YOUNG ANDERSON
BARRISTERS & SOLICITORS

LOCAL GOVERNMENT SERVICES: STRIKING THE ACCOMMODATION BALANCE

DECEMBER 2, 2011

Carolyn MacEachern & Jay Lancaster

LOCAL GOVERNMENT SERVICES: STRIKING THE ACCOMMODATION BALANCE

I. INTRODUCTION

Section 8 of the *Human Rights Code* (the "Code") prohibits discrimination on the basis of various enumerated grounds with respect to the provision of services customarily available to the public:

> 8 (1) A person must not, without a *bona fide* and reasonable justification,
>
> (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
>
> (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public
>
> because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation of that person or class of persons.

Before the Human Rights Tribunal or a court will consider whether there is a *bona fide* and reasonable justification for discrimination, complainants must establish that:

- Their claim relates to an accommodation, service or facility; and
- The accommodation, service or facility is customarily available to the public.

"Accommodation", "service" and "facility" are not defined in the Code and generally there is little distinction made between these three terms. The Tribunal has interpreted these terms broadly and therefore, a wide range of activities fall within the scope of section 8. As well, the service does not even need to be beneficial to the person directly affected by it—for example, an investigation conducted by the police and the Crown's decision to approve charges against someone are "services" for the purposes of section 8 of the Code (*British Columbia v. Crockford*, 2006 BCCA 360).

The cases discussed in this paper illustrate the range of activities that local governments undertake that may be subject to claims of discrimination under section 8 of the Code, including bylaw enforcement, recreation, access to municipal buildings and hours of operation.

II. JURISDICTIONAL ISSUES

As noted above, services for the purpose of section 8 of the Code is interpreted broadly. In *Alexander v. Vancouver (City)*, 2005 BCHRT 39, Mr. Alexander filed a complaint with the Tribunal alleging that the City of Vancouver discriminated against him with respect to a service or facility customarily available to the public, in this case the City's public library services, due to his physical disability. The Vancouver Public Library, which is funded by the City, opens certain branches on Sunday. Joe Fortes, which is the branch closest to Mr. Alexander's home, was not one of those branches. The complainant claimed that, as a result of the City's failure to provide funding for Sunday opening at Joe Fortes, he was not able to access library services on Sunday, as there was no accessible bus service from his residence to those branches which do have Sunday hours of operation.

In its application to dismiss the complaint, the City argued that the Sunday opening services were not an accommodation, service or facility customarily available to the public, and thus that section 8 of the Code did not apply. The Tribunal rejected the City's argument, and found that the service, "Sunday library services" were funded by the City through its funding of the Library Board, and as such constituted a service or facility customarily available to the public. The Tribunal declined to dismiss the complaint, stating that it could not determine on the information before it that Mr. Alexander had no reasonable prospect of success in his complaint.

Another important preliminary matter to determine in section 8 cases is who actually offers the service. As can be seen in *Long v. Vancouver (City)*, 2009 BCHRT 431, delegating responsibility for a service to third parties by way of a bylaw does not protect a local government from liability under section 8 of the Code. This case is a preliminary decision about whether it was appropriate to add two corporate respondents to a complaint about discrimination by the City in failing to clean sidewalks during two snowstorms. The complainant in this case originally named the City and two corporate respondent energy companies in his complaint. He alleged the respondents failed to clear sidewalks in front of two gas stations that have Translink bus stops he used. However, the Tribunal refused to accept the complaints against the two corporate respondents as the complainant had not provided information to establish that snow clearing is a service the two corporate respondents normally offered to the public. The complaint proceeded against the City only.

The City took the position that its Street and Traffic Bylaw 2948 (the "Bylaw") allowed the City to require owners of real property to remove snow and ice from the sidewalk adjacent to their properties. Therefore, the City argued that the snow clearing was a service provided by the two gas stations and as such the two corporate respondents should be added as respondents.

The Tribunal noted that the information about the Bylaw was before the Tribunal when it made the decision not to accept the portion of the complaint related to the two corporate respondents. In its application, the City had provided no new information to justify a different

conclusion. The Tribunal was satisfied that it was the City that provides sidewalk snow removal services and that just because it delegates this responsibility to others, who provide different services, does not make others responsible for those services under section 8 of the Code.

