IN THE MATTER OF: A complaint under the Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214

AND

IN THE MATTER OF: Board File No. 51000-30-H16-1629

BETWEEN:

WARREN REED, BEN MARSTON, PAUL VIENNEAU, JEREMY MACDONALD AND KELLY MCKENNA

Complainants

AND

PROVINCE OF NOVA SCOTIA (DEPARTMENT OF ENVIRONMENT), AND/OR PROVINCE OF NOVA SCOTIA OR CAPITAL DISTRICT HEALTH AUTHORITY

Respondent

AND

NOVA SCOTIA HUMAN RIGHTS COMMISSION

Commission

AND

RESTAURANT ASSOCIATION OF NOVA SCOTIA

Intervenor

DECISION

Nova Scotia Board of Inquiry Chair:	Gail L. Gatchalian, Q.C.
Counsel for the Complainants:	David Fraser
Counsel for the Respondents:	Kevin Kindred
Counsel for the Commission:	Kendrick Douglas
Date of Hearing:	July 5 and 6, 2018
Date of Award:	September 6, 2018

The Complaint

1. The Complainants, Warren Reed, Ben Marston, Jeremy MacDonald, Kelly McKenna and Paul Vienneau, are people with disabilities who use wheelchairs for mobility. On July 4, 2017, they filed a complaint under the Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c.214, alleging that the Respondent, the Province of Nova Scotia, had discriminated against them in respect of the provision of or access to services or facilities on the basis of physical disability in violation of ss.5(1)(a) and (o) of the *Act*.

2. The issue in this case is the manner in which the Respondent interprets and applies s.20(1) of the *Food Safety Regulations*, N.S. Reg 206/2005, as amended, made under the *Health Protection Act*, S.N.S. 2004, c.4. Subsection 20(1) of the *Food Safety Regulations* provides as follows:

> **Washroom facilities**
>
> 20 (1) A food establishment must have washroom facilities for staff and washroom facilities for the public available in a convenient location, unless exempted by the Administrator.
>
> ...

3. There are many food establishments in Nova Scotia that do not have washroom facilities for the public that are accessible to wheelchair users. These are food establishments that are "grandfathered" under the *Nova Scotia Building Code Regulations*, N.S. Reg. 26/2017, made under the *Building Code Act*, R.S.N.S. 1989, c.46. The *Building Code Regulations* apply to new construction and to alterations, reconstruction, occupancy and change of occupancy classifications of existing buildings. The *Building Code Regulations* do not require retrofits of existing buildings.

4. The Respondent does not interpret or apply s.20(1) of the *Food Safety Regulations* as requiring food establishments to have washroom facilities for the public that are accessible to wheelchair users. The Respondent therefore issues permits under the *Health Protection Act* and the *Food Safety Regulations* allowing food establishments to operate without washrooms that are accessible to members of the public who use wheelchairs.

5. The question to be determined is whether the Respondent's interpretation and application of s.20(1) as not requiring food establishments to have washroom facilities for the public that are accessible to wheelchair users constitutes discrimination in respect of the provision of or access to services or facilities on the basis of physical disability in violation of ss.5(1)(a) and (o) of the *Act*.

The *Human Rights Act*

6. The following provisions of the *Human Rights Act* are relevant to this complaint:

> **Meaning of discrimination**
>
> 4 For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.
>
> **Prohibition of discrimination**
>
> 5 (1) No person shall in respect of
>
> (a) the provision of or access to services or facilities;
>
> ...
>
> discriminate against an individual or class of individuals on account of
>
> ...
>
> (o) physical disability or mental disability;
>
> ...
>
> **Exceptions**
>
> 6 Subsection (1) of Section 5 does not apply
>
> ...
>
> (f) where a denial, refusal or other form of alleged discrimination is
>
> (i) based upon a *bona fide* qualification,
>
> (ia) based upon a *bona fide* occupational requirement; or

(ii) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society;

...

Procedural Background

7. In July and August of 2016, one of the Complainants, Mr. Reed, attempted to file a complaint about the Province's alleged discriminatory enforcement of s.20(1) of the *Food Safety Regulations* with the Nova Scotia Human Rights Commission: *Reed et al. v. Nova Scotia (Human Rights Commission)*, 2017 NSSC 85, at para.2.

8. On August 3, 2015, a Human Rights Officer advised Mr. Reed that she would not accept the complaint. On September 14, 2016, in a reconsideration decision, a second Human Rights Officer advised Mr. Reed that the Commission would not accept the complaint: *Reed, supra*, at paras.3 and 4.

9. The Complainants were successful in their application for judicial review of the decisions of the Human Rights Officers. Justice Edwards held that the *Human Rights Act* does not allow a Human Rights Officer to refuse to accept a complaint. The *Act* requires the Commission to inquire into the complaint. While the Commission may ultimately decide to dismiss the complaint, the dismissal must be on the basis of one of the reasons set out in s.29(4) of the *Act*: *Reed, supra*, at para.8. Justice Edwards ordered the Commission to process the complaint: *Reed, supra* at para.19.

10. The Complainants filed the July 4, 2017 complaint, and I was appointed as a Board of Inquiry to inquire into and render a decision regarding the complaint.

11. The Commission decided to participate in the proceeding by way of "watching brief" only. The Commission did not take a position for or against the complaint.

12. On June 25, 2018, on consent of the parties, I granted the request of the Restaurant Association of Nova Scotia to be added as an intervenor in this matter.

13. The hearing took place on July 5 and 6, 2018 in Halifax, Nova Scotia.

Evidence

14. The Complainants relied on an affidavit of Mr. Reed and on a letter from Ellsworth Campbell, a computational biologist employed with the Centers for Disease Control and Prevention in the United States. The Complainants called one witness, Paul Vienneau, one of the Complainants.

15. The Respondent called one witness, Karen Wong-Petrie, Director, Environmental Health and Food Safety Branch, Sustainability and Applied Sciences Division, with the Nova Scotia Department of Environment, which is responsible for administering the *Food Safety Regulations*.

The Facts

Hand-Washing and Public Health

16. Hand-washing is an important measure for the protection of public health and the prevention of disease.

17. The Province of Nova Scotia has published a Norovirus Fact Sheet which states in part that "[t]he most important measure to prevent any communicable disease is proper hand hygiene," and that hand hygiene must be performed before preparing food, before eating, after contact with ill individuals, after using the toilet and after changing diapers. The Fact Sheet also states that "[u]sing most commercially available alcohol-based rubs should not be considered a replacement for proper hand hygiene, using liquid soap and water, against norovirus."

18. Ms. Wong-Petrie believes that she is the one who wrote the Province's Norovirus Fact Sheet, and she obviously agrees with its contents.

19. The Nova Scotia Department of Health has published a poster entitled "Hand Washing!" that provides instructions on proper hand-washing and that states that "[w]ashing your hands with soap and water is the best way to reduce the spread of germs."

20. The Department of Environment distributes the "Hand Washing!" poster published by the Department of Health, and suggests to food establishments that the poster be posted in staff and public washrooms and in the food preparation area above the hand-washing sink.

21. Ms. Wong-Petrie testified that the ability of a member of the public to wash their hands before eating is a food safety issue for that individual, and that hand washing is "the number one greatest infection control procedure that's around." Ms. Wong-Petrie also testified that when a member of the public is not able to wash their hands in a restaurant, the person could be impacting what eventually moves into the kitchen, or what staff eventually come into contact with.

22. Ms. Wong-Petrie agreed with the following description of the concept of "herd immunity" by Mr. Campbell:

> ... Herd immunity is a theoretical concept which holds that susceptible persons receive some benefit when those around them are immune to an infectious threat. That is to say: If we can just protect ***enough*** people, we can effectively protect the rest. However, this theory rests on a single but woefully inaccurate

assumption about human populations: that susceptibility is randomly distributed. The moment that we begin to see groups or communities of susceptible persons, the theoretical basis of herd immunity crumbles and its benefits cease to exist. These groups of susceptible persons act as the kindling necessary to start an outbreak that can spread through a community like wildfire.

To learn that persons who use wheelchairs, or who otherwise cannot readily traverse stairs, are often unable to access washrooms at public restaurants is alarming, not only because it places an undue risk on one demographic, but because the risk of infectious disease is rarely isolated to any single demographic. We cannot assume that because a community constitutes a numerical minority that the effects of their unequal disease burden will have on the community-at-large will also be minor. While members of this demographic constitute an integral part of most every family they also constitute cohesive groups that form resilient social communities. Denying access to handwashing – the most effective means of preventing the transmission of foodborne illnesses – is akin to denying access to other tools of preventive medicine like vaccination.

...

[Emphasis in original]

Hand-Washing and Individuals who use Wheelchairs for Mobility

23. The ability to wash one's hands is especially important for individuals who use wheelchairs for mobility. Their hands are in almost constant contact with dirt and germs because the palms of their hands rub against the rims of the wheels on their chairs, which are in contact with rain water, mud, grime, dog excrement and other unpalatable substances.

24. There are many restaurants in Halifax and in Nova Scotia that do not have washroom facilities that are accessible to individuals who use wheelchairs for mobility.

25. When an individual who uses a wheelchair for mobility is at a restaurant that does not have an accessible washroom, they are unable to properly wash their hands before eating. This poses a health risk for the individual, and a potential health risk for others.

Renovations Required to Make Washrooms Accessible

26. The Restaurant Association is supportive of the idea that restaurants should be accessible. By way of example, the Association is currently rebuilding its website, which will list accessible restaurants, something that it has done for the past 10 years. According to the Association, there are over 100 accessible food establishments within a five-kilometre radius of downtown Halifax.

