

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS
DE LA PERSONNE

2010 CHRT 4 (CanLII)

JAMES PETER HUGHES

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ELECTIONS CANADA

Respondent

- and -

COUNCIL OF CANADIANS WITH DISABILITIES

Interested Party

DECISION

MEMBER: Matthew D. Garfield

2010 CHRT 4
2010/02/12

[I. INTRODUCTION](#)

[II. COMPLAINT](#)

[III. PRELIMINARY MATTERS](#)

[IV. ISSUES](#)

[V. DECISION](#)

[VI. LIST OF WITNESSES](#)

[VII. FACTS](#)

[VIII. EC: ITS STRUCTURE, ROLE AND ACCESSIBILITY WORK](#)

| |
|--|
| <u>IX. IMPORTANCE OF ELECTIONS</u> |
| <u>X. STATUTORY PROVISIONS</u> |
| <u>XI. UNIQUE STATUS OF HUMAN RIGHTS STATUTES</u> |
| <u>XII. LEGAL PRINCIPLES RELATING TO LIABILITY</u> |
| <u>XIII. LEGAL PRINCIPLES RELATING TO REMEDY</u> |
| <u>XIV. ANALYSIS</u> |
| <u>XV. REMEDY</u> |
| <u>XVI. ORDER</u> |

I. INTRODUCTION

[1] These are my Reasons for Decision concerning the Complaint of James Peter Hughes against Elections Canada ("EC"). Mr. Hughes alleges that he was denied an accessible polling location and adversely differentiated against on account of his disability when he went to vote at St. Basil's Church in the downtown Toronto riding of Toronto Centre on two occasions within a 7-month time span (the March 17, 2008 federal by-election and the October 14, 2008 federal general election), contrary to subsections 5(a) and 5(b) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended ("*CHRA*"). His Complaint also deals with the lack of proper investigation and action by EC following his verbal and written complaints to it.

II. COMPLAINT

[2] Mr. Hughes filed his Complaint with the Canadian Human Rights Commission ("Commission") on June 5, 2008. As this was four months before the October 14th general election, the Complaint form itself only dealt with the March 17th by-election incident. The Commission investigated and referred the subject-matter of the Complaint to the Canadian Human Rights Tribunal ("Tribunal") on December 29, 2008. By this time, the second incident of the October 14th general election had occurred. This second incident and EC's handling of the two incidents form part of the subject-matter before the Tribunal. None of the parties disagree with this.¹

III. PRELIMINARY MATTERS

Commission Not Participating

[3] The Commission indicated early after the referral that it would be participating in the hearing. A week before the hearing on the merits began, it indicated that it would no longer participate; however, it remains a party. Commission counsel did indicate in writing that the Commission would participate in any systemic remedies, including "monitoring" of EC, if such remedies were granted by the Tribunal.

Motion for Interested Party Status

[4] Prior to the hearing, the Council of Canadians with Disabilities ("CCD") brought a motion to be added as an intervenor or Interested Party. The Complainant supported CCD's motion and EC consented with conditions. The Tribunal granted the request. CCD was allowed to make oral and written argument. The title of proceeding was amended accordingly. CCD's participation in the hearing was helpful. CCD is a pan-Canadian not-

for-profit, multi-disciplinary organization covering a wide spectrum of disabilities. It has participated in many leading human rights cases, including before the Supreme Court of Canada.

IV. ISSUES

[5] At the commencement of the hearing, EC's counsel stated that his client would be making certain admissions regarding liability. The other parties stated that further facts not admitted by EC also constitute liability and are aggravating in nature, and relevant to the personal and systemic remedies sought by them. I consider in these Reasons the extent of EC's liability and what remedies are appropriate.

V. DECISION

[6] The Complaint has been substantiated.

VI. LIST OF WITNESSES

The following individuals gave evidence:

- (1) Mr. James Peter Hughes - the Complainant;
- (2) Prof. Catherine Frazee - disability rights/accessibility expert;
- (3) Mr. Michel Roussel - senior director, field readiness and event management, EC; and
- (4) Mr. Robert Topping - architect and expert on accessibility, universal design and barrier-free design.

VII. FACTS

[7] The parties filed a limited Agreed Statement of Facts. As indicated earlier, at the beginning of the hearing, EC conceded certain facts, the combination of which EC agreed, results in liability under subsection 5(b) of the *CHRA*. The concession of liability involved the admission of facts regarding the walk to, and entrance #2 itself. EC has agreed not to use St. Basil's Church again as a polling location. There are many better, fully accessible locations close by. There was some disagreement as to certain facts. Below are my findings of fact, including those facts found in the Agreed Statement of Facts and those admitted by EC.