The Tribunal also noted that the City had initiated a prosecution against one of the corporate respondents which was further evidence that it was the City's responsibility to provide snow removal services and enforce its bylaws. This decision was upheld by the BC Supreme Court (*City of Vancouver v. Suncor Energy Inc.*, 2011 BCSC 643) in which it was noted that the City did not provide any authority for the proposition that a breach of a bylaw creates a human rights obligation.

Another preliminary issue that may arise is whether the individual who filed the complaint is a proper complainant, particularly where the complainant brings a representative complaint. In *Jones v. Vancouver (City)*, 2010 BCHRT 207, the issue was whether the complainant could bring a complaint on behalf of residents in a particular area of the City. The City had sent out a brochure to residents in a particular area describing a potential re-zoning plan. The brochure was distributed in English and Chinese. The complainant was of the view that the City had discriminated against those residents whose first language was neither English nor Chinese. The complainant was a vocal critic of the re-zoning at issue.

The Tribunal dismissed the complaint as proceeding with the complaint would not benefit the class alleged to have been discriminated against. The Tribunal did reiterate the importance of representative complaints in addressing issues of systemic discrimination. It also stated at para. 16 that:

> …the Code does not require that the members of a group or class authorized the filing of a representative complaint on their behalf, nor does it require the representative to canvas all members of the group or class with respect to their interest in proceeding.

However, the Tribunal concluded that the complainant was not an appropriate representative because his first printed notice to potential members of the class was in English only. As well, the complainant did not include all of the major minority language groups within the class in subsequent communications. The Tribunal did not accept the complainant's argument that he should not be held to a standard higher than the City and he should not be required to communicate in a variety of languages. The Tribunal noted that the issue of a failure to communicate in an individual's first language was the very basis of the complaint. Finally, the Tribunal noted the complainant's "vociferous" opposition to the re-zoning, which raised the concern that the complainant was advancing his own interest rather than that of any class.

III. TYPES OF SERVICES

A. Bylaw Enforcement

Even though bylaw enforcement may not be seen by some members of the public to be "beneficial", it is clearly a service that falls within the scope of section 8 of the Code. This includes the failure to enforce a bylaw.

James v. Salmon Arm (City), 2009 BCHRT 285 is an example of a complaint where the service in issue was the enforcement of bylaws by a local government. This case involved an allegation that the City had discriminated against the complainants by the manner in which the City had enforced one of its bylaws. The complainants were living together in a long-term relationship and one of the complainants was licensed to grow marijuana to treat his physical disability. One of the complainants applied to Health Canada to have his licence renewed within the time frame suggested by Health Canada but there was a delay in issuing permits because of staffing issues. Therefore, the renewal permits were not issued before the complainant's old permits expired. The complainant ultimately received his renewal permits about four months after his old permits had expired.

After consultation with the RCMP, the City had adopted a "Controlled Substance-Safe Premises Bylaw No. 3601" (the "Bylaw") to prevent City properties from being used for illicit marijuana cultivation or controlled drug production. The City had received notification from the RCMP that it had dismantled a "grow" at the complainants' residence and that the owner of this residence had a Health Canada Permit but it had expired. In reliance on this information, a City manager took steps to enforce the Bylaw (the "Manager"). The Manager simply relied on the information provided by the RCMP and never attended the complainants' residence to inspect it, although under the terms of the Bylaw the Manager could have done so. The Manager also never inquired about the Health Canada permits, although he had been informed that the complainant had possessed a valid permit. Nor did anyone from the City contact the complainants before beginning bylaw enforcement.

The Manager sent a registered letter to the complainants, as the owners, imposing various clean up requirements and advising that the municipal water supply would be cut off no sooner than seven days after an upcoming Council meeting. As well, a "Do Not Occupy" notice was posted to the complainants' residence. The complainants were advised they could make a representation to Council regarding the proposed water cut-off. Council supported the recommendation to cut off the water supply.