27. The Restaurant Association is concerned, however, of the possible financial impact on restaurants if s.20(1) of the *Food Safety Regulations* is interpreted to require restaurants to have washroom facilities for the public that are accessible to individuals who use wheelchairs for mobility.

28. The Restaurant Association provided some general and anecdotal information about the potential cost of requiring older buildings to be accessible:

> ... There are many operations that are in older buildings and will incur considerable costs if required to address and resolve certain accessibility issues. Most of these types of buildings are in Halifax but there are some spread throughout the province. Added to this is that most restaurants rent and do not own their premises. Many of the landlords of older buildings don't want major structural changes, which is what most of the changes would be for compliance.
>
> Some examples of recent quotes for accessible access to restaurants:
>
> (Halifax Restaurant) to install a ramping system – the quote was $41,000 and involved some major structure items. The other part of this ramp system was that it had to be built inside the restaurant utilizing approximate 100sq.ft. That meant there was a loss of revenue for that space and a monthly carrying cost of approximately $2,500.
>
> Another recent quote for a renovation to a restaurant (Halifax) for complete accessibly [sic] with washrooms & ramping access was $135,000. The challenge with this is that the average profit for a restaurant in NS is 3.2-3.5 % (that is they make $3.20-$3.50 for every $100 in sales). It takes a lot of sales to pay for even modest renovations; still a lot of operators have committed to make more accessible improvements.

29. The example of the $135,000 quote given by the Restaurant Association related to a proposed new food establishment that was not grandfathered under the *Building Code Regulations* and therefore would be required to meet the accessibility standards under those *Regulations*.

30. Mr. Vienneau gave an example of a restaurant on Spring Garden Road that has washrooms for the public, one for men and one for women with stalls, neither of which are accessible to wheelchair users. Fairly minor modifications would be required to make one of the washrooms accessible: removal of a raised "lip" on the floor, removal of the stalls in the women's washroom to make it barrier-free, and conversion of both of the washrooms into gender-neutral washrooms.

Respondent's Interpretation and Administration of the Food Safety Regulations

31. The Nova Scotia Department of Environment is responsible for the licensing of food establishments under the *Health Protection Act* and the *Food Safety Regulations*.

32. A "food establishment" is defined in s.75(c) of the *Health Protection Act* as follows:

> 75 In this Part,
>
> ...
>
> (c) "food establishment" means any premises, including a mobile, stationary, temporary or permanent facility or location and the surroundings under control of the same person, in which food is processed, manufactured, prepared, labelled, served, sold, offered for sale or distributed free of charge, dispensed, displayed, stored or distributed, but does not include a dwelling except a dwelling used for commercial food preparation; ...
>
> ...

33. Section 81 of the *Health Protection Act* provides as follows:

> **Establishment or operation of food establishment**
>
> 81 No person shall establish or operate a food establishment except in accordance with this Part and the regulations.

34. Under s.82 of the *Health Protection Act*, a person requires a permit to operate a food establishment, unless exempted by the Administrator under the *Act*, and applications and fees for permits are to be set out in the regulations:

> **Permit required**
>
> 82 (1) No person shall operate a food establishment, unless exempted by the Administrator, without first having obtained a permit from the Administrator.
>
> (2) An application for a permit in respect of a food establishment shall be made to the Administrator in accordance with the regulations.
>
> (3) Subject to this Part and the regulations, the Administrator shall issue a permit in respect of a food establishment to an applicant upon payment of the prescribed fee.

35. The Administrator appointed under the *Act* is the Director of the Regional Integration Compliance Operations Division with the Department of Environment.

36. Section 83 of the *Health Protection Act* describes the circumstances in which the Administrator shall not issue or renew a permit, or may suspend or revoke a permit:

> **Where permit is not to be issued or may be revoked**
>
> 83 (1) The Administrator shall not issue or renew a permit, or may suspend or revoke a permit, in respect of a food establishment to an applicant where the Administrator is of the opinion that
>
> (a) the past conduct of the applicant or, where the applicant is a corporation, of any of its officers or directors, affords reasonable grounds to believe that the operation of the food establishment would not be carried on in accordance with this Part and the regulations;
>
> (b) the applicant does not have or will not have available all premises, facilities and equipment necessary to operate a food establishment in accordance with this Part and the regulations;
>
> (c) the applicant is not complying or will not be able to comply with this Part and the regulations; or
>
> (d) the operation of the food establishment represents or would represent a risk to human health.
>
> (2) Any condition that is injurious to human health or, in the opinion of the Administrator, is potentially injurious to human health is deemed a risk under this Part.

37. Under s.86 of the *Health Protection Act*, "[t]he Administrator may designate types or classes of food establishments for which permits are issued under Section 82."

38. Under s.87 of the *Act*, "[t]he Administrator may amend, add or impose terms and conditions on a permit."

39. Section 89 of the *Act* requires a food establishment to be constructed and maintained in a manner that is not injurious to human health:

> **Construction and maintenance of food establishment**
>
> 89 A food establishment must be constructed and maintained in such a manner that no condition exists that is injurious to human health or that, in the opinion of the Administrator, is potentially injurious to human health.

40. Section 93 of the *Act* allows the Administrator or an inspector to enter premises for the purpose of carrying out their duties under the *Act* or the regulations:

> **Entry and inspection without warrant**
>
> 93 (1) The Administrator or an inspector may, at any reasonable time, for the purpose of carrying out the Administrator's duties or inspector's duties, as the case may be, under this Part or the regulations,
>
> (a) enter without a warrant any premises where there are reasonable and probable grounds to believe that the premises are a food establishment and that records relating to the food establishment are to be found in the premises; and
>
> (b) inspect the premises and any food or records relating to food.
>
> ...

41. Section 105(1) of the *Act* authorizes the Governor in Council to make regulations:

> 105 (1) ...
>
> ...
>
> (c) providing for the exemption from this Part or the regulations, or any part thereof, of any person or class of persons or of any food product and prescribing the terms and conditions of the exemption;
>
> ...

(e) prescribing the facilities and equipment to be provided and maintained at food establishments and the operation of food establishments;

...

(f) respecting cleanliness and sanitation of food establishments;

...

(j) providing for the issue, renewal, suspension, reinstatement or revocation of or refusal to issue or renew permits and prescribing the fees payable for permits or the renewal of permits;

...

(p) providing for the inspection of premises before the issue of permits;

...

(r) prescribing conditions to which permits may be subject;

...

42. Section 5 of the *Food Safety Regulations* sets out the classes of food establishment permits (e.g. "temporary event," "eating establishment" or "foodshop"), the expiry dates for permits and the fees prescribed for permits.

43. Section 6 of the *Food Safety Regulations* requires an application for a permit to be in a form prescribed by the Administrator and requires the application to include the fee, any reasonable information required by the Administrator, and the plans and specifications of the food establishment.

44. Section 9 of the *Food Safety Regulations* sets out the requirements for the renewal of a permit.

45. Section 11 of the *Food Safety Regulations* deals with the suspension or cancellation of a permit.

46. The Environmental Health and Food Safety Branch of the Sustainability and Applied Sciences Division of the Department of Environment develops the government's food safety program, ensures compliance with and enforcement of the *Food Safety Regulations*, and provides education, outreach, training and food-borne illness outbreak management. The Environmental Health and Food Safety Branch considers its mandate, as it pertains to food safety, to be the reduction of food-borne illness in populations by mitigating, controlling or eliminating biological, physical or chemical hazards that might present themselves at permanent food establishments in Nova Scotia.

47. The approach of the Environmental Health and Food Safety Branch to compliance with the *Food Safety Regulations* is "a lightest touch approach," which Ms. Wong-Petrie described as getting to the outcome of reducing food-borne illness by reducing hazards in food establishments in a way that is not overly burdensome to industry or to government and in a way that is responsible in terms of budgetary accountability.

48. As Ms. Wong-Petrie described it, the compliance continuum, at one end, is comprised of methods such as education, training, and informal discussions with inspectors during inspections, and at the other end, involves suspension or revocation of permits.

49. The Inspection Compliance and Enforcement Division of the Department of Environment implements the food safety program developed by the Environmental Health and Food Safety Branch of the Sustainability and Applied Sciences Division. The public health inspectors who deliver the food safety program are part of the Inspection Compliance and Enforcement Division.

50. In 2017, the Department conducted just over 13,000 inspections and issued approximately 6,000 permits under the *Food Safety Regulations*.

51. An application for a permit to establish or operate a food establishment triggers an inspection. The application must be accompanied by a floor plan and a menu. An inspector conducts a pre-inspection to determine compliance with the *Food Safety Regulations*. The inspector considers factors such as design, construction, personnel, hygiene, training, how food is to be stored, refrigeration, freezers, and food flow. The Department may then issue a permit, or schedule another pre-inspection. The Department conducted approximately 2,000 pre-inspections in 2017.

52. Inspectors also conduct what are called "routine inspections" of food establishments based on an assessment of risk. High risk establishments are inspected twice a year. Medium risk establishments are inspected once every 12 months. Low risk establishments are inspected once every 18 months. The Department conducted approximately 11,000 routine inspections in 2017.

53. The Department also conducts ad hoc inspections in response to every complaint lodged against a food establishment.

54. If a routine inspection raises concerns that must be followed up, the Department will conduct a re-inspection.

55. Finally, the Department conducts what are called "consultation inspections," which are requested by the operator.

56. If an inspector identifies a deficiency that the Department considers critical to health, such as a broken refrigerator or lack of potable water, the inspector may suspend the operator's permit until the issue has been resolved.