[8] Mr. James Peter Hughes and his wife lived for many years in the United States. They moved back to Canada upon retirement. Mr. Hughes has post-polio syndrome and uses a wheelchair or walker. They live in a condo in downtown Toronto, a couple blocks away from St. Basil's Church, the polling location used in the two electoral events at issue here. Mr. Hughes testified that the March 2008 by-election was his first time voting in a Canadian election since he lived in Quebec in the 1970s. This was an important event for him. Unfortunately, the "election experience" he received was less than what he had hoped for.

Voting in the March 17th By-election

[9] On March 17, 2008, he proceeded using his walker to vote at St. Basil's Church. The Church is in a beautiful, old building in downtown Toronto. It has three entrances: entrance #1 (main one, south side); entrance #2 (back one, north side); and entrance #3 (side one, west side). More will be said about the three entrances later in these Reasons.

[10] From the street, the Complainant walked up a sloped hill on a long, winding path to entrance #1. At the front door was "a perfectly acceptable handicap ramp," said the Complainant. He said he found some "cryptic, yellow" EC signs, but they pointed away from entrance #1 and toward entrance #3. Entrance #1 was locked. Said signs indicate to me as well that EC (at least the official who put up the signs) was aware that entrance #1 was locked and unusable as an accessible entrance, for disabled and non-disabled voters. Mr. Hughes proceeded around the building to entrance #3. When he opened the door, he was somewhat startled to find a flight of stairs leading downward. It was clearly not an accessible entrance.

[11] Mr. Hughes was not able to get down the stairs without assistance. He called out for assistance and someone came over. The person appeared to be an EC official and told him he could either come down the stairs or walk around the building (to entrance #2). He chose to deal with the known obstacle rather than face the unknown ones. The official took his walker down the stairs and Mr. Hughes then proceeded to go down the stairs "on the seat of my pants". The Complainant testified that this was rather humiliating. He was concerned as well about falling. They then put the walker back together and he walked down the hallway to the election polling stations in the basement hall.

[12] His experience with inaccessibility did not end there. When in the hall, he was not able to vote in the polling booth because the tables were placed too close together, blocking his path. EC officials had to re-arrange the tables. A person using a walker or wheelchair did not have a direct pathway to the private voting booth.

[13] While in the Church basement hall, Mr. Hughes told a male EC official about his "difficult voting experience." He does not remember the name of the official. Mr. Hughes averred that the person replied that the lack of accessibility was for financial reasons and that "in federal by-elections they are not given sufficient funds to have an accessible polling station." Mr. Hughes was "appalled". EC avers that if this in fact occurred, the official was factually wrong and was not in a position to make such comments. Nothing came of his verbal complaint. I accept Mr. Hughes' testimony on this topic.

[14] Mr. Hughes eventually got to mark his ballot that day. However, his departure was no less easy. Rather than go back through entrance #3 with its barrier-ridden path, the EC officials offered to help this voter with a disability leave through the back way, entrance #2, adjacent to the parking lot. Mr. Hughes had to walk up a "steep, narrow ramp". It was only "marginally possible" for use with his walker. The two doors leading out to the parking lot weren't open. There was no automatic opening mechanism for the doors. Mr. Topping, who did an onsite inspection on behalf of EC and gave expert opinion evidence at the hearing, agreed that they are heavy, steel doors. Only one of the two double doors was openable. Mr. Hughes' walker had to be folded in order to get it through. Outside the doors, he confronted snow on the ground which hadn't been sufficiently cleared. He stated that the width shoveled looked like it had been done with ambulatory people in mind. It was barely wide enough for his walker's wheels, and certainly not wide enough for a person using a wheelchair. There was a sloped ramp downward. He described it as steep and slippery. I accept Mr. Hughes' testimony that he could not have exited through entrance #2 without assistance.

[15] Mr. Hughes described the entrance at the back as a "freight/emergency entrance". In his view, it was demeaning and not dignified. He remarked that it doesn't affirm a person as an actual person, but signals they should be handled as freight. I accept that he felt this way. There was a debate among counsel as to whether this constituted a segregated entrance, reminiscent of the images of the Old South in the United States. I make no finding in this regard. Suffice to say, the back entrance was not ideal or acceptable in the circumstances. None of the three entrances to the Church was accessible to Mr. Hughes. Entrance #1 was closed; entrance #2 was fraught with barriers (physically and symbolically); and entrance #3 was inaccessible due to the flight of stairs.