The day after the water was cut off, the complainants went to City Hall to request their water supply be reconnected. They showed the Manager the renewed Health Canada Permits. The City took the position that the water supply would not be reconnected until such time as the Bylaw requirements were met, which included remediation steps and payment of about $3,000

in fees. These fees were for "peace officer" charges and for the posting and anticipated removal of the Do Not Occupy notice.

The Tribunal concluded the complainant had a physical disability and valid Health Canada permits to grow, possess and use marijuana to treat the symptoms of his disability. In reviewing the facts, the Tribunal noted that the City was not required to enforce the Bylaw simply because it had received notice from the RCMP. The Tribunal also concluded that no staff member of the City considered the complainant's disability when deciding whether to enforce the Bylaw as they were required to do, in accordance with human rights principles.

The Tribunal confirmed that bylaw enforcement is a service customarily available to the public. The main issue in this case was not the Bylaw itself but whether the City had discriminated against the complainant on the basis of a disability because of the manner in which it enforced the Bylaw. As noted by the Tribunal at paras. 150-151:

> …In my view, the evidence is clear that the City failed to recognize that it had discretion in the application of the Bylaw. It further failed to take into account Mr. James' physical disability, and his resulting production and possession of marijuana for treating one of the symptoms of that disability, when it decided to enforce the Bylaw as it did.
>
> To put it in its simplest terms, the City knew, or ought to have known, that it was frustrating the ability of a very ill individual to provide himself with an important medication, when it applied the Bylaw in the fashion that it did.

The Tribunal noted that the Bylaw was neutral on its face and applied equally to all home owners but that the complainant was adversely affected by the enforcement of the Bylaw against him.

With respect to the issue of whether the City had a *bona fide* and reasonable justification for its conduct, the Tribunal took no issue with the good faith purpose of the Bylaw. However, the Tribunal found that the City had failed to consider whether it had a requirement to accommodate the complainant. As noted by the Tribunal at para. 162:

> I conclude that the City discriminated against Mr. James, when it rigidly imposed the Bylaw against him, while failing to take into account, adequately or at all, his disability, the very reason he was growing marihuana in his residence in the first place. The City never considered whether to exercise its discretion in the application of the Bylaw, to accommodate Mr. James' unique circumstances. It took no steps to obtain all the relevant information it could about his disability. It would not have caused it undue hardship to do so.

In *Bowers v. Port Coquitlam (City)*, 2009 BCHRT 410, the complaint was that the City discriminated against the complainant by failing to enforce "no stopping" restrictions in front of his children's elementary school. The complainant used a wheelchair. He alleged that the City restricted his ability to safely access the school and drop off his children by failing to enforce the no stopping restrictions. The complainant was prevented from taking his children to the outdoor classroom entrances due to safety concerns and therefore, could not interact with their teachers.

The City filed an application to dismiss the complaint. Prior to his complaint, the complainant had requested that the City take various measures to address his safety concerns including enforcing parking restrictions. He alleged that the City took no action. The Tribunal dismissed the complaint as it would not further the purposes of the Code. The Tribunal concluded that the City had addressed the complainant's safety concerns. It noted that the City held a public hearing and received submissions regarding traffic safety concerns at the school. It then made a number of improvements.

The complainant also alleged that the City did not properly enforce the traffic and parking violations. The City gave evidence that it responded to complaints and a bylaw enforcement officer had gone to the school area when complaints were received. However, the officer did not always witness infractions but when he or she did, those committing the infractions were warned. The Tribunal recognized that the City could not enforce infractions its staff does not physically witness and that it was not feasible for the City to provide bylaw enforcement officers for all schools where parking issues arise. As well, the Tribunal recognized that the City could not provide a remedy for safety concerns arising on the school property itself, as that property was owned by the School District.

In *Bundala v. City of North Vancouver,* 2005 BCHRT 186, Ms. Bundala alleged that she was discriminated against in the provision of services customarily available to the public because of her race, place of origin, marital status, and sex. The City issued a Notice of Contravention to Ms. Bundala because of plumbing deficiencies in her house. Ms. Bundala alleged that the previous home owner, a white, English male, was not cited for deficiencies, but because Ms. Bundala was a "woman not born in this country", the City targeted her.