57. If an inspector identifies a deficiency that the Department considers to be non-critical to health, the operator is typically given a time frame within which to correct the deficiency. According to Ms. Wong-Petrie, if the deficiency continues, even if it is not considered critical to health, the deficiency could, if not addressed, lead to a warning, suspension or revocation of a permit. The Department considers suspensions and revocations to be severe, and there have only been 87 suspensions and 2 revocations in the last 10 years.

58. According to Ms. Wong-Petrie, the cost of compliance does not exempt an operator from complying with the *Food Safety Regulations*. However, the Department might provide an operator with time to correct the deficiency based on the cost of correcting it.

59. The Department interprets the requirement to have washroom facilities for staff and the public available in a convenient location in s.20(1) of the *Food Safety Regulations* as only requiring a washroom to be in a location that does not pose a risk to food safety. For example, if the public can only access the washroom by walking through the kitchen, the Department would consider the food establishment to be in violation of the requirement to have a washroom available to the public in a convenient location because it poses an unacceptable risk to the food that is being prepared. If staff could only access a washroom by walking up stairs or going through another business, the Department would consider the food establishment to be in violation of the requirement to have a washroom available to staff in a convenient location, because staff would be exposing themselves and their hands to potential food-borne illness.

60. In the last 10 years, the Department has only issued eight exemptions under s.20(1) of the *Food Safety Regulations*. None of the exemptions were for restaurants, but rather, establishments such as general stores, convenience stores, or small take-out establishments. The Department considered these food establishments to be low-risk. Of the eight exemptions, only one remains active as the others related to food establishments that are no longer in operation.

61. In five of the above-noted exemptions under s.20(1) of the *Food Safety Regulations*, one of the factors relied on by the Administrator for granting the exemption was that compliance would be "so cost prohibitive as to make the continued operation of the business non viable."

62. In two of the exemptions granted under s.20(1) of the *Food Safety Regulations*, the operator was given a time frame within which to comply with the *Regulations*: in one case, prior to the third year of operation, and in the other case, one year.

63. The Department does not interpret s.20(1) of the *Food Safety Regulations* as requiring a washroom for the public that is wheelchair accessible. The Department does not consider the accessibility of washrooms in food establishments to relate to food safety.

64. The Department does not consider hand washing by members of the public to fall within the mandate of its food safety program.

65. The Department therefore issues permits and renews permits under the *Health Protection Act* and the *Food Safety Regulations* allowing food establishments to operate without washrooms that are accessible by members of the public who use wheelchairs for mobility.

Argument

The Complainants

66. The position of the Complainants is that the failure of the Respondent to require food establishments to have washroom facilities for the public that are accessible for individuals who use wheelchairs for mobility under s.20(1) of the *Food Safety Regulations* has a discriminatory impact on those individuals contrary to ss.5(1)(a) and (o) of the *Human Rights Act*.

67. The Complainants argue that Respondent's interpretation and application of s.20(1) of the *Food Safety Regulations* adversely affects the health of individuals who use wheelchairs for mobility and the health of the population generally.

68. The Complainants, anticipating that the Respondent would rely on the Province's promise of full accessibility by 2030 under the new *Accessibility Act*, S.N.S. 2017, c.2, argue that deferring the enforcement of s.20(1) of the *Food Safety Regulations* to require washrooms that are accessible would perpetuate the discrimination and increase the probability of a public health incident.

69. The Complainants characterize the approach of the Respondent to s.20(1) of the *Food Safety Regulations* as systemic discrimination.

70. The Complainants assert that their complaint is not solely about the ability to access a toilet, but that it is also about access to basic hygiene, as individuals in non-motorized wheelchairs spend most of their day with their hands on the hand rims of the wheels in order to move the chair, and the hand rims are in close proximity to the ground and get dirty throughout the day. The dirt is then transferred to the individual's hands. Individuals in

wheelchairs who do not have access to handwashing facilities have their health placed at risk. The Complainants rely on the letter from Mr. Campbell for their argument that jeopardizing the health of individuals who use wheelchairs jeopardizes the whole population.

71. In addition to relying on ss.5(1)(a) and (o) of the *Human Rights Act*, the Complainants rely on the right to equal protection and equal benefit of the law without discrimination on the basis of physical disability under s.15(1) of the *Canadian Charter of Rights and Freedoms*.

72. The Complainants argue that the purpose of the *Health Protection Act* is to protect the health of all Nova Scotians.

73. The Complainants argue that in order to be licensed as a food establishment under the *Health Protection Act*, a food establishment must have washroom facilities for the public available in a convenient location, pursuant to s.20(1) of the *Food Safety Regulations*. The Complainants argue that "convenient" in s.20(1) of the regulations means a location that is accessible, and that "the public" in s.20(1) includes individuals who use wheelchairs.

74. Until the hearing, the Complainants were not aware of the reason why the Respondent did not require food establishments to have washroom facilities for the public that are accessible to wheelchair users.

75. The Complainants rely on *Waplington v. Maloney Steel Ltd.*, 1983 CarswellAlta 513, 4 C.H.R.R. D/1483 (ABQB) for the proposition that individuals have a right to washroom facilities that are suitable for them, and on *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 SCR 650, 2007 SCC 15 for the proposition that individuals have a right to an accessible washroom.

76. The Complainants seek an order requiring the Respondent to enforce s.20 of the *Food Safety Regulations* in a consistent and non-discriminatory manner so that licensed food establishments must have a washroom that is accessible to all members of the public.

77. The Complainants seek an unspecified amount of nominal damages to be used for the purpose of accessible washrooms to protect public health.

The Position of the Respondent

78. The Respondent agrees that accessibility is an important issue, and that all Nova Scotians, including Nova Scotians who use wheelchairs, have a right to participate fully in society and public life, and that barriers that prevent full participation and cause disability must be addressed.

79. However, the Respondent submits that accessibility cannot and should not be addressed in the context of the *Food Safety Regulations* and that accessibility, including the accessibility of washrooms, is not a food safety issue.

80. Rather, according to the Respondent, the legal requirements with respect to accessibility of buildings, including restaurants, are set out in the *Building Code Regulations* and in the Halifax Regional Municipality *By-Law S-1000 Respecting the Regulation of Sidewalk Cafés*.

81. The Respondent states that it is the *Building Code Regulations* and *By-Law S-1000* that create the situation where a patron who uses a wheelchair may be served at a restaurant, including a patio of a restaurant, that does not have an accessible washroom. However, the complaint does not directly address either the *Building Code Regulations* or *By-Law S-1000.* As a result, the Respondent asserts that the core policy issues with respect to the scope of the *Building Code Regulations*, the grandfathering of existing buildings, and *By-Law S-1000* are not directly dealt with by the complaint.

82. The Respondent also asserts that, because the complaint is not against individual restaurants, a whole set of policy issues involving accommodation and undue hardship that could be presented by the restaurants is bypassed because of the manner in which the Complainants framed the complaint.

83. The Respondent argues that the complaint does not address a "service" within the meaning of s.5(1)(a) of the *Human Rights Act*. The Respondent states that the Complainants are seeking the enforcement of the *Food Safety Regulations* according to their interpretation, and that the enforcement of regulations is not a "service" within the meaning of the *Human Rights Act*. The Respondent points out that neither of the cases relied on by the Complainants involved the enforcement of regulations or policies by a government regulator.

84. The Respondent acknowledges that some aspects of government activities have been recognized as "services" under the *Human Rights Act*. For example, in *O'Quinn v. Nova Scotia Workers' Compensation Board*, [1995] 131 DLR (4th) 318, the Nova Scotia Court of Appeal found that government-administered workers' compensation benefits amount to a "service" under the *Human Rights Act*. A similar conclusion was reached with respect to public pension benefits in *Nova Scotia (Minister of Finance) v. Hodder et al.*, 1998 CanLII 5962 (NSCA).

85. The Respondent relies on *Watkin v. Canada (Attorney General)*, 2008 FCA 170 for the proposition that government's enforcement activities per se are not a "service" within the meaning of human rights legislation. In *Watkin*, *supra*, the allegation was that Health Canada enforced the *Food and Drug Act* unequally based on ethnicity. The Federal Court of Appeal rejected the argument that the enforcement activity of Health Canada involved "services" under the *Canadian Human Rights Act*.

86. The Respondent argues that even if this case involved actions that could somehow be characterized as a "service", then the "service" is not provided to the Complainants. Rather, the enforcement of the *Food Safety Regulations* is between the Department of Environment and the food establishments. Relying on *Watkin, supra*, the Respondent argues that simply because

government activity is undertaken for the public good does not, in and of itself, transform that activity into a "service."

87. The Respondent relies on the recent decision of the Supreme Court of Canada in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 for the proposition that the government, in legislating, is not providing a "service" within the meaning of human rights legislation, and that a human rights tribunal does not have the jurisdiction to negotiate with the responsible Minister the manner in which legislative provisions are to be applied.

88. The Respondent argues that the complaint is based on an incorrect interpretation of the *Food Safety Regulations*, and that the *Food Safety Regulations* do not require a restaurant to have a washroom accessible to wheelchair users. The Respondent argues that the food safety regulatory regime is focused on ensuring that food establishments adhere to practices that minimize the risk of food contamination, which in turn protects public health. The Respondent argue that the *Food Safety Regulations* do not regulate food establishments in terms of other public interests, such as Building Code compliance and accommodation of disability. Such matters, according to the Respondent, fall outside the narrow focus of food safety. Therefore, says the Respondent, the location of the washroom under s.20(1) of the *Food Safety Regulations* must be reviewed solely with a narrow focus on food safety, and not with a broader focus on accessibility. The argument of the Respondent is that the Department's mandate is to regulate the hygiene of food establishments and food handlers, not food consumers.

