only way of establishing a connection between a prohibited ground and an impugned act is proof that the prohibited ground prompted the refusal of service. The connection between the complainant's disability and the denial of service may also be established if the disability was not taken into account

in the decision leading to the denial of service. The Director's decision was deficient because there was no proper recognition of the allegations of systemic discrimination in Ms. Portman's case.

6. In *Aurora College v. Niziol* NWTSC 34 (hereinafter "*Aurora"*) a Director's decision was held to be deficient because it overlooked the systemic discrimination issue brought forward by the complainant, even though the complainant did not explicitly use the expression "systemic discrimination" in her complaint. In Ms. Portman's case, the Director's failure to properly deal with the systemic discrimination issue is one reason why the Director's decision to dismiss her complaint should be reversed.

7. The Director also erred by not taking into account the particular framework of the NWT Human Rights Act and in particular sections 11(1) and 11(2):

> 11(1) No person shall, on the basis of a prohibited ground of discrimination and without a *bona fide* reasonable justification,
>
> (c) deny to any individual or class of individuals any goods, services, accommodation or facilities that are customarily available to the public; or
>
> (d) discriminate against any individual or class of individuals with respect to any goods, services, accommodation or facilities that are customarily available to the public.
>
> *(2) In order for the justification referred to in subsection (1) to be considered bona fide and reasonable, it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship on a person who would have to accommodate those needs.* (Emphasis added)

The unique nature of the NWT *Human Rights Act* requires that individuals who will be adversely affected on a prohibited ground must be accommodated in the development of policies. A service provider must demonstrate that it has accommodated to the point of undue hardship before it may be able to deny services to protected groups or discriminate in the provision of services on prohibited grounds. According to the Complainant, the term "justification" is defined in the Act to mean that those adversely affected have been accommodated to the point of undue hardship.

9. The Legal Services Board relied on a blanket policy to refuse legal aid to Ms. Portman and the Director did not discuss the Legal Services Board's failure to accommodate under section 11(2) of the Act. It was the Complainant's position that the Director failed to pay proper attention to the principle provisions of the governing statute and relied on the common law in the form of case law relating to the *Charter* or human rights matters from other jurisdictions. According to the Complainant, this is another reason why the Director's dismissal of Ms. Portman's complaint is invalid.

10. The Act and related jurisprudence indicate that, on a section 45 appeal from a dismissal such as the one in this case, the adjudicator possesses broad discretion to come to their own conclusions. The adjudicator is not bound by the record of the Director and owes the Director little deference. The Complainant relies on *Aurora* supra at para 29 - 32 and indicates that a section 45 appeal is similar to an "appeal by way of re-hearing where the adjudicator is not limited to a scrutiny of the Director's decision, but should form his own

judgement on the issues." It was further pointed out that the NWT Supreme Court in *Aurora* supra held that the adjudicator can hear new or other evidence and may, on hearing an appeal, affirm, reverse or modify the Director's decision and provide any direction that he or she considers necessary.

11. The Complainant further pointed out that *Aurora College* supra, at para 35, establishes that section 44 of the *Act* does not give the Director an adjudicative role but rather a fact finding function to determine if there is a "reasonable basis in the evidence to support the complaint". The Court held that this test presents a low threshold and that it is not for the Director to evaluate the case on its merits but rather to screen complaints at paras 34 - 35:

> The purpose of the provision in question is to screen complaints. This is not an adjudicative function, since the very issue is whether the complaint merits an adjudicative hearing. It is an administrative function **with a very low threshold of assessment of merit.** The adjudicator is faced with the same question as the Director: **is there a reasonable basis in the evidence for sending the complaint to a hearing?** . . .
>
> The nature of the question, whether there is a reasonable basis in the evidence for sending the complaint to a hearing, is **primarily fact driven**. (Emphasis added in submission)

12. It was the Complainant's position that the Director did not apply the correct test and instead of fact-finding devoted considerable time to evaluating the legal merits of the case. The Director examined three decisions from other jurisdictions on whether there is a guaranteed right to state-funded counsel. She prefaces her analysis of these decisions by stating: ". . . the case law is clear that there is no guaranteed right to state-funded counsel and that discretionary decisions may be made by legal aid organizations with respect to funding for civil matters."

13. It was further argued that when the Director did turn her mind to fact-finding, she misunderstood the issue and looked for inappropriate evidence. Her decision states at p. 3:

> "Ms. Portman has not provided any information to support that Legal Aid did not allow her to apply for funding; she applied for funding, was refused and was given the opportunity to appeal the refusal."

However, it was pointed out that her complaint is not that Legal Aid did not allow her to apply for funding, but that her disability was not considered in the application process as it should have been. It was argued that to conform with human rights principles, consideration of the Complainant's disability was necessary for the proper exercise of the Board's discretion over funding eligibility.

14. The Complainant pointed out that there was reasonable evidence that the Legal Services Board failed to consider anything but its internal policy in making its decision to refuse her funding.

15. Furthermore, it was argued that the Director asked the wrong question when she concluded that there was "insufficient reasonable evidence to show a connection between Ms. Portman's disability and a denial of her application for funding" (see page 3 of the Director's decision dated May 6, 2014). According to the Complainant, the question in this case is not whether Ms. Portman's disability was a factor in the decision to deny her Legal Aid funding

but whether her disability was even taken into consideration when her funding application was refused. According to the Complainant, discrimination can also be established where a prohibited ground was not taken into account in the decision to deny service (See paragraphs 5 - 7 above for the Complainant's argument on this point). It was argued that the Director's finding rests on her mis-characterization of the issue and therefore the relevant law. Had the Director addressed the appropriate question, she would have recognized that there was reasonable evidence for the claim to proceed to adjudication.

16. In the alternative, the Complainant submits that there was reasonable evidence for the case to proceed to hearing on the issue of whether there is a connection between Ms. Portman's disability and the denial of her application for legal aid funding. She had provided information about her disability, her inability to represent herself and the Board's failure to take her disability into account in denying funding. It was argued that this should have been enough to send her complaint to adjudication to be explored further for both individual and systemic discrimination.

17. The Complainant also argued that the Legal Services Board failed to exercise its discretion in conformity with human rights law. According to the Complainant the Legal Services Board improperly fettered its discretion when it simply adhered to Resolution 2011-B-4 rather than considering Ms. Portman's individual circumstances when processing her application for legal aid funding. There was reasonable evidence that the decision to deny funding was based exclusively on Resolution 2011-B-4, and that, due to the nature of her disability, the policy had a discriminatory effect on Ms. Portman.

18. Finally, the Complainant pointed out that even if there are other groups affected by the Legal Services Board's policy to deny funding for matters arising out of human rights complaints, Ms. Portman has provided reasonable evidence that the policy has a disproportionately negative effect on persons with certain disabilities and that is an issue worthy of examination by an adjudicator.

**Respondent's Argument**

19. The Respondent's position was that the Director properly dismissed the complaint pursuant to subsection 44(1)(c) of the Act because there was insufficient evidence to warrant proceeding to a hearing:

> 44.(1) The Director may, at any time before complaint is referred for an adjudication under section 46, dismiss all or part of the complaint if the Director is satisfied that
>
> (c) the complaint or that part of the complaint is trivial, frivolous, vexatious or made in bad faith;

20. The standard of review of a decision of a Director has been determined to be one of reasonableness. (see *Aurora College v. Niziol,* 2007 NWTSC34 at para 49.)

21. The Supreme Court in *Aurora* supra provided guidance in determining whether a case has sufficient merit to bring it above the trivial and frivolous threshold. The Court indicated that the following principles establish the threshold:

    - There must be reasonable evidence to support the complainant's allegations of discrimination. If a common sense assessment of the evidence indicates that there is not reasonable evidence, then the complaint may be dismissed.

- The Director will consider the respondent's evidence. However, the focus is to be on the complainant's evidence.
- If there is contradictory evidence, the Director should consider whether, if the complainant's version was accepted, the complaint could be found to have merit. If so, a hearing is likely warranted.
- The Director cannot make decisions about credibility.

20. It was the Respondent's position that the complaint does not provide reasonable evidence to support the Complainant's allegation that her disability was a factor in the decision to refuse her legal aid and no evidence that the Respondent's practice of denying legal aid for human rights complaints systemically discriminates against persons with disabilities.

