In the Court of Appeal for the Northwest Territories

Citation: ***GNWT v Portman*, 2018 NWTCA 4**

Date: 2018 05 29
Docket: A-1-AP-2017-0000011;
A-1-AP-2017-0000012
Registry: Yellowknife

Between:

The Government of the Northwest Territories and the Northwest Territories Legal Aid Commission

Respondents
(Appellants)

- and -

Elizabeth Portman and the Northwest Territories Human Rights Commission

Appellants
(Respondents)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Thomas W. Wakeling

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Madam Justice K.M. Shaner
Dated the 29th day of August, 2017
Filed the 29th day of August, 2017
(2017 NWTSC 61; Docket: S-1-CV2016000189)

Memorandum of Judgment

The Court:

[1] The underlying issue in this appeal is whether the Legal Aid Commission's policy of not funding legal counsel for human rights complaints discriminates against disabled complainants. An Adjudication Panel appointed by the Human Rights Commission concluded that the policy was discriminatory, but that decision was set aside on appeal: ***Government of the Northwest Territories v Portman***, 2017 NWTSC 61. Ms. Portman and the Human Rights Commission appeal that decision.

Facts

[2] Ms. Portman suffers from episodic multiple sclerosis which flared up unexpectedly after having been in remission for 10 years. Due to her condition she experiences periods of debilitating fatigue and diminished cognitive functioning. The recurrence of her symptoms compromised her ability to maintain her employment. Ms. Portman applied for long term disability benefits, but for reasons that are not detailed on this record the disability insurance policy provided through her employer by Sun Life did not entitle her to coverage.

[3] Ms. Portman filed two complaints with the Human Rights Commission:

(a) A complaint against Sun Life for providing a long-term disability plan that discriminates against persons with episodic pre-existing disabilities, and against her employer, the Government of the Northwest Territories for "choosing a discriminatory plan"; and

(b) A complaint against the Government of the Northwest Territories for failure to accommodate, harassment, and systemic discrimination against all persons with disabilities employed by it.

Because of her disability, Ms. Portman did not feel that she was able to advance these claims without assistance.

[4] On December 5, 2011, Ms. Portman applied to the Legal Services Board for legal aid coverage. The Board had previously adopted a policy that it would not fund human rights complaints:

> 2011-B-4 Resolved that given the lack of expertise and funding limitations the LSB will not fund matters arising out of WSCC [Workers' Safety and Compensation Commission] claims or complaints to the NWT Human Rights Commission.

On January 25, 2012, Ms. Portman's application for legal aid was denied in accordance with this policy. Requests for internal reviews of the decision were unsuccessful.

[5] Ms. Portman filed another complaint with the Human Rights Commission, this time against the Legal Services Board:

> With this complaint I allege that the Legal Aid Services of the GNWT Department of Justice has discriminated against me on the grounds of disability in the provision of a service. Legal Aid's practice of denying legal aid for human rights complaints systemically discriminates against persons with disabilities, and the denial of my appeal is a denial to accommodate my disability.

It is this third complaint to the Human Rights Commission that is directly in issue in this appeal.

[6] In accordance with the usual practice, this complaint was reviewed by the Director of the Human Rights Commission. In a decision dated May 6, 2014, the Director noted that there was no guaranteed right to state funded legal counsel, and therefore concluded that the service provided by Legal Aid was the "opportunity to be considered for legal aid funding (as opposed to the service of providing legal aid funding to all applicants)". Ms. Portman had not been denied that "opportunity". Further, the policy precluded funding any human rights complaints, and accordingly there was no adverse discrimination. No human rights complainant was provided with legal aid, regardless of the prohibited ground of discrimination alleged, and accordingly there was no discrimination based on disability. The Director concluded that this was, in effect, a claim for an entrenched right to legal aid funding, which was inconsistent with the binding case law. The Director therefore dismissed the complaint as being unsustainable.

[7] In its submissions to the Director, the Legal Aid Commission had suggested that the Human Rights Commission should be providing legal assistance for Ms. Portman. Ms. Portman explored this possibility. On June 13, 2014, the Human Rights Commission responded that it was not "currently funded to appoint counsel", and that "We are not staffed for that sort of function and we would have to develop criteria for determining how to fund applicants". It noted that the legal aid budget, in absolute terms, was considerably larger than the budget of the Human Rights Commission.