Mr. Hughes' Complaints and EC's Investigation

[16] In addition to his verbal complaint on the day of the election, Mr. Hughes made a written complaint to EC on March 20, 2008.² This was done with the assistance of his counsel. It was addressed to the attention of the Elections Officer at Elections Canada in Ottawa. For some unexplained reason, the letter was delivered to the wrong official at EC. That became evident when the Complainant's counsel received a response on March 26th from the General Counsel to the Commissioner of Canada Elections. The General Counsel acknowledged receipt of the letter, but said the subject matter of the complaint fell outside the jurisdiction of the Commissioner, who is responsible for compliance with, and enforcement of, the *Canada Elections Act*, S.C., 2000, c. 9, as amended ("CEA"). The General Counsel forwarded the letter to the Legal Services Directorate at EC. Mr. Hughes testified that he felt the letter he received was dismissive of his complaint. EC has no explanation as to why it was sent to the wrong office at its national headquarters in Ottawa. The letter was properly addressed.

[17] Mr. Hughes stated that he heard nothing from EC regarding his verbal and written complaints to it (other than the letter from the Commissioner's General Counsel referred to in the preceding paragraph) until receiving EC's August 6, 2008 letter to the Commission. On June 5, 2008, he had filed a *CHRA* Complaint with the Commission. The August 6th letter was EC's response to the *CHRA* Complaint. Mr. Roussel said that he had his officials investigate Mr. Hughes' Complaint, although he didn't speak to them directly about it and didn't personally speak to the Toronto Centre Returning Officer ("RO") or other relevant EC officials at the St. Basil's Church polling stations.

Voting in the October 14th General Election

[18] On October 14, 2008, Canadians went to the polls in a federal general election. Mr. Hughes received a Voter Information Card, indicating that his polling station would be at St. Basil's Church once again. The Card even had the universal accessibility symbol on it. Mr. Hughes was hopeful that things would be different this time, that EC had addressed his concerns.

[19] To his chagrin, the Complainant said he experienced the same lack of accessible voting on October 14th, except for the snow on the ground. When he went to St. Basil's, the front door (entrance #1) with its accessible ramp was again unavailable. This time he proceeded to entrance #2, where he found one of the doors was being held ajar by a broken rock. The Complainant testified that he could not open the heavy steel door

himself. With assistance, he entered via entrance #2, voted and left the same way. Mr. Hughes averred that he was quite upset that, notwithstanding his verbal and written complaints to EC some seven months earlier and his June 2008 Complaint to the Commission, EC had not remedied the problem by providing a barrier-free polling facility to exercise his important democratic right to vote. He thought, at best, EC was incompetent; at worst, wilful or bad intentioned.

Post-October 14th General Election

[20] Following the election, the Commission referred the subject-matter of the Complaint to the Tribunal on December 29, 2008. EC commissioned architect and accessibility expert Robert Topping to do an on-site inspection of St. Basil's Church and report on certain accessibility issues in March 2009. Mr. Topping's report was tendered as an exhibit and he gave opinion evidence as well at the hearing in October 2009. He outlined some of the problems with the St. Basil's facility from a barrier-free perspective. As a result of Mr. Hughes' Complaint, Mr. Topping's report, the steepness of the incline and better alternative locations in the area, prior to the hearing Mr. Roussel, in his affidavit, indicated that EC would no longer use St. Basil's Church as a polling location, notwithstanding some of its "significant advantages" (e.g., parking, community use and prior election use). Mr. Roussel did not know if an alternative site had been chosen, as of the hearing.

VIII. EC: ITS STRUCTURE, ROLE AND ACCESSIBILITY WORK

[21] Michel Roussel's witness statement and his *viva voce* evidence thoroughly described EC's structure, role and work done regarding accessibility matters. At the apex of EC is the Chief Electoral Officer of Canada ("CEO"), who is an officer of Parliament. There are senior managers below the CEO, including Mr. Roussel. EC's national office in Ottawa is responsible, among other things, for general policies and training of election officials and the overseeing of federal electoral events (general elections, by-elections and referendums). There is also an independent Commissioner of Canada Elections to ensure compliance with, and recommend if necessary, prosecutions of violations of, the *CEA*.