21. The Respondent further argued that if it is decided that this matter should proceed to adjudication the Complainant bears the onus to prove discrimination on a balance of probabilities.

22. In *Northwest Territories (Workers Compensation Board) v. Mercer*, 2012 NWTSC 57 it was settled that the test which must be met to establish discrimination in a human rights context is the test articulated in *O'Malley v. Simpson-Sears Ltd.* [1985] 2 S.C.R. 536. The complainant must establish:

    1. That she is a member of a protected group;
    2. That she was denied or discriminated against with respect to, goods, services, accommodation or facilities customarily available to the public; and
    3. That her disability played some role in her adverse treatment.

23. It is only when all three of these criteria have been met that the Complainant will have established a prima facie case of discrimination and the Respondent will be required to provide justification of their conduct. (See Human rights Act, S.N.W.T. 2002 c. 18 as amended, subsection 11(1)).

24. The Respondent argued that it is not enough to show that the Complainant is a member of a protected group and received negative treatment with respect to a service customarily available to the public; there must be some nexus between the treatment and the membership in the protected group to ground the claim of discrimination. The Respondent argued that to establish a claim of discrimination the facts alleged must support a reasonable inference that the negative treatment is related, in whole or in part, to a protected ground.The Respondent referred me to *Schnur v. Douglas College*, 2007 B.C.R.R.T. 40 at para. 23, upheld, 2008 BCSC 1799, 91 Admin. L.R.(4th) (B.C.S.C.).

25. The Respondent argued that the Complainant was not singled out and denied access to specific services available to other members of the public. She does not meet parts 2 and 3 of the O'Malley test.

26. According to the Respondent the provision of Legal Services is not automatic in every case (See Legal Services Act ss. 45 and 24). Funding is only provided to the extent that the regulations allow. Because it is the Board's policy not to fund complaints to the Human

Rights Commission, it cannot be said that the provision of legal aid for this purpose is customarily available to the public.

27. Furthermore, the Respondent argued that the Complainant was not adversely affected on the grounds of disability. According to the Respondent, the Complainant's disability was not a factor in the Legal Services Board's decision to refuse her funding. Funding was refused because of the nature of the legal services she was seeking, not because she was disabled. Her application was processed in the same fashion as any application for legal aid and was denied because Legal Aid does not fund this particular type of litigation. According to the Respondent, the Complainant must show that she had a right to funded counsel in this particular type of litigation in order to prove that there has been a discrimination practiced upon her by a denial of a certificate. The respondent argued any individual, whether a member of a protected group or not, would be denied legal aid in respect to a complaint to the Commission and that there was no differential treatment here.

28. In support of the above, the Respondent referred me to *Hinds v. Legal Services Society,* 2010 B.C.H.R.T. 76 (CANLII); *Fowler v. Fowler,* 1997 CarswellOnt 3210 (Ont. Gen. Div.) and *Mireau v. Canada* 1991 CarswellSask 335 (SKQB).

29. On the issue of systemic discrimination, the Respondent argued that there is no guaranteed right to state funded counsel and referred me to *British Columbia v. Crockford*, [2006] B.C.J. No. 1724 (Q.L.) at para 49. The Respondent referred me to *British Columbia v. Christie* 2007 SCC 21 (CanLii); *Caro v. Abdel-Kerim*, 2001 ABCA 201 (CanLII) in support of its position and argued that the Legal Services Board is entitled to make discretionary decisions with respect to funding for civil matters. Further, Counsel argued that the Supreme Court of Canada has held in the constitutional context concerning civil matters, a right to a fair hearing will not always require an individual to be represented by counsel when a decision is made affecting an individuals right to life, liberty or security of the person. Counsel referred me to *New Brunswick (Minister of Health and Community Service*) v. G. (J.) [J.G.]. [1999] 3 S.C.R. 46 (QL) at para 86.

30. The Respondent argued that the Legal Services policy denies funding for human rights complaints at the Tribunal level but not necessarily where human rights matters go before a court. According to the Respondent the practice, ". . . despite being partially based on lack of funding and expertise, also recognizes the more user friendly human rights complaint process in comparison to that of the court process."

31. The Respondent suggested that legal aid may not be the only access to representation available to the Complainant as "in the recent past the Human Rights Commission has had the ability to appoint advisors to advocate or assist a party in pursuing remedies available under the HRA."

32. It was the Respondent's position that the Complainant failed to show that she had a right to funded counsel in this particular type of litigation and must do so in order to prove that she suffered discrimination by a denial of a certificate. The Respondent argued that the Complainant did not establish a nexus between the conduct complained of, and her membership in the protected group. According to the Respondent, she has not established a prima facie case of discrimination and therefore there was no need to consider the question of accommodation. In the alternative, the Respondent argued that even if the Complainant established a case of prima facie discrimination, the Legal Services Board provided a bona fide reasonable justification for the discrimination.

**Was the Director's decision to dismiss Ms. Portman's complaint reasonable?**

**The Standard of Review is Reasonableness**

33. The Supreme Court of Canada has moved towards a "presumption of reasonableness" approach with few exceptions: *Dunsmuir v. New Brunswick* [2008] 1 S.C.R., *Alberta (Information and Privacy Commissioner) v. Alberta Teacher's Association* 2011 SCC 61, *Mouvement laique Quebecois v. Saguenay (City),* 2015 SCC 15. Dunsmuir directs that if the case law is clear on the standard of review, a fulsome analysis of the balancing factors is unnecessary. As *Aurora College* makes clear, the standard of review is reasonableness and the issues in this matter do not appear to fall within any exceptions to the reasonableness standard. I find that the standard of review is reasonableness.

**Was the Director's decision reasonable?**

34. For the reasons that follow, I find, with respect, that the Director's decision was not reasonable.

- the role of the Director under s. 44(1)(c) is to screen the complaint; this is primarily fact driven with a low threshold. The Director failed to apply the low threshold test appropriate to her gatekeeper role (reasonable basis in the evidence for sending the complaint to a hearing) and instead assumed a strong adjudicative role improperly deciding the case on its merits.

- the Director improperly identified the subject matter of Ms. Portman's complaint as "the opportunity to be considered for legal aid funding" and concluded that Ms. Portman had not provided information to support her complaint. The true issue in the complaint is whether the Legal Aid funding policy had an adverse discriminatory effect on Ms. Portman's access to the human rights complaint process;

- the Director failed to address the issues of adverse effect or systemic discrimination;

- the Director ignored relevant evidence, including evidence of the nature of Ms. Portman's disability and its impact on her access to the human rights complaint process, and did not address any justifications for the possible discrimination.

**The Director failed to apply the low threshold test appropriate to her gatekeeper role (reasonable basis in the evidence for sending the complaint to a hearing).**

35. Section 44(1)(c) gives the Director the discretion to dismiss a complaint if satisfied that it is trivial, frivolous or made in bad faith. This has been interpreted to allow a complaint to be dismissed if the Director finds that there is no reasonable evidence to support the allegation made. The Director must identify the legal issue in order to determine if there is reasonable evidence, but is not entitled to adjudicate the complaint on its merits. Here, the Director failed to apply the low threshold test appropriate to her gatekeeping role. by doing so she made an unreasonable decision.

36. The Act requires that to discriminate against any individual or class of individuals, protected under the Act, with respect a service that is customarily available to the public, there must be bona fide and reasonable justification.

37. In order for the justification referred to in subsection (1) to be considered bona fide and reasonable, it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship on a person who would have to accommodate those needs. The Director indicated that although the *Legal Services Act* does not bar funding for legal services in human rights cases, the Legal Services Board is authorized to administer the Legal Services Act and make policies respecting the provision of legal services. It was her position that Resolution 2011-B-4 was a proper exercise of the Legal Services Board's delegated authority. She reasoned that the refusal of Ms. Portman's application for legal aid was not discriminatory because the refusal was based on the nature of the action she was pursuing rather than on her disability. The Director stated that the Complainant must show that she had a right to funded counsel in this particular type of litigation and failed to do so.