[8] Ms. Portman then filed an appeal from the Director's decision, which was allowed by a single person Human Rights Adjudication Panel (*infra*, para. 14). The Legal Aid Commission appealed that decision to the Supreme Court of the Northwest Territories, which set aside the decision of the Adjudication Panel, and restored the decision of the Director (*infra*, para. 22). These two further appeals were then filed by Ms. Portman and the Human Rights Commission.

The Statutory Framework

[9] The *Human Rights Act*, SNWT 2002, c. 18, prevents discrimination on listed "prohibited grounds" which include "disability": s. 5(1). The *Human Rights Act* covers discrimination in "employment", "tenancies" and "services . . . that are customarily available to the public". Services customarily available to the public may not be denied based on a prohibited ground, including disability, "without a *bona fide* and reasonable justification": s. 11(1). In order to be considered *bona fide* and reasonable, a justification must be such that accommodation of the class of individuals affected "would impose undue hardship on a person who would have to accommodate those needs": s. 11(2).

[10] Complaints of discrimination are dealt with by the Human Rights Commission. Unlike in some jurisdictions, the Commission does not take over the carriage of complaints that are filed, and the complainants are expected to present their own cases. The Commission, however, does have the mandate to assist complainants when appropriate:

> 22(1) The Commission may
>
> (a) appoint the assistants it considers necessary to advocate for or to assist a party in pursuing the remedies available to the party under this Act; and
>
> (b) fix the remuneration, duties and the other terms of appointment of those assistants.

The Commission states that budgetary limitations prevent it from providing assistance to all complainants, although it has on occasion done so. The "assistants" need not necessarily be lawyers. As noted, Ms. Portman was not provided with assistance in pursuing her claims against Sun Life and her employer.

[11] At the time that Ms. Portman made her application, legal aid was covered by the *Legal Services Act*, RSNWT 1988, c. L-4. On December 28, 2014 that statute was replaced by the *Legal Aid Act*, SNWT 2012, c. 17. The Legal Services Board was continued under the new statute as the Legal Aid Commission. The parties noted some subtle distinctions between the old statute and the new statute. Even though Ms. Portman's application was made under the previous version of the statute, there would appear to be little practical utility in deciding this appeal based on fine distinctions in the wording of the legislation. That might simply mean that if Ms. Portman made a fresh application today, a different result might arise. These reasons, accordingly, focus on the underlying principles rather than the specific wording of the statute.

[12] Like all Canadian jurisdictions, the Northwest Territories does not have "universal legal representation", unlike "universal health care" and "universal primary education" which it does have. There is also no ". . . constitutional entitlement to legal services in relation to proceedings in

courts and tribunals dealing with rights and obligations": ***British Columbia (Attorney General) v Christie***, 2007 SCC 21 at para. 29, [2007] 1 SCR 873. The Northwest Territories has a limited legal aid system funded jointly by Canada and the Northwest Territories, which focuses its resources on criminal matters where the liberty of the subject is at stake. The criminal law focus is justified by s. 10(b) of the *Charter of Rights*, which extends to detained persons the right to retain counsel. There is some limited funding provided when the interests of children are at risk.

[13] The Legal Aid Commission is a corporation independent from the Government of the Northwest Territories: s. 4. The *Legal Aid Act* deals in part with the scope of legal aid services that are available, but leaves the precise management of the system and entitlement to legal aid services to the Legal Aid Commission: s. 4(9)(a). Section 8(1) provides that legal aid services "may be provided" for a list of matters including criminal matters and "child protection, family and civil matters". Section 8(2) states that legal aid services "may not be provided" for certain civil matters, including "any other prescribed matter". The *Legal Aid Regulations*, R-132-2014, state that legal aid services "may not be provided" for workers' compensation or residential tenancy matters, and other listed matters. Assistance with human rights claims is not expressly dealt with either in the *Act* or the *Regulations*.

The Adjudication Panel's Decision

[14] The Adjudication Panel found four reasons why the Director's decision to dismiss Ms. Portman's complaint at the threshold level was unreasonable (at para. 34):

(a) The Director exceeded her threshold, gatekeeper role and "improperly decided the case on its merits";

(b) The Director incorrectly framed the issue as whether Ms. Portman had been denied the opportunity to be considered for Legal Aid funding, when the true issue was the adverse discriminatory effect of the Legal Aid funding policy;

(c) The Director failed to address the issues of adverse effect or systemic discrimination;

(d) The Director "ignored relevant evidence", and did not address the justification for the discrimination.