89. The Respondent finds support for its interpretation of s.20(1) of the *Food Safety Regulations* as requiring the least amount of interference or the lightest exercise of power to respond to a health hazard or public health emergency in s.2 of the *Health Protection Act*, which reads as follows:

> **Restrictions on private rights and freedoms limited**
>
> 2 Restrictions on private rights and freedoms arising as a result of the exercise of any power under this Act shall be no greater than are reasonably required, considering all of the circumstances, to respond to a health hazard, notifiable disease or condition, communicable disease or public health emergency.

90. The Respondent argues that, in the alternative, the exceptions under s.6(f) of the *Human Rights Act* apply to this case.

91. The Respondent argues that its approach to s.20(1) of the *Food Safety Regulations* is based upon a "*bona fide* qualification" under s.6(f)(i) of the *Human Rights Act*. The Respondent states that in order for this exemption to apply, one would need to weigh the potential consequences to individual restaurants flowing from the remedy being requested.

92. The Respondent also argues that the exception in s.6(f)(ii) of the *Human Rights Act* is engaged because the remedy sought in the complaint would be inconsistent with the Province's legislated plans for addressing accessibility issues in the *Accessibility Act*, in which the Province has adopted a goal of achieving accessibility by 2030. The Respondent argues that the remedy sought in the complaint would take the one issue of accessible washrooms in restaurants, and using the food safety inspection process, require immediate change in the industry, at the risk of closing down businesses, and that this would be inconsistent with and ultimately damaging to the progressive realization of accessibility contemplated in the *Accessibility Act*.

93. The Respondent asserts that the Province's decision to address accessibility of the built environment, including restaurants, under the progressive realization process in the *Accessibility Act* is "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society" under s.6(f)(ii) of the *Human Rights Act*.

94. The Respondent argues that the exception in s.6(f)(ii) of the *Human Rights Act* indicates a need for a level of deference to government in developing a complex regulatory response to a social problem, relying on *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para.37.

Reply of the Complainants

95. In reply, the Complainants state that in the ten years since the Federal Court of Appeal decision in *Watkin, supra*, it has not been cited by a non-federal court or tribunal, that the decision is not binding on this Tribunal, that it can be distinguished, and that it is not good law.

96. The Complainants rely on *Johnson v. Halifax Regional Police Service*, 2003 CarswellNS 621, [2003] N.S.H.R.B.I.D. No.2, 48 C.H.R.R. D/307 for the argument that the discriminatory enforcement of regulations constitutes a "service" within the meaning of the *Human Rights Act*.

97. The Complainants point out that, unlike in *Watkin, supra*, this case does not involve a single decision or a series of discrete decisions about whether or not to enforce a particular law or take any particular enforcement action. Rather, we are dealing with a systemic practice that has a widespread discriminatory impact.

98. The Complainants also state that *Watkin, supra* is distinguishable because it did not deal with access to both services and facilities, as is the case here.

99. The Complainants take issue with the Respondent's interpretation of s.20(1) of the *Food Safety Regulations*. The Complainants rely on the decision of the Nova Scotia Court of Appeal in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2008 NSCA 21 for the proposition that human rights legislation is quasi-constitutional and therefore that the regulations must be administered in a manner that is non-discriminatory.

100. The Complainants also assert that the Respondent's interpretation ignores the words "for the public" in s.20(1) of the *Food Safety Regulations*. Relying on the Court's approach to statutory interpretation in *Heritage Capital Corp. v. Equitable Trust Co.*, [2016] 1 SCR 306, 2016 SCC 19, the Complainants assert that the words mean that a restaurant must have a washroom for the public for public health purposes.

101. The Complainants state that the Respondent has provided no evidence to support its reliance on the exceptions in s.6(f) of the *Human Rights Act.* The Complainants argue that the Respondent's discriminatory conduct is not a limit that is "demonstrably justified" or that is "minimally impairing" of the rights of individuals who use wheelchairs.

102. The Complainants assert that the remedy they seek will not necessarily lead to the revocation of permits. The Complainants state that whether or not enforcement of s.20(1) of the *Food Safety Regulations* will cause undue hardship to a food establishment will have to be determined on a case by case basis. The Complainants point out that the Respondent has the authority to grant exemptions from s.20(1), and to grant extensions of the time for compliance with s.20(1).

Position of the Restaurant Association of Nova Scotia

103. The Restaurant Association of Nova Scotia argues that the remedy sought by the Complainants would be catastrophic to the food and beverage sector in Nova Scotia because the impact to small and medium sized family owned restaurants would be immense. The Association argues that, with the low profit margins in this sector, the expenses involved in having washrooms that are accessible to wheelchair users could have major impacts such as business closures, loss of jobs, and loss of tax revenue.

Reply of Complainants to Restaurant Association

104. The Complainants reply to the concerns of the Restaurant Association by stating that the language used is hyperbolic, and that Mr. Vienneau gave examples of where minimal investment was required to provide an accessible washroom. The Complainants state further that the Province has already applied s.20(1) of the *Food Safety Regulations* in a manner that recognizes undue financial hardship.

Reply of Respondent to Restaurant Association

105. The Respondent states that the submissions of the Restaurant Association are relevant in assessing potential undue hardship. The Respondent also argues that it is not entirely clear what standard should be used to determine "accessible," and therefore that accessibility issues should be left to be determined under the *Building Code Regulations*, where actual standards are found.

Issues

106. The issues that need to be determined in this complaint are:

1. What does s.20(1) of the *Food Safety Regulations* mean?

2. Does the Respondent's interpretation and application of s.20(1) of the *Food Safety Regulations* constitute discrimination on the basis of physical disability within the meaning of s.4 of the *Human Rights Act*?

3. If there is discrimination on the basis of physical disability, is it in respect of the provision of or access to services or facilities within the meaning of s.5(1)(a) of the *Human Rights Act*?

4. If there is discrimination on the basis of physical disability in respect of the provision of or access to services or facilities, do either of the defences to discrimination in s.6(f)(i) or s.6(f)(ii) of the *Human Rights Act* apply?

5. If there is discrimination on the basis of physical disability in respect of the provision of or access to services or facilities, and if neither of the defences to discrimination in s.6(f)(i) or s.6(f)(ii) *Human Rights Act* apply, what is the appropriate remedy?

Decision

Meaning of s.20(1) of the Food Safety Regulations

107. Section 20 of the *Food Safety Regulations* provides in full as follows:

> **Washroom facilities**
>
> 20 (1) A food establishment must have washroom facilities for staff and washroom facilities for the public available in a convenient location, unless exempted by the Administrator.
>
> (2) A washroom facility must be constructed, equipped, and designed in accordance with the *Nova Scotia Building Code*.
>
> (3) If an inspector gives written approval, the same washroom facilities may be used for both staff and the public.

108. The leading cases on statutory interpretation are *Rizzo v. Rizzo Shoes, Ltd.*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII). In both cases, the Supreme Court of Canada quoted the following passage from *Driedger's Construction of Statutes* (2nd ed. 1983):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> *Rizzo, supra* at 21; *Bell, supra* at para.26

109. Furthermore, s.9(5) of the *Interpretation Act*, R.S.N.S. 1989, c.235 provides as follows:

> 9(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
> (b) the circumstances existing at the time it was passed;
> (c) the mischief to be remedied;
> (d) the object to be attained;
> (e) the former law, including other enactments upon the same or similar subjects;
> (f) the consequences of a particular interpretation; and
> (g) the history of legislation on the subject

110. Reading the words of s.20(1) of the *Food Safety Regulations* in their grammatical and ordinary sense is straightforward: the regulation requires, in part, a food establishment to have washroom facilities for the public available in a convenient location, unless exempted by the Administrator. There must be separate washroom facilities for staff and for the public, unless there is written approval given by an inspector under s.20(3) of the regulations.

111. The provisions of the *Health Protection Act* indicate that the purpose of the *Act*, and the *Food Safety Regulations* made under the *Act*, including s.20(1) of the regulations, is the protection of public health:

- The title of the act refers to health protection.

- Under ss.82(1) and 83(1)(d) of the *Act*, which fall under Part II – Food Safety of the *Act*, no person shall operate a food establishment without first having obtained a permit from the Administrator, and the Administrator shall not issue or renew a permit, or may suspend or revoke a permit, where he or she is of the opinion that ***the operation of the food establishment represents or would represent a risk to human health***.

- Under s.89 of the *Act*, a food establishment must be constructed and maintained in such a manner that ***no condition exists that is injurious to human health*** or that, in the opinion of the Administrator, ***is potentially injurious to human health***.

112. I have found, and the Respondent agrees, that hand-washing by customers in food establishments is an important measure for the protection of public health and the prevention of disease.

113. I do not accept the Respondent's interpretation of s.20(1) of the *Food Safety Regulations*, which is:

- that the requirement for washroom facilities for the public must be narrowly construed to require only that the location of the washroom for the public not pose a risk to food safety,
- that the regulation eliminates any assessment of whether washroom facilities are accessible to wheelchair users because accessibility is not a food safety issue, and
- that interpreting s.20(1) as requiring an assessment of washroom accessibility would be inconsistent with the scheme and purpose of the legislation, which is food safety.

114. There is nothing in the express terms of the *Health Protection Act* or the *Food Safety Regulations* that supports such a narrow interpretation of s.20(1) of the *Food Safety Regulations*.