38. In support of her position, the Director relied on *British Columbia v. Christie* 2007 SCC 21 (Can LII), *Mireau v. Canada* 1991 Carswell Sask 335 (SJQB) and *Fowler v. Fowler,* 1997 Carswell Ont 3210 (Ont. Gen. Div.) all of which deal with claims under s. 15 of the Charter of Rights and Freedoms. She relied on these cases in concluding that to establish discrimination based on disability, Ms. Portman must first show that she had a right to counsel funded by the State in this type of litigation. Although I will comment further on her analysis and reliance on these Charter cases below, I find the Director's analysis, as evidenced by her language and findings (specifically findings of no discrimination), took her outside her administrative, fact-finding role as set out in *Aurora* supra at para 34:

> "The purpose of the provision in question (s. 44(1)) is to screen complaints. This is not an adjudicative function, since the very issue is whether the complaint merits an adjudicative hearing. It is an administrative function with a low threshold of merit."

**The Director improperly identified the subject matter of the complaint.**

39. The Director incorrectly identified the service which is the subject matter of the complaint as "… the opportunity to to be considered for legal aid funding." She dismissed the complaint because Ms. Portman ". . . had not provided any information to support that Legal Aid did not allow her to apply for funding." Ms. Portman's complaint was not that she was prevented from applying for legal aid funding but that the Legal Aid policy, which excludes funding for matters arising out of human rights complaints, unfairly discriminates against persons with disabilities. Legal Aid funding is the narrow issue, however the broader issue is whether the Legal Aid policy unfairly disadvantages persons with disabilities from access to the Human Rights Commission complaint process. It was unreasonable for the Director to address the narrow issue and ignore the discriminatory effect of the Legal Aid Policy on Ms. Portman's access to the human rights complaint process

40. The Director's legal analysis also failed to address the broad legal issue of adverse effect discrimination either specifically or within the context of systemic discrimination. Her narrow view of the issue is illustrated by the cases she relied on in her decision.

41. In *Mireau v. Canada* 1991 CarswellSask 335 (SKQB), a claim under the *Canadian Charter of Rights and Freedoms,* a diabetic on social assistance asserted that the *Charter*

guaranteed him a government funded lawyer to pursue certain civil claims, one of which involved a complaint to the Saskatchewan Human Rights Commission. In refusing his claim, the Saskatchewan Court of Queens Bench indicated that the applicant had not established that any of his protected rights had been violated and concluded that the violations, if any, are not the result of discriminatory conduct. The Court stated:

> The denial of funded legal counsel did not depend on some irrelevant personal characteristic of the applicant. What made him ineligible for funded counsel was the nature of the action he sought to pursue. The denial to provide funding fell squarely within the provisions of the Legal Aid Act, the Regulations thereunder and the policies of the Department of Justice.

42. In *Fowler v. Fowler*, 1997 CarswellOnt 332 (Ont Gen. Div.), the Court held that to establish the existence of a breach of the *Charter* guaranteed right to equal protection and benefit of the law, it must be shown that there exists a right to counsel funded by the State in this type of litigation and that there has been a discrimination practiced upon the applicant by the denial of a certificate.

43. Neither of these cases address adverse effect discrimination. This issue is central to Ms. Portman's claim. Both *Mireau* and *Fowler* interpret section 15 of the Canadian Charter of Rights and Freedoms and specifically whether "equal protection and benefit of the law" includes the right to funded counsel in civil matters. This issue is not raised in Ms. Portman's human rights complaint.

44. It is noteworthy that both *Mireau* and *Fowler* were decided before *Meiorin* and did not consider the concept of adverse effect discrimination. The Director relied on these cases to conclude that the Complainant's only right was the right to apply for Legal Aid. She was able to exercise that right but since the Legal Aid policy applied to all Human Rights complaints, the Director decided the Legal Aid policy was not discriminatory against Ms. Portman. The Director concluded that the Legal Services Board was entitled to refuse her application on the basis of its policy to deny legal aid funding to all human rights complaints and that Ms. Portman's application for legal aid funding was properly denied because she had failed to prove that she had a right to paid legal representation.

45. As outlined above, to meet the low threshold necessary to have her complaint referred to adjudication, it is only necessary to provide a reasonable basis in the evidence that there was discrimination with respect to a service customarily available to the public. As will be discussed in greater detail below, the service which Ms. Portman was denied was access to the Human Rights complaint process. For this matter to be referred to adjudication, it is enough that there is evidence that the Legal Aid Policy had a disproportionately negative affect on her access to the Human Rights Complaint process because of her disability. It is not necessary to prove that she has a right to paid legal representation. Charter rights are not an issue in this complaint.

46. The Director also relied on *Hinds v. Legal Services Society*, 2010 BCHRT 76. The complainant in *Hinds* alleged that the Legal Service Society of BC refused to fund certain legal proceedings on her behalf (family matters), when it was aware that she was unable to represent herself due to her disabilities.

47. Although the facts here are similar to those in *Hinds*, there are important differences. Like Ms. Portman, Ms. Hinds alleged that her ability to represent herself in civil legal proceedings

was impaired by her disability. Like Ms. Portman, she was refused legal aid funding and brought a human rights claim alleging discrimination on the basis of disability. Like Ms. Portman, her claim was refused. This is where the similarities end. Ms. Hind's claim was refused because she failed to identify a specific disability or provide information establishing the denial of a service customarily available to the public and a connection between her disability and the denial of service. The Tribunal stated:

> In order to establish her complaint, Ms. Hinds must identify a physical disability, provide information establishing the denial of a service customarily available to the public, and also provide information that establishes a connection between her disability and the denial of the service. **In this case, Ms. Hinds has not identified a specific disability in her complaint, except for the general reference to LSS being aware she has one. As well, she has not established any link between that disability and the refusal of LSS to provide legal aid.** There is no information set out in the complaint upon which it could be reasonably inferred that she was denied funding because of a disability, whatever its nature. (emphasis added)

48. Ms. Hinds' complaint was refused because her submission was deficient. It is not clear whether, or to what extent, this was attributable to her inability to represent herself. In any event, Ms. Portman's complaint is not similarly deficient. Unlike Ms. Hinds, Ms. Portman identified her physical disability to be Multiple Sclerosis. She explained how it affects her access to the Human Rights complaint process: MS limits the duration of good cognitive functioning, causes debilitating fatigue and affects her mobility, vision and hearing. These functions are vital to communication and her ability to prepare and present her claim to a human rights tribunal. The connection between her disability and the denial of service is also supported by evidence: her disability has affected her ability to work and earn enough to retain legal counsel, in the NWT there is no alternative for persons who cannot afford to pay a lawyer, her disability prevents her from representing herself and this effectively prevents her access to the Human Rights complaint process,. The Legal Aid Services policy to deny legal aid for all human rights claims has a discriminatory impact on persons with certain disabilities. Without legal aid, Ms. Portman and others with similar disabilities, are denied access to the Human Rights complaints process.

49. These cases can be distinguished because the issue of adverse effect discrimination was not considered. In each case the Court concluded that the claimant had no right to paid legal service and therefore the denial of a legal aid certificate was not discriminatory against her. However, the discrimination experienced by Ms. Portman concerns equal access to the human rights complaint procedure. This "user friendly" process is a service that is customarily available to the public and her access to it was adversely affected by the Legal Services Board's blanket policy to deny funding for all Human Rights matters.

50. The Director's conclusion at page 3 of her letter May 6, 2014 that "Legal Aid was entitled to refuse her funding because of its policy not to fund legal aid for complaints before the commission" ignores the fact that all government Policies, including those of Legal Aid Services Board must comply with the provisions of the Human Rights Act.

51. It was unreasonable for the Director not to recognize, at the gatekeeping level, that the argument and evidence supports that the Human Rights Commission's complaint process is a service customarily available to the public and that the Legal Aid policy to deny legal aid on matters arising out of human rights complaints has a disproportionately negative impact

on Ms. Portman's access to that process.