In the end, all of these reasons come down to one thing: the Adjudication Panel disagreed with the Director's analysis of the *Human Rights Act*. The essence of these appeals lies in the second and third questions. Did the denial of Ms. Portman's application for funding, based on the application of the Legal Aid funding policy, amount to discrimination under the *Act*?

[15] The Adjudication Panel cited ***Aurora College v Niziol***, 2007 NWTSC 34 at para. 34, 62 Admin LR (4th) 309 for the proposition that the Director has a screening role, not an adjudicative role. The Adjudication Panel concluded at para. 38 that the Director went beyond screening, and performed a "fact finding" role. However, the facts were not in dispute, and there

was no "fact finding" to be done. The Director assumed that Ms. Portman could prove the facts underlying her complaint, but screened out the complaint on the basis that it would nevertheless not disclose discrimination at law. This is a legitimate use of the screening or gatekeeping function. Again, the essential issue was the legal implications of the accepted facts.

[16] For similar reasons, the fourth reason for finding the Director's decision unreasonable ("ignoring the evidence") is another way of disagreeing on the legal implications of the accepted facts. Since the facts were not in dispute, the "evidence" was not in play, and there was no question of "ignoring evidence". As stated, the Director accepted or assumed that Ms. Portman could prove her complaint, and merely disagreed on whether the facts as alleged made out discrimination. The Director only had to discuss "justification" if she found discrimination, and since she did not it was not unexpected that "justification" was not discussed. In any event, if she found *prima facie* discrimination she would have referred the complaint to adjudication, which would possibly have made any discussion of justification premature.

[17] The first question, respecting the "gatekeeper role", is now moot. It was agreed that if the Director had erred in dismissing the complaint at the threshold level, and should in fact have referred the complaint to an adjudication panel, then this Adjudication Panel would continue in that role and decide the case on its merits.[1] These appeals come down to the second and third issues, the proper interpretation and application of the *Act.*

[18] The Adjudication Panel disagreed with the Director's description of the "service available to the public". The Director had described it as the "opportunity to apply for legal aid" (emphasis added). The Adjudication Panel concluded at para. 45 that the service in question was "access to the Human Rights complaint process". The person responsible for the discrimination was the Government of the Northwest Territories. The failure of the Legal Aid Commission to provide funding for the human rights process had a disproportionately negative impact on Ms. Portman's access to that process (at paras. 51, 71).

[19] The Adjudication Panel cited ***Moore v British Columbia (Education)***, 2012 SCC 61, [2012] 3 SCR 360 which was concerned with educational funding for disabled students. ***Moore*** held that the "service offered to the public" was "education" in the general sense, and that specialized education was only the "means" of offering that service. The Adjudication Panel thus concluded at para. 89 that "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".

[20] The essence of the Adjudication Panel's decision can be found at para. 73:

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[1] Unfortunately, the Human Rights Commission was not advised that the parties had agreed that the Adjudication Panel would, if necessary, continue on and consider the complaint on its merits. The Commission was thus denied the opportunity to participate in the adjudication as it was entitled to under s. 53(1)(c) of the *Act*.

> 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.

The Adjudication Panel confirmed at paras. 69, 121 that the allocation of legal aid funding was up to the Legal Aid Commission, but it could not maintain a blanket policy denying funding to all human rights claims. Any policy had to allow for "important individual distinctions", and applicants for legal aid were entitled to consideration of whether their specific circumstances justified an exemption to the blanket policy.

[21] Finally, the Adjudication Panel concluded that the discrimination had not been justified, because it had not been shown that accommodation would amount to undue hardship. The stated reasons for not funding human rights complaints was "lack of expertise and funding limitations". While these factors were rationally connected to the function being performed, there was no attempt to justify this policy. Vague expressions of financial hardship were not sufficient to meet the test.

The Appeal Decision

[22] The Supreme Court judge set aside the decision of the Adjudication Panel.

[23] The Supreme Court judge found that it was reasonable for the Adjudication Panel to proceed with a review of the merits of the claim, after allowing the appeal from the Director's decision, since the parties had consented to this procedure (at para. 59). The failure to name the Legal Services Board as a respondent was a curable irregularity (at para. 64). The conclusion that the Director went beyond her screening role was reasonable (at para. 67). It was reasonable for the Adjudication Panel to find that the Director had defined the service too narrowly, as the "opportunity to apply" for legal aid (at para. 68).