[22] Canada has 308 electoral districts, also known as ridings or constituencies, which vary in physical size and population. The largest riding is Nunavut (20% of the land mass of Canada). By contrast, the City of Toronto contains 22 electoral districts. Each district has a RO, appointed by the CEO. The RO is responsible for the preparation and conduct of an electoral event in his/her electoral district and oversees its execution. Below the RO is an assistant returning officer. Both of these officials are permanent officers and continue their work between elections. Below them are numerous part-time and full-time temporary officials - the deputy returning officer, central poll supervisors, poll clerks, etc.

[23] Each district has polling locations or sites and within them, polling stations. Toronto Centre electoral district had 75 polling locations (St. Basil's being one of them) with 271 stations. Country-wide, in the 2008 general election, there were over 20,000 polling locations, 63,000 polling stations, and over 200,000 temporary officials. This presents a formidable organizational and logistical challenge to EC, as much work can only be done, according to its governing statute, once the writ is dropped and an election is called. This includes the hiring of most of these 200,000 employees and the signing of

leases for polling locations. I acknowledge that much work is done also before and after elections. I have been mindful of the logistical, time-constraining considerations faced by EC. The ROs and others are extremely busy during the 36-day election period.

Accessibility Requirements

[24] Parliament has provided for the accessibility of elections in numerous sections of the *CEA*, including subsection 121(1) which states that "a polling station shall be in premises with level access." The term "level access" is not defined in the statute. In EC's CPS manual it is defined as "flat access..." Guidelines, not legislatively mandated, indicate that the benchmark for a ramp slope is 1:12 (1" rise per every 12" long). I appreciate that "level access" is a sub-category of "barrier-free access". While the lack of level access is a major barrier, it is by no means the only barrier faced by those with mobility impairments.

[25] As well, the *CEA* does not prohibit EC from providing further and greater accommodations than simply "level access", and it has done so. This may be seen in its policies, guidelines, manuals, training materials and as outlined on its website, which involves "barrier-free" accommodations for mobility impairments beyond "level access" and for non-mobility impairments. EC's Policy on Barrier-Free Access to Voting reads: "Offices and polling sites established and maintained by returning officers during an electoral event **must in all respects** provide barrier-free access." (EC's bolding) In its module on accessibility in its training session for ROs, in one of the Power Point slides, EC says one of the goals of the session is for ROs to be able to "[E]nsure barrier free access to the electoral process." EC's Accessibility Information sheet for St. Basil's Church lists many criteria, including accessibility issues other than "level access", such as signage and adequate heating. Mr. Roussel also testified that EC considers many factors other than the "level" or flat access of premises when determining the suitability of polling stations under subsection 121(1) of the *CEA*, including factors that I would characterize as "barrier-free" in nature.

[26] Parliament has also legislated an exception in the *CEA* to providing "level access": subsection 121(2). It sets out the procedure whereby a RO may obtain dispensation from the requirement upon prior approval of the CEO, if the RO is unable to secure suitable "level access" premises. Mr. Roussel testified that seeking this exemption is a last resort and rare. Any such exemptions are reported by the CEO in his post-election report to Parliament. Instead, EC has paid for the installation of temporary, and formerly also permanent, ramps to overcome barrier issues. In the 2008 general election, 122 ramps were installed across Canada, at a total cost of \$127,000.

Selection of Polling Locations

[27] It is the RO's responsibility to select the many polling locations within the district. As Mr. Roussel testified, the ROs conduct onsite evaluations to the best of their ability. There is an inventory or computer data base of over 27,000 locations across Canada. The last onsite inspection of St. Basil's Church appears to have been done on May 20, 2002. The document indicates that the Church met the section 121 "level access" requirements of the *CEA*. Mr. Roussel also averred that ROs are not architects or construction

estimators and are not equipped with the proper tools to ascertain exact measurements about certain criteria such as the slope of a ramp. Expert witness and architect Robert Topping testified that a layperson would need certain specialized equipment and training to make such accessibility determinations.

[28] Mr. Roussel also gave evidence that ROs rely on existing information in the database for their pre-election writ plan of which polling locations to use. He said that due to the time constraints once the election has been called, ROs do not have the time to conduct an onsite visit of each location. No doubt that is why ROs are trained to "[S]elect suitable polling sites well in advance [of the election being called]." In the RO Manual at p. 12, a chart divides the RO's tasks into "Before, During and After Electoral Events". In the "Before" column for the task dealing with polling stations, it says, *inter alia*: "Visit potential polling sites" and "Evaluate the accessibility of potential locations".