**The Director ignored relevant evidence, including evidence of the nature of Ms. Portman's disability and its impact on her access to the human rights complaint process, and also did not address any justifications for the possible discrimination.**

52. Ms. Portman provided evidence that she and others with similar disabilities, are affected in ways that others who are entitled to protection under the Human Rights Act are not. She offered evidence that the Legal Aid Policy has a disproportionately negative effect on persons with disabilities that impair their ability to represent themselves before human rights tribunals. Her evidence supports her claim that she cannot represent herself, it is based on her knowledge of her medical condition and was not challenged:

- persons who are entitled to protection under the Act on are not all impacted in the same way;
- she has multiple sclerosis and her symptoms include fatigue which limits the duration of good mental functioning, however, these must be interspersed with periods of rest;
- unexpected or unmanageable stress immediately increases the symptoms of her multiple sclerosis resulting in debilitating fatigue, pain as well as diminished cognitive functioning, hearing, vision and mobility;
- she could not participate in a hearing of more than 4 hours per week and she occasionally experiences an exacerbation of her condition which renders her completely incapable of preparing for, or participating in a hearing;
- her disability affects her cognitive functioning and ability to communicate which prevents her from adequately representing herself whereas persons with disabilities that do not affect their cognitive functioning and communication, may have the capacity to represent themselves;
- her human rights complaints concern the denial of Long Term Disability coverage which is a complex and multi-faceted issue and could affect many people. She says there is much at stake and she will be opposed by Sun Life, a multi-billion dollar international organization and the Government of the NWT, the largest employer in the territory. Both organizations have unlimited resources to support their response to her complaints. She possesses neither the skill, knowledge or ability to adequately prepare and present her complaint.

52. She also provided evidence that her disability and the disadvantages that go with it, including unemployment and poverty, impair her access to the human rights complaint process and further support her need for Legal Aid:

- like many other persons with disabilities, she is unemployed and in receipt of public assistance. She does not have the financial resources to retain legal counsel. Ms. Portman pointed out that the cost of a one hour consultation with a lawyer is equivalent to her food allowance for an entire month;
- the monetary awards in human rights cases are typically too low to pay the cost of the legal services required to achieve an award. In many cases, it would negate the purpose of the

proceeding if the entire remedy (and possibly more) were needed to pay the legal fees incurred to pursue the remedy.

53. Ms. Portman provided evidence that legal aid is the only way that she, and others with similar disabilities, can access the human rights complaint procedure:

- there are no other appreciable legal resources available in the NWT through which she can obtain the legal assistance she needs. There are no law students in the NWT and the new, temporary, poverty law clinic provides a maximum of 1 hour of advice 2 - 3 times per month which is inadequate for her needs;

- in the NWT, legal fees are not recoverable in human rights claims and she has canvassed the lawyers in Yellowknife and the immediate area and determined that there are no lawyers willing to take on a human rights claim on a pro bono basis.

54. It was also pointed out that although human rights cases are civil matters, they are not strictly private disputes between parties. The goal and purpose of the legislation is to promote human rights for the benefit of the community as a whole and although the remedies awarded often include monetary compensation, the matters in dispute concern the inherent dignity and equality of all persons and must be recognized as fundamental principles of public policy.

55. The Director also relied on *British Columbia v. Christie* 2007 SCC (CanLII) for the principle that there is no guaranteed right to state funded legal counsel and that discretionary decisions may be made by legal aid organizations with respect to funding for civil matters. The Court in Christie was addressing a constitutional challenge to a 7% tax levied by the Province of British Columbia on legal fees. One of the arguments advanced on behalf of Mr. Christie was that the tax would make it impossible for some people to obtain legal representation and therefore the law breached a fundamental constitutional right to access to justice for low-income persons and should be declared unconstitutional to that extent. In rejecting this argument the Court stated at para. 23:

> . . . Access to legal services is fundamentally important in any free and democratic society. In some cases, it has been found essential to due process and a fair trial. But a review of the constitutional text, the jurisprudence and the history of the concept does not support the respondent's contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law.
>
> and at para. 25:
>
> . . . Section 10(*b*) (of the Charter) does not exclude a finding of a constitutional right to legal assistance in other situations. Section 7 of the *Charter* , for example, has been held to imply a right to counsel as an aspect of procedural fairness where life, liberty and security of the person are affected: see *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, at p. 1077; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46. But this does not support a general right to legal assistance whenever a matter of rights and obligations is before a court or tribunal. *Thus in New Brunswick, the Court was at pains to state that* ***the right to counsel outside of the 10(b) context is a case-specific multi-factored enquiry*** *(see para. 86)***.** (emphasis added)

56. *New Brunswick (Minister of Health and Community Services) v. G. (J.)* supra was also Charter case. It began as an application to extend the state's custody of the appellant's three children for a further period of up to an additional six months. The applicant was indigent and her application for legal aid was denied because legal aid guidelines did not cover custody disputes. Although the issue was moot by the time it was heard, the Court held that the legal issues were of sufficient importance that the Court should exercise its discretion to decide the case. The Court observed that the right to state-funded counsel at a custody hearing is of national importance, and, although similar cases may arise in the future, they are by nature evasive of review. The Court ultimately concluded that the New Brunswick government was under a constitutional obligation to provide the appellant with state-funded counsel in the particular circumstances of this case.

57. The Court reasoned that the right to security of the person guaranteed by s. 7 of the Charter included the right to both the physical and psychological integrity and extends beyond the criminal law and can be engaged in child protection proceedings. It concluded that the removal of a child from parental custody was a serious interference with the psychological integrity of the parent, a gross intrusion into a private and intimate sphere often resulting in stigma and distress. This was sufficient to constitute a restriction of security of the person.

58. The Supreme Court of Canada in *New Brunswick supra* set out the following test to determine whether it was necessary for the government to provide legal counsel in a particular case. The Court said **it was necessary to consider: the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the appellant.** (emphasis added) It concluded that the interests at stake in a custody hearing are of the highest order; that despite the somewhat relaxed procedural atmosphere, custody hearings are adversarial proceedings where difficult evidentiary issues are frequently raised. In assessing the capacity of the appellant, the Court noted that the parent "must adduce evidence, cross-examine witnesses, make objections and present legal defences in the context of what is to many a foreign environment, and under significant emotional strain and that in this case, all other parties were represented by counsel." The Court concluded that in this case assistance of a lawyer was necessary to ensure the appellant her right to a fair hearing.

59. Although the analysis in *New Brunswick* was in the context of a *Charter* challenge in a custody matter, the principles also apply to human rights claims. The interests at stake in human rights matters concern fundamental principles of public policy and the inherent dignity and equality of all persons. Ms. Portman's complaint alleges discrimination with respect to Legal Aid to pursue long term disability benefits. These are serious interests, involving legal complexity. Despite a somewhat relaxed procedural atmosphere at the tribunal level, it is an adversarial proceeding. She will be opposed by legal counsel with special expertise in the area of human rights and insurance law. She has a disability that impairs her ability to prepare and present her complaint. This is a case where the assistance of a lawyer is necessary to ensure a fair hearing.

60. The Director acknowledged that funding was refused to Ms. Portman on the basis of the Legal Services Board policy (Resolution 2011-B–4). The only evidence to justify the policy is in the policy itself which states:

> "Resolved that given the lack of expertise and funding limitations the LSB will not fund matters rising out of WSCC claims or complaints to the NWT Human Rights Commission."

This information strongly supports a finding of prima facie discrimination.

61. The Director's decision does not address whether "the lack of expertise" or "funding limitations" represent a bona fide reasonable justification for the denial of legal aid funding for human rights complaints or whether it would impose an undue hardship for the Legal Services Board to accommodate the needs of some human rights complainants. The issue is not addressed. With respect, it is unreasonable to dismiss the complaint after admitting factual findings which appear, at least at this screening stage, to support prima facie discrimination, without addressing any justification argument.

62. As outlined in paras 50 - 53 above, the policy to deny legal aid for all matters arising out of claims to the Human Rights Commission has a discriminatory impact on persons with certain disabilities. Such persons are not capable of representing themselves and without assistance will be unable to obtain the assistance they need to access the human rights complaint procedure. In the NWT, Legal Aid is the only source of assistance. The blanket policy to deny legal aid for matters arising out of complaints to the Human Rights Commission represents a barrier to equal access to the human rights complaint process for these persons.