115. I do not accept the Respondent's argument that s.2 of the *Health Protection Act* supports its very narrow interpretation and application of s.20(1) of the *Food Safety Regulations*. I find that s.2 of the *Act* concerns the "exercise of any power under this *Act*," such as the power to grant exemptions under s.20(1) of the *Regulations*, but not to the interpretation of substantive requirements of the *Act* or the *Regulations*, such as the requirement to have washroom facilities for the public in 20(1) of the *Regulations*. I find that this interpretation of s.2 of the Act is one that better achieves the broad purpose of the *Act*, which is the protection of public health, than the interpretation offered by the Respondent.

116. An interpretation of s.20(1) of the *Food Safety Regulations* that better ensures the attainment of the purpose of public health protection is an interpretation that assumes that the provision of washroom facilities for the public has a public health protection benefit, and an interpretation that allows a consideration as to whether wheelchair users can, in fact, access and use a public washroom in a food establishment and therefore whether those individuals can access the public health protection benefit of s.20(1).

117. Subsection 20(1) of the *Food Safety Regulations* does explicitly address wheelchair accessibility of washrooms. However, it certainly does not preclude a consideration of the wheelchair accessibility of washrooms, particularly if such a consideration furthers the purpose of public health protection, which I find that it does.

Discrimination under s.4 of the Human Rights Act

118. The next question is whether the Respondent's interpretation and application of s.20(1) of the *Food Safety Regulations* constitutes *prima facie* discrimination under s.4 of the *Human Rights Act*.

119. For ease of reference, s.4 of the *Human Rights Act* provides as follows:

> 4. For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

120. The Respondent interprets and applies s.20(1) of the *Food Safety Regulations* as requiring food establishments to have washroom facilities for the public, but not requiring them to have washroom facilities that are accessible to members of the public who use wheelchairs for mobility. What this means in practice is that the Respondent issues permits to food establishments allowing them to operate without washroom facilities that can be used by members of the public who use wheelchairs. The Respondent's interpretation and application of s.20(1) of the *Food Safety Regulations*, which includes the issuing of permits, makes a distinction based on physical disability that has the effect of imposing burdens or disadvantages on individuals based on their physical disability.

121. The Respondent's interpretation and application of s.20(1) of the *Food Safety Regulations*, including the issuing of permits to food establishments, in a manner that requires food establishments to have washroom facilities for the public but not for members of the public who use wheelchairs, meets the definition of discrimination in s.4 of the *Human Rights Act*.

Provision of or access to services or facilities under s.5(1)(a) of the Human Rights Act

122. The next question is whether the discrimination described above is in respect of "the provision of or access to services or facilities" under s.5(1)(a) of the *Human Rights Act*.

123. For ease of reference, s.5(1) provides as follows:

Prohibition of discrimination

5 (1) ***No person shall in respect of***

(a) ***the provision of or access to services or facilities***;

(b) accommodation;

(c) the purchase or sale of property;

(d) employment;

(e) volunteer public service;

(f) a publication, broadcast or advertisement;

(g) membership in a professional association, business or trade association, employers' organization or employees' organization,

discriminate against an individual or class of individuals on account of

...

(o) ***physical disability or mental disability***

...

[Emphasis added]

124. The Respondent interprets and applies s.20(1) of the *Food Safety Regulations* as requiring a food establishment to have washroom facilities for the public available in a convenient location, but not requiring those washroom facilities to be accessible to individuals who use wheelchairs for mobility. What this means in a practical sense is that the Respondent uses this interpretation:

- in the conversations that take place between inspectors and operators during inspections, whether they be pre-inspections, routine inspections, re-inspections, ad hoc inspections and consultation inspections;
- in deciding whether to issue permits or to renew permits;
- in decisions about whether to provide food establishments with extensions of time to come into compliance, and if so, how much time will be provided;
- in deciding whether to grant exemptions;
- in deciding whether to issue warnings; and

- in deciding whether to suspend or revoke a permit.

125. I will refer to these activities as "the Respondent's administration and enforcement of the *Food Safety Regulations*."

126. The Respondent asserts that the conduct being complained of is "enforcement" and that the enforcement activities of government are not "services" within the meaning of human rights legislation. The Respondent also argues that, even if the impugned activities of government are a "service," they are a service provided to food establishments and not to the Complainants, and therefore do not fall within s.5(1)(a) of the *Human Rights Act*.

127. A reading of the words of s.5(1)(a), in the context of the *Human Rights Act* as a whole, and in light of the *Act*'s purpose, leads me to conclude that the Respondent's administration and enforcement of the *Food Safety Regulations* are in respect of the provision of or access to services within the meaning of the *Act*.

128. First, there are no words in s.4, s.5(1)(a) or any other section of the *Human Rights Act* that suggest that "services" exclude activities such as the Respondent's administration and enforcement of the *Food Safety Regulations*.

129. In fact, the wording of s.4 is very broad, applying to a "distinction":

> ... that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society

130. Furthermore, there are no words in s.5(1)(a) that restrict the phrase "in respect of the provision of or access to services."

131. I find that the ordinary meaning of "services" in s.5(1)(a) of the *Human Rights Act* includes the activities of the Respondent here. The Respondent provides inspection, licensing, compliance and enforcement services to food establishments, and public health protection services to the public when it administers and enforces the *Food Safety Regulations*.

132. Second, the purpose section of the *Human Rights Act* is broad and specifically recognizes that government and all public agencies have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life:

> **Purpose of Act**
>
> 2 The purpose of this Act is to

(a) recognize the inherent dignity and the equal and inalienable rights of all members of the human family;

(b) proclaim a common standard for the achievement of basic human rights by all Nova Scotians;

(c) recognize that human rights must be protected by the rule of law;

(d) affirm the principle that every person is free and equal in dignity and rights;

(e) ***recognize that the government, all public agencies*** and all persons in the Province ***have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons***; and

(f) extend the statute law relating to human rights and provide for its effective administration.

[emphasis added]

133. An interpretation of "services" in s.5(1)(a) as encompassing the Respondent's administration and enforcement of the *Food Safety Regulations*, all for the purpose of protecting the health of the public, better achieves the purposes in s.2 of the *Human Rights Act*, especially the purpose in s.2(e) of the *Act*, than the interpretation advanced by the Respondent.

134. Third, the context of the *Human Rights Act* suggests that "services" should include the Respondent's administration and enforcement of the *Food Safety Regulations*.

135. Section 21 of the *Human Rights Act* states that the *Act* is binding on the Province.

136. Subsection 10(1) of the *Human Rights Act* provides that regulations that are discriminatory on their face are void and of no legal effect:

Void

10 (1) Where, in a regulation made pursuant to an enactment, there is a reference to a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5 that appears to restrict the rights or privileges of an individual or class of individuals to whom the reference applies, the reference and all parts of the regulation dependent on the reference are void and of no legal effect.

137. If s.20(1) of the *Food Safety Regulations* were amended to state that food establishments need not have a washroom that is accessible to wheelchair users, it would have the same effect as the practice of the Province being challenged in this case, and would run afoul of s.10(1) of the *Human Rights Act*.

138. If the Respondent published material for the benefit of food establishments that set out its position that food establishments need not have a washroom that is accessible to wheelchair users under s.20(1) of the *Food Safety Regulations*, it would simply reflect the actual practice of the Respondent at issue in this case, and such a publication would run afoul of s.5(1)(f) and (o) of the *Human Rights Act*.

139. Reading "services" in s.5(1)(a) of the *Human Rights Act* harmoniously with other provisions of the *Act* therefore supports an interpretation of "services" that includes the Respondent's administration and enforcement of s.20(1) of the *Food Safety Regulations*.

140. I do not accept the Respondent's argument that, because other spheres of activity listed in s.5(1) of the *Human Rights Act* are transactional, "services" must be interpreted as only concerning transactional activities between a service provider and the receiver of that service. Subsection 5(1) includes in subsection (f) "a publication, broadcast or advertisement," which are not transactional activities.

141. I find support for an interpretation of "services" as including the Respondent's administration and enforcement of the *Food Safety Regulations* in the decision of the Nova Scotia Court of Appeal in *The Workers' Compensation Board of Nova Scotia v. O'Quinn*, 1995 CanLII 4179, in which the Court dismissed the argument of the Workers' Compensation Board that workers' compensation benefits were not "services" within the meaning of s.5(1)(a) of the *Human Rights Act*.

142. In reaching its decision in *O'Quinn*, *supra*, the Nova Scotia Court of Appeal relied on:

> 1. A broad, liberal and purposive approach to the interpretation of human rights legislation.
>
> 2. The fact that the word "services" in the Nova Scotia *Human Rights Act* is not limited by any phrase similar to the phrase "generally available to the public," as it is in human rights legislation in other provinces.
>
> 3. The fact that the scope of the word "services" was broadened by amendments made by the Nova Scotia legislature to the *Human Rights Act* in 1991 that deleted the limiting phrases "customarily provided members of the public" and "to which members of the public have access."
>
> 4. The broad social goals included in s.2 of the *Human Rights Act*, which had been in the preamble to the previous legislation and then became embodied in

the amended legislation as its stated purpose, in particular s.2(e) which recognizes the responsibility that the government, all public agencies and all persons in the province have to ensure equal opportunity for all individuals.