[29] In most cases, they confirm the availability with landlords by phone once the writ is issued. Perhaps ROs should confirm with the landlords at that time the accessibility features of the polling locations and their operation during the electoral event (e.g., that accessible entrances will be open).

Accessibility: What Has EC Done in General?

[30] As expert witness Robert Topping testified, there have been many advancements in technology and attitudes regarding barrier-free design and accessibility since the 1980s. EC has gone a long way in ensuring barrier-free access in federal elections. This was recognized specifically by the Tribunal in *Canadian Paraplegic Association v. Elections Canada et al.*, [1992] C.H.R.D. No. 2 ("CPA"): i.e., "The strong positive actions taken by Elections Canada after 1984..." at p. 27 and "In view of the steps which Elections Canada has taken since 1984 to improve accessibility of polling stations,..." at p. 28. That case involved nine complaints of persons with disabilities who either could not vote because of barrier-ridden polling locations or voted with difficulty in the 1984 federal election in Manitoba. These complaints spurred EC to act, ahead of the Tribunal's decision in 1992. EC created in 1988, with the help of Barrier-free Design Consultants, the RO Guide "Accessible Facilities: How to Make Voting More Accessible".

[31] EC also developed a national inventory or database of over 27,000 accessible locations with an onsite evaluation done for each. It created an Accessibility Checklist for each polling site to be entered into the National Inventory of Electoral Facilities. In the RO Manual: A Guide to Conducting Federal Electoral Events, it says at p. 81, ROs "should identify problem areas so that corrective measures can be taken IN ADVANCE." (EC's capitalizing) As well, EC began to share "polling place information" with internal and external groups so that the information could be complete and accurate.

[32] There is also a Manual for Central Poll Supervisors. In the "pre-polling day tasks" section at p. 12, it says the CPS should, "Examine the layout...identify issues." I suggest that EC specifically mention "accessibility issues" in this part to highlight the importance of said issues. EC also includes this language in the Manual for Deputy Returning Officers and Poll Clerks. EC even has a Training Officers Manual, including a section on tips or lessons for "Assisting an Elector with a Disability".

[33] I would be remiss if I didn't mention the very good website of EC. It contains a lot of useful information, including many reports and documents. There is a fair bit of information concerning accessibility features, including a section entitled "Accessibility of the Electoral System". I would recommend that, for ease of reference, EC add a link on the main page of its website under "Information for You" entitled "Voters with Disabilities", along with the present ones for "Voters", "Young Voters" and "Aboriginal Voters".

[34] As indicated earlier, EC also does modifications to polling locations, permanent and temporary, to provide level access (e.g., ramps). Mr. Roussel testified that EC never refuses such requests from the ROs.

[35] EC also provides training for its officials, from the ROs down to the army of 200,000 election day temporary employees. They also "train the trainers". Part of the training involves accessibility issues.

[36] EC makes available to persons with disabilities different ways to vote. In addition to being required to provide "level access" at polling stations, advance poll sites, RO offices, and revision offices, it provides alternative ways to vote. For example, a transfer certificate may be issued to vote at a nearby accessible polling station where the local one is not accessible. As well, provision is made to have EC officials attend at the home of a disabled voter for him/her to vote. Special ballots, including mail-in ballots, may also be used.

What Has EC Done Since Mr. Hughes Filed His CHRA Complaint?

[37] Mr. Roussel says EC has learned a lot from the negative voting experience of Mr. Hughes in the 2008 by-election and general election, and it has improved. For example, EC changed its yellow sign to make the letters bigger and added the universal symbol of accessibility. Counsel for the Complainant avers that this should have been done sooner, as it was mentioned in the *CPA* decision in 1992.

[38] EC's counsel also points out that his client admitted liability at the opening of the hearing. However, the Complainant's counsel counters that, given the facts of this case, said admissions came too late. Notwithstanding the timing, the admissions did save time at the hearing and facilitated the co-operative mood of the parties at the hearing.

[39] Through Mr. Roussel's testimony and its counsel's submissions, EC has agreed to several remedial requests of the Complainant, in whole or in part. These will be spelled out in the section on Remedy in these Reasons for Decision.