**The Director's decision was Unreasonable**

63. In *Dunsmuir v. News Brunswick*, 2008 SCC 9. [2008] 1 S.C.R. 190 the Court stated that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process". (para 47). Similarly, for all of the above reasons, I cannot find that the Director's gatekeeping decision survives a somewhat probing examination, or that the reasons provided the required 'justification, transparency and intelligibility.' Accordingly, I find, with respect, that the Director's decision is unreasonable.

**B. Did Legal Aid discriminate against Ms Portman, in contravention of the Human Rights Act?**

64. The complainant carries the burden to establish a *prima facie* case of discrimination based on the usual civil standard: the balance of probabilities. In *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360 the Supreme Court of Canada set out the requirements of a *prima facie* case:

> [33] . . . to demonstrate *prima facie* discrimination, Complaints 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.

65. Here the Complaint's disability is not disputed. It is common ground that Ms. Portman suffers from multiple sclerosis. Due to her condition she experiences periods of debilitating fatigue and diminished cognitive functioning. She applied for legal aid and was denied

because of the Legal Aid policy not to fund matters arising out of complaints to the Human Rights Commission (Resolution 2011-B-4). It is acknowledged that Ms. Portman was adversely affected by Legal Aid's policy however the Respondent says that it was the nature of the legal action she was pursuing, not her disability, that was the basis for the denial.

66. The purpose of the *Legal Services Act* is to provide eligible individuals in the NWT with funding for legal services. The *Act* sets out certain eligibility criteria which include the applicant's ability to pay for legal services (see s.31) and the type of legal services that will be funded (see s.s. 44 and 45). Matters arising out of complaints to the Human Rights Commission are not excluded from funding under the Legal Services Act. The Legal Services Board administers the Act and is authorized to make policies and rules applicable to the provision of legal services.

67. The Human Rights Act in s. 46, provides a process through which unresolved complaints are heard and decided by a panel of adjudicators. The *Act* specifies in s. 48(4) that adjudicators must have experience, an interest in, and sensitivity to human rights matters and be a member of at least five years good standing of a law society of a province or territory and have at least five years experience as a member of an administrative tribunal or court. Human Rights Act establishes a complaint process for human rights complaints which involves special tribunals presided over by adjudicators with special qualifications.

68. The Human Rights complaint process is designed to allow persons without legal training to represent themselves. It was described by the Respondent as more "user friendly" than the civil procedure of the courts. Due to its focus on accessibility, it represents a significant benefit to persons who cannot afford legal representation and wish to pursue a human rights complaint. It is a service which is customarily available to the public.

69. The "user friendly" complaint process, however, is not accessible to Ms. Portman. Her disability impairs her cognitive functioning and ability to communicate to an extent that she is unable to represent herself in the Human Rights complaint process. Legal Aid's blanket policy to deny funding for human rights complaints has an adverse impact on all human rights complainants, but has a disproportionately negative effect on Ms. Portman and others with similar disabilities.

70. Ms. Portman, like many disabled persons is unemployed and cannot afford to pay for legal representation. In the NWT there are no alternative avenues through which she can obtain legal assistance; there are no law students and no lawyers willing to take her case on a pro bono basis. Legal Aid is the only alternative for her to obtain legal assistance.

71. The refusal to fund Ms. Portman's human rights complaint has different consequences to her than a similar refusal would have on a person who does not share her disability. Because of her disability, she is incapable of representing herself. Because of her disability, Ms. Portman suffers a disproportionately adverse impact as a result of being refused legal aid. Being denied legal aid means that she will not have meaningful access to the human rights complaint process. Her disability is a factor in the adverse impact.

**C. Was the denial of legal aid in this instance systemic discrimination against a person with a disability?**

72. Throughout Canada, Human Rights legislation is recognized as fundamental, quasi-constitutional law. It is to be interpreted in a liberal and purposeful manner, given expansive meaning and accessible application. See *Tranchemontagne v. Ontario (Director , Disability Support Program)* [2006] 1 S.C.R. 513, 2006 SCC 14 at para 33:

> The most important characteristic of the (Human Rights) Code for the purposes of this appeal is that it is fundamental, quasi-constitutional law: see *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566, at para. 18; *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, at p. 158. Accordingly, it is to be interpreted in a liberal and purposive manner, with a view towards broadly protecting the human rights of those to whom it applies: see *B v. Ontario (Human Rights Commission)*, [2002] 3 S.C.R. 403, 2002 SCC 66, at para. 44. And not only must the content of the Code be understood in the context of its purpose, but like the *Canadian Charter of Rights and Freedoms* , it must be recognized as being the law of the people: see *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 70, aff'd in *Martin*, at para. 29, and *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, [2004] 2 S.C.R. 223, 2004 SCC 40 ("*Charette*"), at para. 28. **Accordingly, it must not only be given expansive meaning, but also offered accessible application.** (Emphasis added)

73. The *Legal Services Act* must comply with and be administered in accordance with the *Human Rights Act*. Eligibility criteria cannot discriminate against persons protected by the *Human Rights Act* nor can eligibility criteria have a disproportionately negative effect on a group protected under the *Act.* Ms. Portman's application for legal aid was rejected on the basis of Resolution 2011-B-4 which states that matters arising out of complaints to the Human Rights Commission will not be funded. The decision to refuse Ms. Portman funding for her human rights complaint is consistent with the Legal Aid eligibility criteria, however because the policy has a disproportionately negative effect on Ms. Portman and others with similar disabilities, it is discriminatory.

74. At the hearing the Complainant referred me to *Senyk v. WFG Agency Network (B.C.) Inc. (No. 2)* (2008) CHRR Doc. 08-676, 2008 BCHRT 376, a case concerning discrimination on the basis of physical and mental disability in employment. The case arose shortly after the British Columbia Human Rights Commission went from a system where the Commission took carriage of complaints to a direct access system where the complainant became responsible for carriage of the complaint throughout the process. As a result, many complainants, who could not afford or obtain counsel, represented themselves before the Tribunal. The Tribunal provided statistics from the BC Human Rights Tribunal in 2006 - 2007 Annual Report (at para 481) which showed the comparative success rate of self represented and represented parties:

> In 25 cases, only the respondent had legal representation - in each of these the complaint was dismissed. In 6 cases, only the complainant had legal representation - in each of these the complaint was found to be justified. Where neither party was represented, 8 of the 18 (44%) complaints were found to be justified. Finally, where both parties were represented, 9 of the 14 (64%) cases were found to be justified.

75. In *Senyk,* the Tribunal commented that, at least in some cases, it may be unreasonable to expect a complainant who has suffered discrimination to represent themselves, or at least to

do so adequately. The Tribunal said that the *Senyk* case was an excellent example of how legally and factually complex some complaints are and noted that the parties provided the Tribunal with approximately 60 legal authorities and referred to many more in the course of extensive and sophisticated submissions. It was observed that the Respondent was a large enterprise, well represented by effective counsel, that expert evidence was required and that witnesses were subject to extensive cross-examination which was important to the Tribunal's ability to find the relevant facts. The Tribunal concluded that it would be unrealistic to expect any but the most exceptional of self-represented parties to be able to effectively address the factual and legal issues in such a case.

75. The Tribunal commented on the importance of legal representation where the complainant, like Ms. Senyk, although she had enjoyed a successful career in a competitive industry, latterly suffered from significant mental disabilities which rendered her incapable of working in any occupation, at para 484:

> Whatever her ability to mount a successful complaint on her own might have been prior to the onset of her disabilities, it is apparent that she could not have done so in the condition she has been in since her employment was terminated.

76. Ms. Senyk had retained legal counsel and the issue was whether she could recover the legal expenses incurred to pursue her claim. In awarding compensation for expenses, the Tribunal referred to *Brooks v. Canada (Dept. of Fisheries and Oceans)* (No. 4) (2005), CHRR Doc. 05-232, 2005 CHRT 14 at para 14:

> I think the Tribunal has an obligation to protect the efficacy and integrity of the Canadian Human Rights Act. The entire purpose of the Act is to provide a meaningful remedy for those who have suffered discrimination. I do not see how this is possible, at least in a case where the Commission decides not to appear, without an award of costs. The idea that a complainant who has been discriminated against should be required to pay something in the order of a hundred thousand dollars, for a five thousand dollar claim, and the full gamut of hardship that comes with litigation, is untenable. The cure is worse than the disease.