143. In *O'Quinn*, the Nova Scotia Court of Appeal adopted the approach to the interpretation of human rights legislation articulated by the Supreme Court of Canada in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, per Lamer C.J.:

> In addressing the issue of the interpretation of the British Columbia *Human Rights Act*, Lamer C.J. made reference to the recent decision of the Supreme Court, which set out quite a different approach to interpretation than the approach that was used in *Jenkins*. He said at p.370:
>
> > "In my reasons in *Heerspink*, I commented on the unique nature of human rights legislation (at pp.157-58):
> >
> > > When the subject matter of a law is said to be the comprehensive statement of the 'human rights' of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others.
> >
> > Following *Heerspink*, this Court has had many occasions to comment on the privileged status of human rights legislation. In *Ontario Human Rights Commission v. Simpson-Sears Ltd., supra*, McIntyre J. observed (at p.547) that '[l]egislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary – and it is for the courts to seek out its purpose and give it effect.' This Court has repeatedly stressed that a broad, liberal and purposive approach is appropriate to human rights legislation, and that such legislation, according to La Forest J. in *Robichaud*, at p.89, 'must be so interpreted as to advance the broad policy considerations underlying it.'"

144. In *Nova Scotia v. Hodder*, 1998 CanLII 5962, the Nova Scotia Court of Appeal relied on the Court's reasons in *O'Quinn* to hold that the administration by the Province of Nova Scotia of pension and other benefits falls within the meaning of "the provision of services" under s.5(1)(a) of the *Human Rights Act*.

145. The decision of Edwards J. in *Reed, supra*, which allowed the Complainants' application for judicial review of the Human Rights Officers' decision not to accept their complaint, also supports a finding that the Respondent's discriminatory administration and enforcement of

s.20(1) of the *Food Safety Regulations* falls within the purview of the *Human Rights Act*. Edwards J. found that the complaint fell squarely within the mandate of the Human Rights Commission in s.2(e) of the *Human Rights Act*: *Reed, supra* at para.12. Edwards J. also held that "[t]he *Human Rights Act* trumps the Ombudsman, the *Building Code of Canada*, and the other affected departments of government": *Reed, supra* at praa.14.

146. An interpretation of "services" that encompasses the Respondent's administration and enforcement of s.20(1) of the *Food Safety Regulations* also better achieves the purpose of human rights legislation to address the effects of systemic discrimination: see *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3, 1999 CanLII 652 ("*Meiorin*") at para.42.

147. McLachlin J., as she then was, writing for the Supreme Court of Canada in *Meiorin, supra*, articulated a revised approach to what an employer must show to justify a *prima facie* case of discrimination, given the difficulties with the conventional approach. Under the conventional approach, if an employer could not justify a directly discriminatory standard as a *bona fide* occupational requirement ("BFOR"), the standard would be struck down in its entirety. However, if the standard was found to be a neutral one that adversely affected a certain individual, the employer would have to accommodate the individual claimant to the point of undue hardship, but the discriminatory standard would remain intact: *Meiorin, supra,* at para.30.

148. In explaining the Court's decision to articulate a new approach, McLachlin J. relied in part on the conclusion that the conventional analysis served to legitimize systemic discrimination, or "discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, no one of which is necessarily designed to promote discrimination": *Meiorin, supra* at para.39, quoting from *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114, at p.1139.

149. McLachlin J. explained how the conventional analysis might serve to legitimize systemic discrimination as follows:

> 40 Under the conventional analysis, if a standard is classified as being "neutral" at the threshold stage of the inquiry, its legitimacy is never questioned. The focus shifts to whether the individual claimant can be accommodated, and the formal standard itself always remains intact. The conventional analysis thus shifts attention away from the substantive norms underlying the standard, to how "different" individuals can fit into the "mainstream", represented by the standard.
>
> *Meiorin, supra* at para.40

150. McLachlin J. wrote that the conventional analysis applicable to adverse effects discrimination "bars the court from assessing the legitimacy of the standard itself": *Meiorin, supra,* at para.41. McLachlin J. relied on the following passage from the article by Shelagh Day and Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996), 75 *Can. Bar Rev.* 433, where the authors discuss the conventional approach to neutral standards and the duty to accommodate those who are adversely affected by them:

> 41 ...
>
> The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourse of dominance, such as racism, ablebodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated."
>
> Accommodation, conceived this way, appears to be rooted in the formal model of equality. ... Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply "accommodate" those who do not quite fit. We make some concessions to those who are "different" rather than abandoning the idea of "normal" and working for genuine inclusiveness.
>
> ...
>
> *Meiorin, supra,* at para.41

151. McLachlin J. explained how the conventional analysis shielded systemic discrimination from scrutiny in the case before the Court:

> 42 ... Although the Government may have a duty to accommodate an individual claimant, the practical result of the conventional analysis is that the complex web of seemingly neutral, systemic barriers to traditional male-dominated occupations remains beyond the direct reach of the law. The right to be free from discrimination is reduced to a question of whether the "mainstream" can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the

edifice of systemic discrimination receives the law's approval. This cannot be right.

Meiorin, supra, at para.42

152. McLachlin J. stated that "the conventional analysis may compromise both the broad purposes and the specific terms of the Code": *Meiorin, supra,* at para.43. She then set out the relevant purposes from the British Columbia *Human Rights Code*:

> 44 In British Columbia, the relevant purposes are stated in s.3 of the Code:
>
> 3 ...
>
> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
>
> (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
>
> (c) to prevent discrimination prohibited by this Code;
>
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
>
> (e) to provide a means of redress for those persons who are discriminated against contrary to this Code. ...

Meiorin, supra, at para.44

153. In light of the explicit purposes of the Code, and the principle that human rights statutes ought to be interpreted liberally so that they may better fulfill their objectives, McLachlin J. held that the conventional approach did not allow these statutes to accomplish their objectives as well as they might otherwise do:

> 44 ...
>
> This Court has held that, because of their status as "fundamental law", human rights statutes must be interpreted liberally, so that they may better fulfill their objectives: *O'Malley, supra*, at p.547, *per* McIntyre J.; *Action Travail, supra*, at pp.1134-36, *per* Dickson C.J.; *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 S.C.R. 84, at pp.89-90, *per* La Forest J. An interpretation that allows the rule itself to be questioned only if the discrimination can be characterized as "direct"

> does not allow these statutes to accomplish their purposes as well as they might otherwise do.
>
> *Meiorin, supra,* at praa.44

154. Returning to the wording of the human rights legislation before her, McLachlin J. concluded that, "[s]tated simply, there is no statutory imperative in this case to perpetuate different categories of discrimination and provide different remedies for their respective breaches": *Meiorin, supra,* at para.46.

155. While *Meiorin, supra* dealt with an employer's justification for discrimination rather than on the meaning of "services," the Court's reasoning, with its focus on the importance of addressing systemic discrimination, is helpful in determining the meaning of "services" in the Nova Scotia *Human Rights Act*.

156. An interpretation of "services" in s.5(1)(a) of the *Human Rights Act* that captures only the direct transaction between a service provider and the receiver of that service (in this case, as capturing only the direct relationship between food establishments and customers) might "serve to legitimize systemic discrimination", in the words of McLachlin J. in *Meiorin, supra* at para.39, by failing to take into account the fact that there are numerous structures, systems and practices in society that all work together to create barriers to the full participation in society by individuals who use wheelchairs for mobility. In the context of this case, these structures, systems and practices would include not only the failure of individual food establishments to provide washroom facilities that are accessible to wheelchair users, but also the regulatory regime that the Respondent administers in a way that condones such practices.

157. If, as the Respondent submits, "services" in s.5(1)(a) of the *Human Rights Act* only captures the direct relationship between the food establishment and the Complainants, and not the service provided to the public by the Respondent in its administration of the *Food Safety Regulations*, the legitimacy of the Respondent's discriminatory administration of that regime is not questioned. The focus shifts to whether an individual complainant can be accommodated by a particular food establishment, and the Respondent's practice remains intact.

158. Borrowing from the words of McLachlin J. in *Meiorin, supra*, although individual food establishments may have a duty to accommodate an individual complainant, the practical result of the Respondent's approach would be that part of the complex web of seemingly neutral, systemic barriers to wheelchair users remains beyond the direct reach of the law.

159. It is significant that the purposes of the Nova Scotia *Human Rights Code* go beyond those at issue in *Meiorin*, *supra*, by explicitly recognizing that the Nova Scotia government, the Respondent in this case, has "the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life."

160. A narrow interpretation of "services," to exclude the services of the Respondent in administering and enforcing the food safety regime for the benefit of the public's health, would compromise both the broad purposes and the specific terms of the Nova Scotia *Human Rights Act*.

161. Furthermore, there is no "statutory imperative" in the Nova Scotia *Human Rights Act* that would restrict the meaning of services in the manner suggested by the Respondent.

162. Moreover, the Respondent's narrow interpretation of "services" also seems to result in absurdity. If, for example, food establishments had washroom facilities for the public but prohibited members of certain racialized groups from using those washrooms, and if that practice was well-known to the Respondent and yet the Respondent continued to issue or renew permits for those food establishments, the Respondent maintains that its conduct would not fall within the purview of the *Human Rights Act* and that if members of the public wished to address the Respondent's conduct directly, as opposed to the conduct of the food establishments, they would have to launch a *Charter* challenge against the government. This cannot be right, given the broad purpose of the *Human Rights Act*, the wording and context of the *Act* as a whole, and the legislative history of s.5(1)(a) of the *Act*.

163. I have very carefully considered the decision of the Federal Court of Appeal in *Watkin v. Canada (Attorney General)*, 2008 FCA 170, upon which the Respondent relies for the proposition that the Respondent's conduct constitutes "enforcement activities," and that enforcement activities do not fit the meaning of "services" in human rights legislation. I find that the decision in *Watkin, supra*, is not applicable to this complaint or to the Nova Scotia *Human Rights Act*.