The Tribunal ultimately dismissed the complaint because it was filed late, but it is an example of the Tribunal finding bylaw enforcement to constitute a service customarily available to the public as articulated by section 8.

Hughes v. New Westminster (City), 2009 BCHRT 107 also involved allegations that the complainant was targeted in the manner in which bylaws were enforced. It is also a good example of how local governments should meet a human rights complaint head on. In *Hughes*, the issue was whether the City discriminated against Ms. Hughes on the basis of sex with respect to a number of services customarily available to the public, notably bylaw enforcement. The facts of this case are as follows. Ms. Hughes and her husband were the sole shareholders of

a corporation which purchased the Royal Towers Hotel in 2005. Prior to the purchase, the City had established a Housing Integrated Services Team to address multi-residential properties that posed ongoing community concerns in relation to demand for police services, adverse neighbourhood impacts, bylaw violations, and safety hazards for tenants. The City had also adopted a bylaw, the purpose of which was to provide a comprehensive set of regulatory options to address rental properties that were improperly maintained or managed. The bylaw provided regulations that improved the City's ability to remedy substandard conditions in rental buildings, as well as addressed issues associated with properties that generated nuisances and excessive calls for police services.

Before the Hughes' company purchased the Royal Towers Hotel, it had operated as a traditional hotel with daily or weekly rentals (with few complaints). After the purchase, the City received numerous complaints with respect to bylaw violations and contraventions of the Fire Code. In attempting to address the complaints and enforce its bylaws, the City had a number of dealings with Ms. Hughes. In her complaint, Ms. Hughes alleged all manner of discriminatory treatment on the basis of her sex, including allegedly being told by a person at City Hall:

> "the City Manager and others at City Hall aren't used to dealing with a young woman who won't acknowledge that you can't fight city hall … even if you are right … you won't win … at the end of the day you are just an outsider and a woman…"

The City applied to the Tribunal to dismiss the complaint, on the basis that it had no reasonable prospect of success. The City was successful and the complaint was dismissed. In pursuing its application to dismiss, the City took an active role. It filed over 20 affidavits in support of its application from City Hall employees, members of Council, commission managers, a planning consultant, and a police services chief constable. Seventeen of these deponents were Ms. Hughes' proposed witnesses. All deponents denied discriminating against Ms. Hughes on the basis of her sex. Based on the evidence from the deponents as well as the speculative and imprecise nature of Ms. Hughes' allegations, the Tribunal found there was little to no substance to the allegations of discrimination and there was no reasonable prospect of success. The Tribunal found that rather than a case of discrimination,

> what is set out in all the materials is a dispute between the City and one of its landowners regarding compliance with City bylaws and regulations. The fact that Ms. Hughes is a woman, and a part owner of the corporation that in turns owns the property is merely incidental to all their interactions.

B. Accessibility

The issue in the case of *Moser v. Sechelt (District)*, 2004 BCHRT 72 was the cost of changes required to modify a portion of a municipal walkway along the ocean. The complainant in this case alleged that the District discriminated against her due to the hazards associated with a

portion of the walkway. The complainant, because of a disability, was unable to walk on her own and used a walker, wheelchair or scooter to assist her.

The evidence was that the portion of the walkway in question was different from other phases of the walkway, including the fact that it was narrower. The complainant alleged that in addition to the narrow width and significant slope of the portion of the walkway, it also lacked proper safety features such as a railing. The complainant further alleged that the design of the walkway made it impossible for someone using a scooter or wheelchair to use the walkway with competence, safety and dignity.

At the hearing, the complainant testified that she had significant concerns about her safety when traveling on the walkway and that she could fall over the edge, which could result in injuries that would decrease her mobility even further. She also gave evidence that because of the narrowness of the seawall, her scooter took up a lot of room and she perceived that people on the seawall viewed her as an obstacle.

The complainant's father had contacted the District regarding his concerns about the walkway. The District contacted its insurers about the issue and the insurer indicated that from a risk-management perspective, there was no need for additional railings as the width of the walkway was adequate. Therefore, the District took no further steps to address the complainant's safety concerns.