[24] The Supreme Court judge, however, found that the Adjudication Panel had erred in four respects:

(a) In finding that the policy of not providing legal services for human rights complaints was discriminatory. The Supreme Court judge concluded at para. 77 that no direct or systemic discrimination could be made out on this record, because the service that

Ms. Portman claimed she was denied "did not exist". The Legal Services Board simply did not provide the claimed service to anyone;

(b) In failing to recognize that the Human Rights Commission, the Adjudication Panel, and the Government of the Northwest Territories were legally distinct entities. While the human rights complaints procedure might be described as a "service available to the public", it was unreasonable to find that it was a service provided by the Legal Services Board or the Government of the Northwest Territories (at para. 87). These are both separate legal entities, and not delegates of each other.

(c) In failing to recognize that the Legal Aid Commission and the Government of the Northwest Territories were legally distinct entities, and that it was the former who was responsible for the legal aid system (at para. 92). The independent Legal Aid Commission is the body charged with administering the legal aid system, and it was an error of law for the Adjudication Panel to grant relief against the Government of the Northwest Territories; and

(d) In failing to recognize that the Human Rights Commission had the ability to provide Ms. Portman with assistance in pursuing her complaint. The Adjudication Panel erred in overlooking the fact that the Human Rights Commission itself had the authority to provide assistance to Ms. Portman (at para. 97).

While that was sufficient to dispose of the appeal, the Supreme Court judge provided some alternative comments on the remedies that had been awarded (at para. 101).

"Services Customarily Available to the Public"

[25] The outcome of this appeal ultimately turns on the delineation of the relevant "service customarily available to the public". If the "service" is defined as "publicly funded legal aid for human rights complaints", then there was no "service customarily available to the public", because the Legal Aid Commission provides no funding for that. On the other hand, if the "service" is defined as "publicly funded legal aid", then arguably Ms. Portman has been denied such a service, because her application was denied. The breadth with which one defines the "service" therefore has a significant effect on the outcome. What constitutes a "service customarily available to the public" is a question of law reviewed for correctness: ***University of British Columbia v Berg***, [1993] 2 SCR 353 at p. 369; ***Gould v Yukon Order of Pioneers***, [1996] 1 SCR 571 at pp. 600-601.

[26] The parties are in substantial agreement on all of the important principles governing human rights law. They all agree that Ms. Portman had to demonstrate a *prima facie* case of discrimination by showing (i) a characteristic protected from discrimination under the *Human Rights Act*; (ii) that she experienced an adverse impact with respect to the service; and (iii) that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case had been

established, the burden shifted to the respondents to justify the conduct or practice: ***Moore v British Columbia (Education)*** at para. 33.

[27] The parties all agree that discrimination need not be direct or intentional. Discrimination may be systemic. An otherwise neutral rule or standard which applies equally to all, but which has a discriminatory effect on a protected group, will engage the *Human Rights Act*: ***Ontario (Human Rights Commission) v Simpsons-Sears Ltd.***, [1985] 2 SCR 536 at p. 551. Underinclusion with respect to a service available to the public may indirectly have a discriminatory effect on protected groups.

[28] As a threshold issue, the proper characterization of the "service" at issue here is "legal aid services". The Director defined it as the "opportunity" to apply for legal aid, by which she appeared to recognize that universal legal aid services are not available in the Northwest Territories. The Adjudication Panel stated in places that the service was "the human rights complaints process", but in other parts of its reasons seemed to recognize that it was "legal aid" that was the service. It was unreasonable, however, to find that the Legal Aid Commission was engaged in providing a service called "the human rights complaints process". To the extent that such a "service" was offered, it was offered by the Human Rights Commission.

[29] The Adjudication Panel reasoned that the Legal Aid Commission was engaged in the human rights complaints process, because Ms. Portman required legal aid to make effective use of that process. This analysis was based on cases where more than one organization had to act or accommodate to effectively counteract discrimination in employment: ***University of British Columbia v Kelly***, 2016 BCCA 271, 87 BCLR (5th) 313; ***Dunkley v University of British Columbia***, 2015 BCHRT 100; and ***Central Okanagan School District No. 23 v Renaud***, [1992] 2 SCR 970. Those situations are, however, distinguishable. To illustrate, a medical residency depends on the joint activities of both the training university (providing the "service available to the public"), and the hospital employing the resident. Discrimination by either, or a failure to accommodate by either, would effectively prevent the medical resident from completing his or her residency. That, however, is not the case with the human rights complaints process. The human rights complaints process can operate independently of anything done or not done by the Legal Aid Commission. Legal aid is not a necessary component of the human rights complaints process, whereas accommodation by both the hospital and the university were necessary components of a medical residency.