77. The objects and purpose of the NWT Human Rights Act is set out in the Preamble:

> Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
> And whereas it is recognized in the Northwest Territories that every individual is free and equal in dignity and rights without regard to his or her race, colour, ancestry, nationality, ethnic origin, place of origin, creed, religion, age, disability, sex, sexual orientation, gender identity, marital status, family status, family affiliation, political belief, political association or social condition and without regard to whether he or she has had a conviction that is subject to a pardon or record suspension;
> **And whereas it is of vital importance to promote respect for and observance of human rights in the Northwest Territories, including the rights and freedoms protected under the Canadian Charter of Rights and Freedoms, and rights and freedoms protected under international human rights instruments, while at the same time promoting respect for, and the observance of, the rights and freedoms of aboriginal peoples that are recognized and affirmed under the Constitution of Canada;**

And whereas it is recognized that every person, having duties to others and to the community to which he or she belongs, is responsible to strive for the promotion and observance of the rights recognized in this Act; (emphasis added)

78. The Complainant referred me to the UN Convention on the Rights of Persons with Disabilities. Article 13 states:

Article 13 - Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

79. In *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, 1999 CanLII 699 (SCC) the Supreme Court considered the impact of international treaties and conventions at paras 69 - 70:

> 69. . . . International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. The Queen*, 1956 CanLII 79 (SCC), [1956] S.C.R. 618, at p. 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141, at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

70. Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. **In so far as possible, therefore, interpretations that reflect these values and principles are preferred.** [Emphasis added.]

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration* [1994] 2 N.Z.L.R. 257 (C.A.), at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India), at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter*: *Slaight Communications*, *supra*; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697.

80. The UN Convention on the Rights of Persons with Disabilities was ratified by the Government of Canada in March 11, 2010. The importance of “the rights and freedoms

protected under international human rights instruments" is specifically referred to in the Preamble to the *NWT Human Rights Act .* At the very least, the UN Convention on the rights of Persons with Disabilities should serve as an aid in interpreting the *NWT Human Rights Ac*t. As a citizen of the NWT, Ms. Portman is entitled to effective access to justice which encompasses equal access to the human rights complaint process. Without legal aid, Ms. Portman does not have meaningful access to it.

81. Discrimination in the provision of a service was addressed by the Supreme Court of Canada in *Moore v. British Columbia (Education)* 2012 SCC 61, [2012] 3 S.C.R. 360. Jeffrey Moore was a child with severe learning disabilities who required special education services which had been provided through his School District. When the Diagnostic Centre that provided the special education services was closed due to funding cutbacks, Jeffrey had to transfer to a private school to get the instruction he needed. His father filed a human rights complaint on Jeffrey's behalf alleging that the boy had been denied "a service customarily available to the public."

82. The Tribunal concluded that there was both individual discrimination against Jeffrey and systemic discrimination against Severe Learning Disabilities students in general. The discrimination against Jeffrey was grounded in the District's failure to assess Jeffrey's learning disability early and to provide appropriately intensive instruction following the closing of the Diagnostic Centre. The Tribunal ordered a wide range of sweeping systemic remedies against both the School District and the Province along with reimbursement of the family's private tuition costs.

83. The Supreme Court of British Columbia, set aside the Tribunal's decision finding that Jeffrey's situation should be compared to other special needs students, not to the general student population as the Tribunal had done. The Court noted that there was no evidence about this comparison, nor was there evidence about how students with special needs were affected by funding mechanisms such as the high incidence/low cost cap or the closing of the Diagnostic Centre. The Court concluded that the failure to identify and compare Jeffrey with the appropriate comparator group tainted the entire discrimination analysis. As a result, the Tribunal's decision was set aside.

84. A majority in the Court of Appeal agreed that Jeffrey ought to be compared to other special needs students and to compare him with the general student population was to invite an inquiry into general education policy and its application, which could not be the purpose of a human rights complaint.

85. In her dissent, Rowles J.A. indicated that general education was the service customarily available to the public and special education was the means by which "meaningful access" to educational services was achievable by students with learning disabilities. She found that a comparator analysis was both unnecessary and inappropriate. She agreed with the Tribunal's analysis that Jeffrey had not received sufficiently intensive remediation after the Diagnostic Centre was closed and agreed with the findings of discrimination. However, she found the discrimination justified on the basis that not every service can be funded and the Courts should defer to legislative policy and administrative expertise.

86. The matter went before the Supreme Court of Canada which identified the central issue to be whether the relevant service was general education or special education. The Court agreed with Rowles J.A. that for students like Jeffery Moore, special education is not the

service but the means by which those students get meaningful access to the general education services available to all BC students (at para 34):

> It is accepted that students with disabilities require accommodation of their differences in order to benefit from educational services. Jeffrey is seeking accommodation, in the form of special education through intensive remediation, to enable him equal access to the "mainstream" benefit of education available to all. . . . *In Jeffrey's case, the specific accommodation sought is analogous to the interpreters in* Eldridge: *it is not an extra "ancillary" service, but rather the manner by which meaningful access to the provided benefit can be achieved*. Without such special education, the disabled simply cannot receive equal benefit from the underlying service of public education. [Emphasis added; para. 103.]

87. The Court observed at para 31:

> If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had genuine access to the education that all students in British Columbia are entitled to. As Rowles J.A. noted in her dissent; "this risks perpetuating the very disadvantage and exclusion from mainstream society the *Code* is intended to remedy" (see *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1237; Gwen Brodsky, Shelagh Day and Yvonne Peters, *Accommodation in the 21st Century* (2012) (online), at p. 41).

88. The Court stated at para 48 that the Tribunal had correctly concluded that the failure of the District to meet Jeffrey's educational needs constituted prima facie discrimination:

> It was therefore the combination of the clear recognition by the District, its employees and the experts that Jeffrey required intensive remediation in order to have meaningful access to education, the closing of the Diagnostic Centre, and the fact that the Moores were told that these services could not otherwise be provided by the District, that justified the Tribunal's conclusion that the failure of the District to meet Jeffrey's educational needs constituted *prima facie* discrimination. In my view, this conclusion is amply supported by the record.

89. I cannot agree with the Respondent's argument that since everyone seeking legal aid for a matter arising out of a complaint to the Human Rights Commission is denied funding, there is no discrimination against Ms. Portman. This analysis follows the reasoning that was rejected by the Supreme Court in *Moore.* The Respondent's analysis presumes that Legal Aid is the service customarily available to the public and compares Ms. Portman to other persons seeking legal aid for human rights complaints. However, if we follow the reasoning of the Supreme Court in *Moore,* it is apparent that the service customarily available to the public is the human rights complaint process and legal aid is the means by which Ms. Portman and others with similar disabilities achieve genuine access to that service. As the Court stated in *Moore* (at para. 31):

> If Jeffrey is compared only to other special needs students, full consideration cannot be given to whether he had genuine access to the education that all students in British Columbia are entitled to.

90. Human rights complainants with certain disabilities require accommodation of their differences in order to benefit from the user friendly human rights complaint process in the

same way that Jeffrey Moore required special services (intensive remediation) to have meaningful access to a general education, Ms. Portman requires special services (assistance to prepare and present her complaint) to have meaningful access to the human rights complaint process. In *Moore,* the Tribunal concluded that the failure of the District to meet Jeffrey's educational needs constituted *prima facie* discrimination. Here, the Legal Service's Board's failure to meet Ms. Portman's need for access to the human rights complaint process constitutes *prima facie* discrimination. Comparing Ms. Portman only with others applying for legal aid for human rights complaints was like comparing Jeffrey Moore only with other special needs students. This was the error committed by the lower courts in *Moore.* As Rowles J.A. noted in her dissent: "this risks perpetuating the very disadvantage and exclusion from mainstream society the *Code* is intended to remedy" (see *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at p. 1237; Gwen Brodsky, Shelagh Day and Yvonne Peters, *Accommodation in the 21st Century* (2012) (online), at p. 41).