The Tribunal member concluded that the realities of the complainant's disabilities were ignored by the District and that she had one of two choices:

- Accept the risks and use the walkway with fear; or
- Decide not to use the walkway as a result of that fear.

The District argued the cost to accommodate the complainant constituted undue hardship. The District of Sechelt led evidence that the cost of constructing a railing could be between $20,000 and $40,000, and that the installation of a railing would lead to an unspecified increase in annual maintenance expenditures. The Tribunal member did not accept that these costs constituted an undue hardship. As the Tribunal member noted:

> In this case, the District's evidence did not go beyond impressionistic evidence of increased expense. The District did not provide any detailed estimates of the cost of installing a railing, did not lead any evidence about the impact the potential expenditures would have with respect to the District's total budget, and did not present any alternatives other than the installation of the railing.

Therefore, a municipality that wants to argue that the cost of an accommodation constitutes undue hardship must provide detailed financial information both about the accommodation

and general operations. Municipalities must also keep in mind the fact that both the Supreme Court of Canada and the Human Rights Tribunal accept that an accommodation may result in increased cost to the respondent. The issue is whether the cost is so great as to constitute undue hardship. Again, this will depend on the size of the organization, the cost of the accommodation and the overall financial state of the municipality.

In the *Moser* case, the District also argued that an order to modify its walkway could result in a variety of other expenses related to municipal services. The Tribunal member summarized the District's arguments as follows (at para. 85):

> In addition, the District argued that a finding that it was required to modify the walkway would open the door to a variety of other expenses: for example, providing railings on all District sidewalks, and paving all walking and hiking trails in the District, which could create a cost in the hundreds of thousands of dollars. This, in turn, could lead municipalities to stop providing such facilities at all.

Again, the Tribunal member did not consider that such a floodgates argument had any merit and stated that it was "highly conjectural". The Tribunal member did note that there was a very specific service involved in this case and that her decision should not be taken as predetermining the outcome in other cases where the evidence and facts may be very different.

While the Tribunal member did find that the District discriminated against the complainant, it did not order a specific remedy such as the installation of a railing. She felt that, because of the lack of evidence regarding possible remedial measures, it was appropriate to allow the parties six months to reach agreement on the appropriate steps to modify the walkway and make it safer for persons with mobility-related disabilities.

It is interesting to note the fact that compliance with other legislation such as building codes and regulations did not constitute a *bona fide* and reasonable justification. In *Moser*, the District argued that the walkway was built in accordance with municipal bylaws and standards approved by the Ministry of Transportation and was safe. The Tribunal member rejected the District's arguments that it complied with building standards. The Tribunal member was clear that conformity with such standards does not relieve a respondent from obligations under the Code.

The case of *LePas v. Campbell River (City)*, 2008 BCHRT 394, shows that taking steps to address accessibility issues will assist in the defence to a human rights complaint. The complainant in this case alleged that the City failed to take steps to make the City Council chambers accessible to citizens who used wheelchairs or other mobility aids. The City applied to dismiss the complaint on the basis that proceeding with the complaint would not further the purposes of the Code.

Individuals who used mobility devices could not access the public seating gallery or the speaking podium. The City provided evidence that it had and was continuing to take steps to make the Council chambers accessible. City Hall had been built prior to the introduction of the disabled access provisions of the British Columbia Building Code. The City had made provision for some wheelchair access on a landing at the back of the Council chambers. As well, the City had a portable wheelchair ramp constructed for the purpose of providing access to the lower part of the Council chamber that contained the public seating gallery and podium. However, it took about two hours to install the portable ramp so advance notice of the need for its use was required.

After the City received the complaint, it permanently erected the portable ramp and the City advised that it would remain in place until a permanent ramp was completed. As well, the City adopted two resolutions approving expenditures for the design, construction and installation of a permanent wheelchair ramp and power door opener. The wheelchair ramp would provide full access to the Council chambers and the door opener would allow disabled citizens to open the main entrance to the chambers' door without assistance.

The City also submitted evidence that the construction of these upgrades had been delayed as the City was also considering a more extensive upgrade of the chambers. The City committed that if it did not proceed with the upgrade, it would work on the accessibility improvements within a specified time frame.