164. The word "services" in the *Canadian Human Rights Act*, the statute at issue in *Watkin, supra*, is modified and limited by the phrase "customarily available to the general public," a limiting phrase not found in the Nova Scotia legislation, a fact that the Nova Scotia Court of Appeal considered to be significant in *O'Quinn, supra*:

> 5. It is a discriminatory practice in the provision of goods, ***services***, facilities or accommodation ***customarily available to the general public***
>
> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual ...
>
> ...
>
> *Watkin, supra* at para.20

165. This difference in wording was significant to the decision of the Federal Court of Appeal that the enforcement activities of Health Canada at issue in *Watkin, supra* did not fall within the jurisdiction of the *Canadian Human Rights Act*:

> 22 In my view, Health Canada, when enforcing the *Food and Drugs Act* in the manner complained of is not providing "services, ... ***customarily available to the general public***" within the meaning of section 5. The actions in question are coercive measures intended to ensure compliance. The fact that these measures are undertaken in the public interest does not make them "services".
>
> ...
>
> 31 ... I agree that because government actions are generally taken for the benefit of the public, the "***customarily available to the general public***" requirement in section 5 will usually be present in cases involving discrimination arising from government actions (see for example *Rosin, supra* at para.11, and *Saskatchewan Human Rights Commission v. Saskatchewan (Department of Social Services)*, (1988), 52 D.L.R. (4th) 253 at 266-268. However, the first step to be performed in applying section 5 is determine whether the actions complained of are "services" (see *Gould, supra* per La Forest J., para.60). In this respect, "services" within the meaning of section 5 contemplate something of benefit being "held out" as services and "offered" to the public (*Gould, supra*, per La Forest J., para.55). Enforcement actions are not "held out" or "offered" to the public in any sense and are not the result of a process which takes place "in the context of a public relationship" (*Idem*, per Iacobucci J., para.16). I therefore conclude that the enforcement actions in issue in this case are not "services" within the meaning of section 5.
>
> *Ibid*. at paras.22 and 31 [emphasis added]

166. The decision in *Watkin, supra*, is also distinguishable on the facts. The "coercive measures" of Health Canada in that case were very different from the broad range of activities undertaken by the Respondent in this case. *Watkin, supra* involved discrete actions of Health Canada vis-à-vis one corporation, specifically a request to cease and desist advertising a certain product, a request to recall and cease the sale of the product, and a seizure of a quantity of the product. As the Complainants point out, unlike *Watkin, supra*, this case involves a systemic practice of the Respondent affecting all food establishments at every stage of the compliance spectrum.

167. The Federal Court of Canada in *Watkin, supra*, found support for its decision about the meaning of "services" in the *Canadian Human Rights Act* in the decision of the Supreme Court of Canada in *Gould v. Yukon Order of Pioneers*, [1996] 1 SCR 571. In *Gould, supra*, the Court concluded that the exclusion of the female appellant from membership in the Yukon Order of Pioneers based on sex did not fall within the meaning of "services" in the Yukon *Human Rights Act*. However, significant to the decision of the majority in *Gould, supra*, written by Iacobucci J., and to the concurring judgment of La Forest J., was the limiting phrase "when offering or

providing services, goods or facilities to the public" in s.8(a) of the Yukon *Human Rights Act*: *Gould, supra*, *per* Iacobucci J. at paras.16-17; *per* La Forest J. at paras.20 and 51-55.

168. La Forest J., in his concurring judgment in *Gould, supra*, observed that human rights legislation across Canada contained a phrase limiting the word "services," and in doing so, suggested that s.4 of the Nova Scotia *Human Rights Act* was similar in that it employed a definition of discrimination stated in terms of the denial of "opportunities, benefits and advantages available to other individuals or classes of individuals in society": *Gould, supra* at para.53. However, I do not find this statement to be helpful or applicable to the interpretation of "services" in this case. First, the statement was not necessary to Iacobucci J.'s judgment. Second, he did not refer to the entire definition of discrimination in s.4, which is much broader than the wording relied on in his judgment. Third, the Nova Scotia Court of Appeal decision in *O'Quinn, supra* focused specifically on the wording of s.5(1)(a) of the Nova Scotia *Human Rights Act*, noted the lack of language limiting "services" and relied on the fact that the legislature amended the legislation to remove the limiting language previously in the *Act* to distinguish the Nova Scotia *Act* from other human rights legislation in Canada.

169. Finally, I find that the decision of the Supreme Court of Canada in *Canada (Canadian Human Rights Commission), supra*, relied on by the Respondent, does not apply to this case. In *Canada (Canadian Human Rights Commission), supra*, the complaints were a direct attack on the *Indian Act*: at para.3, per Gascon J. for the majority. The complainants in that case needed to demonstrate that the legislative provisions fell within the statutory meaning of a "service": *ibid*. The Canadian Human Rights Tribunals concluded that legislation was not a service under the *Canadian Human Rights Act* and dismissed the complaints: *ibid*. On judicial review, both the Federal Court and the Federal Court of Appeal found the Tribunal decisions to be reasonable. The appeals to the Supreme Court of Canada were dismissed. The Complainants in this case are not attacking s.20(1) of the *Food Safety Regulations*. They are challenging the government's administration and application of that regulation, and in particular, the government's failure to enforce that section in respect of members of the public who use wheelchairs for mobility.

170. I conclude that the Respondent's administration and enforcement of the *Food Safety Regulations* is in respect of "the provision of or access to services" in s.5(1)(a) of the Nova Scotia *Human Rights Act*, and that therefore the Respondent discriminated against individuals who use wheelchairs for mobility in its administration and enforcement of s.20(1) of the *Food Safety Regulations* contrary to ss.5(1)(a) and (o) of the *Human Rights Act*.

171. Given this conclusion, I do not find it necessary to determine whether the activities of the Respondent also fall within the meaning of "the provision of or access to facilities" in s.5(1)(a) of the Nova Scotia *Human Rights Act*, or whether s.15(1) of the *Charter* supports the position of the Complainants in this case.

Defences: BFOQ or Reasonable Limit Prescribed by Law

172. The Respondent asserts that, in the event that I find that it has discriminated on the basis of physical disability in the provision of or access to services in violation s.5(1)(a) and (o) of the *Human Rights Act*, the discrimination is permitted under s.6(f)(i) of the *Act* as a *bona fide* qualification or under s.6(f)((ii) of the *Act* as "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society."

173. I do not find that either of these exceptions apply in this case.

174. The *Meiorin* test applies to all claims of discrimination under human rights legislation, and all those governed by such legislation "are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them": *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) ("Grismer")*, [1999] 3 S.C.R. 868, 1999 CanLII 646 (SCC) at para.19 [emphasis in original].

175. McLachlin J., writing for the Court in *Grismer*, explained the *Meiorin* test as follows:

> 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;
>
> (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.
>
> *Grismer, supra* at para.20

176. The Respondent does not interpret s.20(1) of the *Food Safety Regulations* as requiring food establishments to have washroom facilities that are accessible and therefore usable by members of the public who use wheelchairs because the Respondent interprets its mandate as being focused on food safety, and it considers hand washing by members of the public and washroom accessibility issues as not relating to food safety. Thus, the Respondent adopted it approach to s.20(1) of the *Food Safety Regulations* – the standard at issue in this case – for the purpose of focusing solely on food safety. This purpose is rationally connected to the function

being performed by the Respondent, which is the administration and enforcement of the *Food Safety Regulations*.

177. I find that the Respondent adopted the standard (its administration and enforcement of s.20(1) of the *Food Safety Regulations*) in good faith, in the belief that it was necessary for the fulfillment of the goal of focusing on food safety.

178. I find that the Respondent fails the third branch of the *Meiorin* test.

179. McLachlin J., in the context of a claim of discrimination by an employee against an employer in *Meiorin*, *supra*, explained that the third branch of the test requires a respondent to build conceptions of equality into the standard by considering, within the standard, "reasonable alternatives" and "various ways" to accommodate individuals that are "less discriminatory," without causing undue hardship:

> 55 This approach is premised on the need to develop ***standards that accommodate the potential contributions of all employees in so far as this can be done without undue hardship*** to the employer. Standards may adversely affect members of a particular group, to be sure. But as Wilson J. noted in *Central Alberta Dairy Pool, supra* at p. 518: "[***i]f a reasonable alternative exists*** to burdening members of a group with a given rule, that rule will not be [a BFOR]". It follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the *prima facie* case of discrimination stands.
>
> ...
>
> 64 Courts and tribunals should be sensitive to ***the various ways in which individual capabilities may be accommodated***. Apart from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be ***different ways*** to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases. The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances.
>
> 65 Some of the important questions that may be asked in the course of this analysis include:

(a) Has the employer investigated ***alternative approaches*** that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

(b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

(c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards be reflective of group or individual differences and capabilities be established?

(d) Is there a way to do the job that is ***less discriminatory*** while still accomplishing the employer's legitimate purpose?

(e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

(f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? ...

...

68 Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They ***must build conceptions of equality*** into workplace standards. By enacting human rights statutes and providing that they are applicable in the workplace, the legislatures have determined that ***the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible***. Courts and tribunals must bear this in mind when confronted with a claim of employment-related discrimination. To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. ***The standard itself is required to provide for individual accommodation, if reasonably possible***. A standard that allows for such accommodation may be only slightly different from the existing standard but it is a different standard nonetheless.

...

Meiorin, supra at paras.55, 64-65 and 68 [emphasis added]

180. In *Grismer, supra,* the Superintendent of Motor Vehicles was found to have discriminated on the basis of disability in the provision of services when he cancelled Mr. Grismer's driver's license because of a medical condition affecting Mr. Grismer's vision. The Court found that the Superintendent of Motor Vehicles failed the third branch of the *Meiorin* test.