91. While many human rights complainants have the ability to represent themselves in the human rights complaint process, Ms. Portman does not. The Legal Aid policy ignores this reality. Legal Aid failed to recognize that its policy has a disproportionately negative effect on Ms. Portman, and others with similar disabilities.

92. Discrimination in the provision of a service was also addressed in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624. This was a claim under the Charter of Rights and Freedoms brought by a number of deaf persons who alleged that the Government's failure to provide sign language interpreters to assist them to obtain medical services violated section 15(1) of the Charter. They alleged that they were denied their right to equality in the provision of publicly funded health care.

93. Sign language interpreters had been provided by a private organization until 1990 but for financial reasons the service was discontinued. The Government's refusal to provide the service was based on lack of resources and concern for the precedent it might represent. Sign language was the claimants' preferred method of communication. It was their position that without interpreter services they could not communicate with their doctors and could not afford the cost of hiring their own interpreters. There was expert testimony that many deaf persons have poor reading and writing skills and that communication through written means was unsatisfactory.

94. The Supreme Court of British Columbia dismissed the application on the basis that interpreter services are ancillary to medically required services in much the same way as is transportation to a doctor's office. Any disadvantage suffered by the deaf is not the result of the government's failure to provide such services, but is rather the result of a limitation that exists outside the legislation. The Court indicated that the Charter does not require governments to implement programs to assist disabled persons but agreed that if the government provides a benefit, it must be distributed equally. The Court concluded that there is no obligation to provide the benefit of interpreter services and that while it is desirable that deaf persons have interpreters for medical procedures paid for by society, s. 15(1) does not demand this result.

95. A majority of the British Columbia Court of Appeal held that not having interpreting services in hospitals is not discriminatory because the *Hospital Insurance Act* does not provide any "benefit of the law" within the meaning of s. 15(1) of the *Charter* . It noted that each hospital receives a global grant from the government and the services provided are decided by each

hospital. The majority found that the absence of interpreters results not from the legislation but rather from each hospital's budgetary discretion. Because hospitals are not "government" within the meaning of s. 32 of the *Charter* , their failure to provide interpreters does not engage s. 15(1) and the lack of interpreter services was not discriminatory because the *Hospital Insurance Act* does not provide interpreter services as a "benefit of the law".

96. The majority also held that the *Medical and Health Care Services Act* did not violate s. 15(1) of the *Charter* because it did not create a distinction between the deaf and hearing populations. The BCCA held that the proper approach to the application of adverse effects analysis to benefit-conferring legislation was to focus on the impact of the legislation on the disadvantaged group. In considering this impact, the majority drew a distinction between effects attributable to the legislation and those that exist independently of it. In the absence of legislation, deaf people would have to pay their doctors in addition to translators; the legislation removes the responsibility to pay the physicians of both hearing and deaf persons. The majority concluded that the inequality resulting from the fact that the deaf remain responsible for the payment of translators, exists independently of the legislation. Thus, the legislation provided the benefit of free medical services equally to the hearing and deaf populations.

97. Lambert J.A., in dissent, held that the legislation violated s. 15(1) . He noted that many deaf patients, including the appellants, have difficulty communicating by writing. As a result, cases will arise where doctors will be unable to discharge their professional obligations without the aid of an interpreter. It was his view that effective communication is an integral part of medical care and sign language interpretation should not be considered a merely ancillary service. He indicated that the proper question is whether the law confers a benefit to which the disadvantaged group does not have the same access as others. He thus concluded that the *Medical and Health Care Services Act* discriminated against the appellants where they seek to obtain medical services that require, for the discharge of the practitioner's professional obligations, effective communication between the practitioner and the patient, and where effective communication can only be achieved through the provision of translation services.

98. When the matter went before the Supreme Court of Canada, it concluded, after an extensive analysis, that effective communication is essential to the provision of medical services describing it as a fact so notorious that the Court can take judicial notice of it (see para. 69). The Court went on the say that without interpreters, Doctors can't communicate with their deaf patients as their professional responsibilities require and it can't be said that these patients receive the same level of medical care as a hearing person. Deaf patients must pay for an interpreter in a system where inability to pay is intended to be irrelevant. The Court held at para. 71:

> Where it is necessary for effective communication, sign language interpretation should not therefore be viewed as an "ancillary" service. On the contrary, it is the means by which deaf persons may receive the same quality of medical care as the hearing population.

99. The Court concluded that once it is accepted that effective communication is an indispensable component of the delivery of medical services, it is much more difficult to assert that failure to ensure that deaf persons can communicate effectively with health care providers is not discriminatory.

100. The right to equal access to the human rights complaint process is not unlike the right to equal access to universal medicare. Both are benefits provided by the Government which are intended to be independent of one's ability to pay. There are striking similarities between a deaf persons' need for a sign language interpreter to permit them to communicate in a hospital environment and a disabled persons' need for legal assistance to permit them to communicate effectively in the human rights complaint process.

101. Here the benefits of the Human Rights Act are not accessible to Ms. Portman and others with similar disabilities. Ms. Portman's multiple sclerosis adversely affects her ability to prepare and present her human rights complaint and like most persons with disabilities she does not have the financial resources to retain counsel. Without assistance from Legal Aid, she does not have meaningful access to the human rights complaint process.

102. The Supreme Court in *Eldridge* further observed at paras 73 and 74 that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner. The Court noted that its reasoning on this principle has been applied in the interpretation of provincial human rights legislation:

> The same principle has been applied by this Court in its interpretation of the equality provisions of provincial human rights legislation. In *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, the Court found that an employer's accident and sickness insurance plan, which disentitled pregnant women from receiving benefits for any reason during a certain period, discriminated on the basis of pregnancy and hence sex. In so holding, it resoundingly rejected the reasoning of *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183, at p. 190, which had held that the inequality resulting from a similar benefit program was "not created by legislation but by nature".

103. The Court indicated at para 77, that if there are policy reasons in favour of limiting the government's responsibility to ameliorate disadvantage in the provision of benefits, those policies are more appropriately considered when determining of a violation is saved (justified) by s. 1.

104. Ms. Portman's evidence that her multiple sclerosis causes debilitating fatigue, impairs her cognitive functioning and prevents her from preparing and presenting her complain was not challenged. Without assistance, Ms. Portman has no meaningful access to the human rights complaint process. Ms. Portman, and other persons with similar disabilities, have an entitlement to meaningful access to the human rights complaint process and it falls on the government, through Legal Aid or otherwise, to provide that access. Certainly, funded legal services is one option.

105. I conclude that Ms. Portman has established prima facie discrimination. Intention to discriminate is not required to prove discrimination. Based on the principles set out in *Moore* , Ms. Portman clearly has a disability and it is because of her disability that Legal Aid's blanket policy to refuse funding for matters arising out of human rights complaints, had an adverse impact on her access to the human rights complaint process.

**Was the discrimination justified? Was there accommodation to the point of undue hardship?**

106. Once prima facie discrimination is established the onus shifts to the Respondent to prove, on the balance probabilities that the discrimination was reasonably justified. (See British

Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3 ("Meiorin") and British Columbia (Superintendent of Motor Vehicles) v. Britsh Columbia Council of Human Rights [1999] 3 S.C.R. 868 ("Grismer")). The test is set out in Grismer at para 20:

> 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 that 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.

107. The Legal Aid policy not to fund matters arising out of human rights complaints was adopted due to "lack of expertise and funding limitations". These are rationally connected to the function being performed and there was no evidence that the standard was adopted other than in good faith and in the belief that it was necessary for the fulfillment of its purpose.

108. Was the standard 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?

109. As in *Moore,* the facts here disclose no attempt on the part of the Legal Services Board to consider alternatives to Resolution 2011-B-4 when it refused Ms.Portman's request for legal aid. Ms. Portman's evidence describing how her multiple sclerosis impairs her ability to represent herself in the human rights complaint process was not considered by the Legal Services Board. The decision was based exclusively on Resolution 2011-B-4. Her claim was rejected in accordance with the blanket policy not to fund matters arising out of human rights complaints.

110. As noted, the Legal Services Act does not prohibit funding for matters arising out of human rights complaints, it was not the legislation but rather the action of the delegated administrators that resulted in discrimination.