The Tribunal concluded that on the basis of the evidence provided by the City, proceeding with the complaint would not further the purposes of the Code. The Tribunal noted the steps the City was taking to make the chambers more accessible and the ability of the complainant to file another complaint if the City failed to take the steps it set out in its evidence.

C. Recreation Services

The two cases in this section deal with allegations by patrons of recreation facilities that they were discriminated against when they were banned from the facility. In *Magrath v. New Westminster (City)*, 2009 BCHRT 233, the City applied to dismiss a complaint that it had discriminated against a patron of a municipal recreation centre on the basis that there was no contravention of the Code and that there was no reasonable prospect that the complaint would succeed. The complainant alleged that she had been discriminated against on the basis of a disability because she was told by an employee of the recreation centre that she could not wear her clothes in the sauna and because she was escorted from the facility by the RCMP and told she could not return.

The City provided evidence including 19 affidavits from employees and patrons of the recreation centre that the complainant acted inappropriately to both staff and patrons while attending the facility, including engaging in loud, aggressive, confrontational and disrespectful

conduct. The City also provided evidence that it had gone to great lengths to try and resolve the complainant's concerns.

The Tribunal granted the City's application on the basis there was no reasonable prospect it would succeed. The Tribunal noted that the only allegation the complainant linked to a physical disability was the direction by an employee that she could not wear clothing in the sauna. However, the City provided evidence it had accommodated her once she explained that her disability made it difficult for her to change her clothes. Furthermore, the complainant had not linked any of her other concerns to the ground of disability.

The case of *Dalton v. Delta (Corporation)*, 2010 BCHRT 9, also involved an application to dismiss a complaint of discrimination by a patron of a recreational facility. The patron in this case was a regular user of public swimming pools who was banned from the facility because of his aggressive behaviour towards a female employee. The employee alleged that the complainant aggressively complained to her about another swimmer and that she felt threatened by his demeanour. As she tried to move away from him, he reached out and grabbed her arm. He then followed her and yelled at her in a loud and threatening manner.

The Director of Parks and Recreation and Culture investigated the incident and concluded the complainant had acted in an aggressive and threatening manner and should be suspended from all of the Municipality's facilities for one year. Prior to his return, the complainant had to meet with a particular manager to discuss the terms of his return. The Municipality ultimately decided to reinstate the complainant's pool privileges after about six months on the condition that he not initiate contact with the employee. However, there was another alleged incident between the complainant and the employee soon after the complainant's reinstatement. After an investigation, it was decided that the complainant would be indefinitely suspended.

The complainant alleged he had been discriminated against on the basis of sex because the representatives of the Municipality were influenced by gender stereotypes. The Tribunal described the complainant's allegations as follows (at para. 28):

> Mr. Dalton alleges that the situation is unjust and retaliatory, and that he did not have an opportunity to defend himself. He alleges that his treatment constitutes discrimination on the ground of sex. It appears that he is alleging that in situations involving allegations of physical contact by men on women, the man is assumed to be the aggressor and that this assumption has resulted in unfair treatment of him.…

The Municipality argued that the suspensions were related to the complainant's aggressive and inappropriate conduct. The Tribunal accepted the Municipality's explanation for its actions and could find nothing to suggest its actions were related to an enumerated ground under the Code. The Tribunal was clear that the complainant's view that the process followed by the Municipality was unfair to him did not constitute discrimination on the basis of sex.

IV. CONCLUSION

The above cases illustrate the broad range of local government activities that fall within the scope of section 8 of the Code. However, it is important to always keep in mind that allegations of discrimination have to be related to one of the enumerated grounds under the Code. In cases like *Hughes, Magrath* and *Dalton*, dissatisfaction in how the service is being offered is not discrimination under section 8 of the Code. As well, many local governments have been successful in applying to dismiss section 8 complaints prior to a hearing. Therefore, it is always worthwhile to consider whether an application to dismiss is appropriate, particularly where the local government has taken steps to address the complainant's concern or the alleged discriminatory conduct does not appear to be related to an enumerated ground under the Code.

NOTES

NOTES