181. The standard at issue in *Grismer, supra* was "an absolute denial of a driver's license" to people with Mr. Grismer's condition: *Grismer, supra* at para.32. McLachlin J., writing for the Court, held that the Superintendent bore the burden of demonstrating that the standard incorporated every possible accommodation to the point of undue hardship, and that the Superintendent could have done this in two ways:

> 32 Against this backdrop, I come to the question of whether the Superintendent met the burden of showing that the standard he applied to people with H.H. – an absolute denial of a driver's license – was reasonably necessary to achieve the goal of moderate highway safety. In order to prove that its standard is "reasonably necessary", the defendant always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost. In this case, there are at least two ways in which the Superintendent could show that a standard that permits no accommodation is reasonably necessary. First, he could show that no one with the particular disability could ever meet the desired objective of reasonable highway safety. For example, using current technology, someone who is totally blind cannot safely operate a motor vehicle on the highway. Since accommodation of such a person is impossible, it need not be further considered. Alternatively, if the Superintendent could not show that accommodation is totally inconsistent with his goal, he could show that accommodation is unreasonable because testing for exceptional individuals who can drive safely despite their disability is impossible short of undue hardship.
>
> *Grismer, supra* at para.32

182. The Superintendent failed to prove on a balance of probabilities that no one with Mr. Grismer's condition could drive with a reasonable level of safety and that, alternatively, individual assessment was not feasible because it would have been impossible short of undue hardship: *Grismer, supra* at paras.34-41.

183. McLachlin J. criticized the Superintendent's failure to consider any of the options that might have made an assessment of Mr. Grismer's driving abilities viable and affordable:

> 42 In summary, the Superintendent offered ***no evidence that he had considered any of the options*** that might have made an assessment of Mr. Grismer's driving abilities viable and affordable. Content to rely on the general

> opinion of the medical community, and ignoring the evidence that some people with H.H. can and do drive safely, ***he offered not so much as a gesture in the direction of accommodation. His position, quite simply, was that no accommodation was necessary***. Under the *Meiorin* test, ***it was incumbent on the Superintendent to show that he had considered and reasonably rejected all viable forms of accommodation***. The onus was on the Superintendent, having adopted a *prima facie* discriminatory standard, to prove incorporating aspects of individual accommodation with the standard was impossible short of undue hardship. The Superintendent did not do so. On the facts of this case, the Superintendent's blanket refusal to issue a driver's license was not justified. ...
>
> *Grismer, supra* at para.42

184. McLachlin J. concluded by clarifying that the Court's decision established Mr. Grismer's right to be assessed, not his right to a driver's license, and that "those who provide services subject to the *Human Rights Code* must adopt standards that accommodate people with disabilities where this can be done without sacrificing their legitimate objectives and without incurring undue hardship":

> 44 This case deals with no more than the right to be accommodated. It does not decide that Mr. Grismer had the right to a driver's license. It merely establishes that he had a right to be assessed. That was all the Member found and all that we assert. The discrimination here lies not in the refusal to give Mr. Grismer a driver's license, but in the refusal to even permit him to attempt to demonstrate that his situation could be accommodated without jeopardizing the Superintendent's goal of reasonable road safety. This decision stands for the proposition that those who provide services subject to the *Human Rights Code* must adopt standards that accommodate people with disabilities where this can be done without sacrificing their legitimate objectives and without incurring undue hardship. It does not suggest that agencies like the Motor Vehicle Branch must lower their safety standards or engage in accommodation efforts that amount to undue hardship.

185. In this case, the Respondent's approach to s.20(1) of the *Food Safety Regulations* is not reasonably necessary to accomplish its purpose or goal because it has failed to establish that it cannot accommodate persons with the characteristics of the Complainants without incurring undue hardship.

186. The Respondent did not offer any evidence, or even make the argument, that it would experience any hardship itself if it administered and enforced s.20(1) of the *Food Safety Regulations* as requiring food establishments to have washroom facilities that are accessible to members of the public who use wheelchairs for mobility.

187. The Respondent asserted that individual food establishments would suffer undue hardship if it were to apply s.20(1) of the *Food Safety Regulations* as requiring food establishments to have washrooms that are wheelchair accessible, because this would lead to the revocation of permits and the ultimate closure of food establishments because of the cost involved in providing accessible washroom.

188. Assuming, without deciding, that the Respondent may rely on hardship caused to third parties, in this case food establishments, to justify its discriminatory administration and enforcement of s.20(1) of the *Food Safety Regulations*, the Respondent offered no evidence that it considered every reasonable alternative to burdening wheelchair users or the various ways in which it could apply s.20(1) in a manner that is less discriminatory to wheelchair users, without causing undue hardship to food establishments.

189. Similar to the case in *Grismer, supra*, the Respondent could have discharged the burden on it under the third branch of the *Meiorin* test in two ways. First, the Respondent could have demonstrated that no food establishment that is grandfathered under the *Building Code Regulations* could ever provide a washroom available to the public that is accessible to wheelchair users because in every case it would cause undue financial hardship to the establishment and threaten its ongoing operation. Alternatively, the Respondent could have demonstrated that a case-by-case assessment of undue financial hardship on food establishments would cause a food establishments undue hardship.

190. Neither the Respondent nor the Restaurant Association asserted or called evidence to establish that no food establishment grandfathered under the *Building Code Regulations* could ever provide a washroom available to the public that is accessible to wheelchair users because in every case it would cause undue financial hardship to the establishment and threaten its ongoing operation. Mr. Vienneau provided an example of the fairly minor renovations that would need to take place at one restaurant to provide a wheelchair accessible washroom.

191. The Respondent has also failed to show that if it undertook a case-by-case assessment of whether providing an accessible washroom would cause a food establishment undue financial burden, that this would cause food establishments undue hardship. An obvious reasonable alternative to the Respondent's standard would have been for the Respondent to apply the requirement in s.20(1) of the *Food Safety Regulations* to have washrooms for the public as requiring washroom that are accessible to members of the public who use wheelchairs, and allow food establishments to apply for extensions of time to come into compliance with the regulation or exemptions from the regulation by demonstrating that compliance would cause them undue financial hardship and/or render the continued operation of the food establishment unviable. These tools are available to the Respondent and have been used by the Respondent to grant exemptions from s.20(1) of the *Food Safety Regulations* or extensions of time to comply with the regulation, including on the basis of financial hardship.

192. Some food establishments may be able to provide accessible washrooms for the public. Some may not be able to do so without experiencing undue financial hardship. Some may need time to comply. This does not justify the Respondent's approach, which is that no accommodation is necessary. Under the *Meiorin* test, which applies to the defences to discrimination in both ss.6(f)(i) and (ii) of the *Human Rights Act*, it was incumbent on the Respondent to show that it had considered and reasonably rejected all viable forms of accommodation. The Respondent did not do so.

193. Although I do not find it necessary to do so, I will address the Respondent's assertion that its approach to s.20(1) of the *Food Safety Regulations* is a "reasonable limit prescribed by law" because the Respondent's decision to address accessibility of the built environment, including restaurants, under the progressive realization process in the *Accessibility Act*. The conduct or activity at issue in this case is the Respondent's practice in administering and enforcing s.20(1) of the *Food Safety Regulations*. The Respondent' practice is not "prescribed by law." It is not required by s.20(1). In fact, I find that the Respondent's practice is inconsistent with s.20(1) and the regulations and the *Health Services Act* as a whole. Furthermore, there is no evidence that the Respondent's approach to the *Food Safety Regulations* was in any way related to or because of the progressive realization approach taken in the *Accessibility Act*. The *Food Safety Regulations* came into force in 2004, and the Respondent's approach dates back at least to that time. The *Accessibility Act* came into force in 2017.

194. On the facts of this case, the Respondent's blanket refusal to administer and enforce s.20(1) of the *Food Safety Regulations* in a way that does not require food establishments to have washrooms that are accessible to members of the public who use wheelchairs for mobility is not justified under s.6(f)(i) or (ii) of the *Human Rights Act*.

Remedy

195. The Complainants, in addition to seeking an order requiring the Respondent to enforce s.20(1) of the *Food Safety Regulations* in a non-discriminatory manner, seek nominal damages to be used for the purpose of accessible washrooms to protect public health. The Complainants did not specify the amount of damages, or explain how such damages could be put toward the purpose of accessible washrooms to protect public health.

196. Given my finding that the Complainants experienced discrimination, I find that they are entitled to some amount of damages. The Board of Inquiry in *Trask v. Department of Justice (Correctional Services)*, 2010 NSHRC 1 (CanLII) at paras.197-203 reviewed a number of Nova Scotia Human Rights Board of Inquiry cases involving disabled employees who were terminated from their employment. The general damage awards in those cases ranged from a low of $1,000 (in a 2004 decision) to a high of $10,000 (in a 2007 decision). Consistent with the request of the Complainants for an amount of damages that is "nominal," but yet recognizes the discrimination experience by them, I consider it appropriate to award each of them an amount of $1,000. I leave it up to the Complainants to decide how they wish to use the money.

197. For the reasons given above, I order the following remedies:

1. An order that the Respondent interpret, administer and enforce the words "washroom facilities for the public available in a convenient location" in s.20(1) of the *Food Safety Regulations* as requiring those washroom facilities to be accessible to members of the public who use wheelchairs;
2. An order that the Respondent pay to each Complainant an amount of $1,000 in damages.

Dated at Halifax, Nova Scotia, this 6th day of September, 2018.

Gail L. Gatchalian, Q.C.
Board of Inquiry Chair