[30] The Human Rights Commission argues that the Legal Aid Commission cannot effectively insulate itself from human rights laws by enacting a policy defining the services it provides. That is conceptually true, but that is not the issue here. It is the Legislature that has delineated the scope of human rights protection, by limiting it to "employment", "tenancies" and "services . . . that are customarily available to the public". Unless the claimant can identify a service customarily available to the public, the *Human Rights Act* is not engaged.

[31] The concept of a facially neutral policy with a discriminatory effect does not apply in reverse. That concept applies when a service is customarily available to the public, but its parameters have an adverse effect on a protected group. Where, however, the service is simply not offered to the public at all, there is "no policy", and so nothing that can be "facially neutral". The service simply does not exist. The *Human Rights Act* is aimed at discrimination or denial of access. The Human Rights Commission cannot unilaterally determine which government agencies' services should and should not "customarily [be offered] to the public".

[32] In the Northwest Territories "universal legal services" are not offered to the public. The scope of legal services available to the public is partly delineated in the *Legal Aid Act* and the *Legal Aid Regulations*. The exact extent of the legal services that will be made available to the public is, however, left up to the Legal Aid Commission. That Commission is given a limited budget, and the power to make policies with respect to how that budget will be spent. As noted, the Legal Aid Commission focuses its resources on criminal matters, where the liberty of the subject is at risk, and it could specify that publicly funded legal aid would exclusively be available for criminal matters. The Commission has made the decision not to fund certain activities at all, including human rights complaints. In the end, the Legal Aid Commission has been given the mandate to decide the scope of "services customarily available to the public". Other services it might potentially offer, but does not offer, are therefore not captured by the *Human Rights Act*.

[33] The appellant argues that the policy of not funding legal services to advance human rights claims "denies a service (i.e. access to the human rights complaints process) to certain individuals (i.e. human rights complainants)". This argument is ultimately circular. The *Human Rights Act* only applies to "services customarily available to the public". If it is argued that any service not customarily available must nevertheless be made available, then the threshold requirements of the *Act* become meaningless. Any service that would be advantageous to, for example, persons with disabilities would have to be offered, even if it was not generally offered.

[34] Determining the scope of the "services customarily available to the public" can easily determine the outcome of a human rights complaint. For example, in ***Moore v British Columbia (Education)*** the issue was whether the service was "primary education" or "special education for disabled students". If "special education" was not a "service customarily available to the public", then the *Human Rights Code* was not engaged. The Supreme Court of Canada held that the service was education generally, and the special resources made available to disabled students was merely the "means" of delivering the primary service. The line can be a fine one. ***Moore*** was decided against the background fact that "universal primary education" was a service offered to the public. In the present appeal, "universal legal aid services" is not a service offered to the public.

[35] As another example, Via Rail provides passenger train service to select cities in Canada. This is a "service customarily available to the public", and so Via Rail had an obligation to

ensure that its railway carriages were reasonably accessible for disabled passengers: ***Council of Canadians with Disabilities v Via Rail Canada Inc.***, 2007 SCC 15, [2007] 1 SCR 650. That does not, however, mean that Via Rail has to provide passenger train service to other cities in Canada not presently served by it, or even that it has to stop in other municipalities along its routes that do not normally receive service. Those were not "services customarily available to the public", and human rights standards are not engaged even though the failure to serve other municipalities might have a disproportionately negative effect on disabled persons. The threshold of a "service customarily available to the public" must be crossed over before the human rights analysis is engaged.

[36] The Legal Aid Commission has made a policy decision to focus on criminal matters. It does not provide funding for most civil matters, and specifically does not provide any funding for proceedings before tribunals such as residential tenancy boards, the Workers' Safety and Compensation Commission, or the small claims division of the Territorial Court. In a perfect world, perhaps the Northwest Territories would have universal legal coverage like it has universal health care coverage. Since there is no such universal coverage, decisions have to be made about the "services that will be customarily available to the public". It is not objectionable for the Legal Aid Commission to draw those lines, knowing that its decisions may have different impacts on different citizens.

[37] It can safely be assumed that there is no government department, agency, board or commission in the Northwest Territories that has more money than it needs. Deciding on the scope of services that will be "customarily available to the public" must always involve budgetary considerations. This is a "zero sum game"; funding that is directed to one purpose is not available for any other purpose. Obviously, if a government agency decides to provide a particular service, it must provide that service on a non-discriminatory basis.