111. If there are policy reasons to refuse funding in cases such as this, those reasons are not evident in the legislation nor were they raised during the hearing. There was no explanation to justify the policy beyond what is stated in the Resolution itself "given the lack of expertise and funding limitations". There was no attempt to justify the policy on the basis that to do otherwise would be an undue hardship.

112. There are many examples in the jurisprudence where vague expressions of financial hardship or funding limitations have not been sufficient to establish undue hardship.

Impressionistic evidence of costs is generally not sufficient to establish undue hardship. In *British Columbia* (*Superintendent of Motor Vehicles*) v *British Columbia* (*Council of Human Rights*), 1999 CanLII 646 (SCC), [1999] 3 S.C.R. 868, the Court stated the following at 41:

> 41 The Superintendent alluded to the cost associated with assessing people with H.H., although he offered no precise figures. While in some circumstances excessive cost may justify a refusal to accommodate those with disabilities, one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment. This Court rejected cost-based arguments in *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, at paras. 87-94, a case where the cost of accommodation was shown to be modest. I do not assert that cost is always irrelevant to accommodation. I do assert, however, that impressionistic evidence of increased expense will not generally suffice. Government agencies perform many expensive services for the public that they serve.

113. It is through Legal Aid that disabled persons, like Ms. Portman, obtain meaningful access to the human rights complaint process. The human rights complaint process is intended to be "user friendly" so that persons without legal training can represent themselves, however, persons who have disabilities that impair their ability to do so must be accommodated. In the NWT, funded legal counsel may be the only effective way to do so, however, the Legal Services Board did not conduct an assessment of the alternatives that might be available.

114. Furthermore, although the human rights complaint process may be more accessible than the courts, the issues are often of equal complexity. This appears to have been within the knowledge of the Legal Services Board since its policy recognizes that "lack of expertise" is a factor which influenced its decision to deny funding. The need for special expertise to effectively participate in the human rights complaint process illustrates the difficulties that an unrepresented claimant would encounter when opposed by experienced counsel. This tends to support the need for legal aid funding rather than provide grounds to refuse it. Whether there is a lack of legal expertise concerning human rights in the NWT is also open to question. It appears to be at odds with the Respondent's argument that if a human rights matter were to go before the courts, legal aid, and I presume the necessary expertise, could be available. If there is a lack of human rights expertise in the NWT legal community, the likelihood of developing expertise in this area would be improved if human rights matters were funded at the tribunal level.

115. The relative "friendliness" of human rights complaint process is no answer for persons who have a disability that prevents them from representing themselves. The Government has a duty to accommodate persons whose disability negatively affects their access to a service which is customarily available to the public. The discrimination which flows from Resolution 2011 B-4 is not justified. Unlike most civil matters, human rights complaints are not simply private disputes between litigants, they involve matters of inherent dignity and equality which are of concern to society as a whole.

116. The reasons for refusing to fund matters arising out of human rights complaints do not justify the discrimination experienced by Ms. Portman. There was no evidence to support the claim that funding Ms. Portman's human rights complaints would constitute undue hardship. There was no evidence that the Legal Services Board considered the actual costs

of funding her request or addressed the larger consequences of providing legal assistance to persons whose disability impairs their access to the human rights complaint process.

117. I find that the Respondent has not justified the discriminatory actions suffered by Ms. Portman and has failed to demonstrate that it would have been an undue hardship to accommodate her.

**Remedy**

118. In accordance with s.62(3) of the *Human Rights Act*, where the adjudicator finds that the complaint has merit, the adjudicator:

> (a) may order a party against whom the finding was made to do one or more of the following:
>
> (i) to cease the contravention complained of,
>
> (ii) to refrain in the future from committing the same or any similar contravention,
>
> (iii) to make available to any party dealt with contrary to this Act the rights, opportunities or privileges that the person was denied contrary to this Act,
>
> (iv) to compensate any party dealt with contrary to this Act for all or any part of any wages or income lost or expenses incurred by reason of the contravention of this Act,
>
> (v) to pay to any party dealt with contrary to this Act an amount that the adjudicator considers appropriate to compensate that party for injury to dignity, feelings and self respect,
>
> (vi) to reinstate in employment any party dealt with contrary to this Act,
>
> (vii) where the adjudicator finds that the party acted wilfully or maliciously, or has repeatedly contravened this Act, to pay to any party dealt with contrary to this Act an amount not exceeding $10,000 as exemplary or punitive damages,
>
> (viii) to take any other action that the adjudicator considers proper to place any party dealt with contrary to this Act in the position the person would have been in but for the contravention of this Act; and
>
> (b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this Act.

119. In *Moore,* the Tribunal reimbursed the Moore family for the tuition paid for Jeffrey to attend private schools up to and including Grade 12, half of the costs incurred for his transportation to and from those schools, and $10,000 for the injury to Jeffrey's dignity, feelings and self-respect. Except for the amount awarded to compensate Jeffrey for injury to his dignity, feelings and self-respect, the amount ordered to be paid were to reimburse the Moore family for expenses incurred to ensure that their son had access to the special services he required and could be calculated with some precision. The Supreme Court held that "these orders properly seek to compensate (the Moores) for the harm that Jeffrey suffered and were well within the Tribunal's broad remedial authority."

120. The Court in *Moore* also held that a number of the systemic remedies ordered by the Tribunal were too remote from the scope of the complaint, at para. 64:

> 64. But the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centred on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine whether *Jeffrey* was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission.

The Court also struck the remedial orders which addressed the District's funding mechanisms, at para 65:

> 65. There is no particular reason to think that these funding mechanisms could not be retained in some form while still ensuring that Severe Learning Disabilities students receive adequate support. . . . the Tribunal's orders that the District establish mechanisms to ensure that accommodations for Severe Learning Disabilities students meet the stated goals in legislation and policies, and provide a range of services to meet their needs, in any event, essentially direct the District to comply with the *Human Rights Code*. They are, to that extent, redundant.

121. Mindful of the direction and comments of the SCC in *Moore*, I will not provide specific direction as to how legal aid funding should be allocated except to indicate that a blanket policy to deny funding for all matters arising out of Human Rights Complaints can, in some cases, have a discriminatory result for persons with certain disabilities. Persons who lack the ability to prepare and present their complaints are entitled to accommodation to the point of undue hardship. Persons like Ms. Portman, must have meaningful access to the Human Rights complaint process. The Legal Services Board's blanket policy does not allow for these important individual distinctions. It is up to the Government of the Northwest Territories to develop appropriate policies which are in accordance with this decision and the *Human Rights Act*.

122. I direct that the Respondent, the Government of the Northwest Territories to:

(a) cease the contraventions complained of: reconsider Ms. Portman's application for legal aid in light of both her disability and the adverse negative impact which a refusal of legal aid would have on her access to the human rights complaint process taking into consideration the Legal Services Board's duty to accommodate her to the point of undue hardship;

(b) discontinue the blanket practice of refusing to fund matters arising out of human rights complaints for applicants such as Ms. Portman without fully considering the impact their disability may have on their access to the human rights complaint process, and consider possible options of accommodation for such persons to the point of undue hardship ;

(a) make available to Ms. Portman, the rights and privileges that were denied contrary to this Act: namely a proper consideration of her application for legal aid to pursue her human rights complaints in light of her disability and the adverse negative

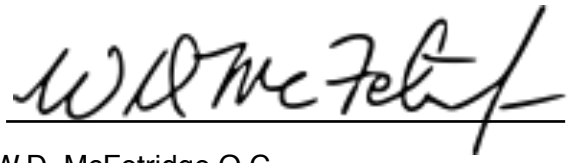
impact which a refusal of legal aid would have on her access to the human rights complaint process and the Government's duty to accommodate her to the point of undue hardship;

(b) compensate Ms. Portman for any wages or income lost or expenses incurred by reason of the contravention of this Act;

(c) compensate Ms. Portman in the amount of $10,000.00 for the distress and injury injury to her dignity, feelings and self respect . This has been a very distressing experience for Ms. Portman and has, on occasion, exacerbated the symptoms of her Multiple Sclerosis.

123.I retain jurisdiction to deal with any issues arising out of the implementation of this award.

Dated at Calgary, Alberta this 25th day of July, 2016.



W.D. McFetridge Q.C.