[38] However, deciding "not to provide a service at all, to anyone" raises different considerations. The complete unavailability (or "denial") of a particular public service might often have a more direct impact on some citizens than on others. Subordinating the whole budgetary process to the human rights paradigm would, however, have the effect of seriously distorting responsibility for government budgeting and financing: ***Christie*** at para. 14. Financing decisions would be taken away from the boards and agencies directly charged with that responsibility, and diverted to human rights Adjudication Panels. The purpose of the *Human Rights Act* is to avoid discrimination in the provision of "services customarily available to the public". The purpose is not to allow human rights Adjudication Panels to decide what services, that are not presently offered to the public, should be offered to the public.

[39] In summary, Ms. Portman applied for legal aid representation to advance her human rights cases. This, however, was not a "service customarily made available to the public" by the Legal Aid Commission. Accordingly, the policy in question was not caught by the *Human Rights Act*.

Responsibility for Accommodation

[40] Determining that the legal aid services requested by Ms. Portman were not "customarily available to the public" determines the outcome of these appeals. Alternatively, this record raises the issue of where the duty to accommodate would lie.

[41] In this appeal the Legal Aid Commission and the Human Rights Commission each seek to place the responsibility for assisting Ms. Portman on the other. The Adjudication Panel erred in assuming that the Legal Aid Commission was the only potential source of assistance for Ms. Portman. As noted (*supra*, para. 10) the Human Rights Commission could itself have provided that assistance.

[42] Ms. Portman asked both Commissions for assistance, and they gave essentially the same response. The policy of the Legal Services Board at the time was:

> Resolved that given the lack of expertise and funding limitations the LSB will not fund matters arising out of WSCC [Workers' Safety and Compensation Commission] claims or complaints to the NWT Human Rights Commission.

When Ms. Portman requested legal assistance the Human Rights Commission explained that it was not:

> ". . . currently funded to appoint counsel", and that "We are not staffed for that sort of function and we would have to develop criteria for determining how to fund applicants".

What "services" the Human Rights Commission offers is not an issue in this appeal, but the Human Rights Commission appears to argue that "legal assistance in human rights complaints is not a service we customarily make available to the public". That is exactly the argument made by the Legal Aid Commission. If it is adverse effect discrimination for the Legal Aid Commission to deny funding to disabled complainants in human rights matters, why is it not also adverse effect discrimination for the Human Rights Commission to deny funding in the same circumstances?

[43] As noted, the Human Rights Commission argues that the "service" is "access to the human rights process". Legal aid is the "means" of using that service. Thus, following ***Moore***, the legal aid system has to accommodate disabled human rights complainants. As noted this is not a correct characterization of the service, but this reasoning would, in effect, result in a "transference" of the duty to accommodate. The Human Rights Commission operates the human rights complaints procedure, and if there is any duty to accommodate it would *prima facie* fall on the Human Rights Commission. The Human Rights Commission, however, argues that this duty to accommodate must be met by the Legal Aid Commission. The former argues that the latter is the one most directly involved in providing legal assistance, and therefore the Human Rights Commission can transfer any duty to accommodate to the Legal Aid Commission.

[44] There may well be situations where two entities have a joint obligation to accommodate a human rights complainant. However, on a plain reading of the statute, it is the person who "customarily provides the service" that must provide the accommodation to the point of undue hardship. So *prima facie* it is the employer that must accommodate the employee, the landlord that must accommodate the tenant, and the service provider who must accommodate the individual seeking the customarily available service. Any duty to accommodate here *prima facie* rested on the Human Rights Commission.

Conclusion

[45] In conclusion, the key to the outcome of these appeals is the definition of the "service customarily available to the public". The Legal Aid Commission does not provide legal assistance to pursue human rights complaints. The service Ms. Portman asked for was not one customarily available to the public. In any event, any duty to accommodate rested primarily on the Human Rights Commission.

[46] In the result, no reviewable error has been shown, and the appeals are dismissed.

Appeal heard on April 17, 2018

Memorandum filed at Yellowknife, Northwest Territories
this day of May, 2018

Berger J.A.

Slatter J.A.

Wakeling J.A.

Appearances:

C. D. Buchanan
for the Respondents

Appellant Elizabeth Portman, in Person (no appearance)

A.K. Akgungor and L. McDaniel
for the Appellant the Northwest Territories Human Rights Commission

C. Levy
for the Northwest Territories Human Rights Adjudication Panel (watching brief)

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MEMORANDUM OF JUDGMENT