IX. IMPORTANCE OF ELECTIONS

[40] The right to vote is protected in the *Canadian Charter of Rights and Freedoms*: section 3. It is a right, and I would argue, a responsibility or duty of citizens of this country. It is the legal duty of the State to ensure that all barriers, whenever possible, are removed so that citizens may vote. Nowhere is this more significant than for people with disabilities. Professor Frazee was eloquent in articulating the barriers that people with disabilities face in our society, structurally and attitudinally, including the intricacies of "disability disadvantage". She set out the context as it would affect a person with a

disability attempting to vote. Included in this was the impact of disabled voters going to "separate but equal" facilities to exercise their franchise or facilities with only "back entrances" available to them. There should be no hierarchy of citizenship when it comes to voting in Canada: no second class voters. Professor Frazee's expert evidence and Mr. Hughes' testimony showed the damaging impact on persons with disabilities going away from the polling site thinking that their presence was at best unexpected, and at worst unwelcome.

[41] I also note the evidence of the 2006 Statistics Canada report showing the number of persons with various impairments and disabilities in Canada: 4.4 million Canadians with an activity limitation yielding a disability rate of 14.3%. What is more telling is the demographic trend upward of Canadians reaching the status of "senior citizen" and the resulting increase of persons with disabilities in Canada, including those with mobility impairments.

X. STATUTORY PROVISIONS

[42] Mr. Hughes' Complaint alleges the violation of subsections 5(a) and 5(b) of the *CHRA*:

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, or
 - b) to differentiate adversely in relation to any individual,
 on a prohibited ground of discrimination.

XI. UNIQUE STATUS OF HUMAN RIGHTS STATUTES

[43] As recently as 2005, the Supreme Court of Canada stated in *Canada (House of Commons) v. Vaid*,³ at para. 81: "...the *Canadian Human Rights Act* is a quasi-constitutional document and we should affirm that any exemption from its provisions must be clearly stated."

[44] In *Council of Canadians with Disabilities v. Via Rail*,⁴ the Supreme Court of Canada wrote at para. 115:

In *Winnipeg School Division*,⁵ McIntyre J. confirmed that where there is a conflict between human rights law and other specific legislation, unless an exception is created, the human rights legislation, as a collective statement of public policy, must govern. It follows as a natural corollary that where a statutory provision is open to more than one interpretation, it must be interpreted consistently with human rights principles. The [Canadian Transportation] Agency is therefore obliged to apply the principles of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, when defining and identifying "undue obstacles" in the transportation context.

XII. LEGAL PRINCIPLES RELATING TO LIABILITY

[45] The initial onus of establishing a *prima facie* case of discrimination under the *CHRA* rests with a complainant or the Commission. A *prima facie* case is one which covers the allegations made and, if believed, is complete and sufficient to justify a verdict in the complainant's favour, in the absence of an answer or justification from the respondent: *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited*, [1985] 2 S.C.R. 536, at para. 28. Once that is established, the burden then shifts to the respondent to establish a justification or explanation for the discriminatory practice or action. The respondent's explanation should not figure in the determination of whether the complainant has made out a *prima facie* case of discrimination: *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, at para. 22.

[46] Courts and tribunals have held that discrimination may, but need not, be intentional.⁶ One must look also at the adverse impact or effect of facially neutral practices and policies on an individual or group of individuals, related to prohibited grounds of discrimination.

[47] The case law recognizes the difficulty of proving allegations of discrimination by direct evidence. Discrimination is frequently practised in a very subtle and subterranean manner. Overt discrimination is rare: *Basi v. Canadian National Railway Company (No. 1)* (1988), 9 C.H.R.R. D/5029 (C.H.R.T.), at para. 5038. Rather, it is the Tribunal's task to consider all of the circumstances to determine if there is what is described in the *Basi* case as the "subtle scent of discrimination".

[48] The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. According to this standard, discrimination may be inferred where the evidence offered in support of the discrimination renders such an inference more probable than the other possible inferences or hypotheses: *Premakumar v. Air Canada (No. 2)* (2002), 42 C.H.R.R. D/63 (C.H.R.T.), at para. 81.

XIII. LEGAL PRINCIPLES RELATING TO REMEDY

[49] The general remedial part of the *CHRA* is found in section 53. Subsections 53(1)-(4) outline the discretionary awards and orders that the Tribunal may make against a respondent following its substantiation of the complaint before it. Included are orders to cease a discriminatory practice; compensatory awards up to \$20,000 for any pain and suffering experienced as a result of the discriminatory practice; a \$20,000 maximum of "special compensation" for loss arising from the wilful or reckless discriminatory action of the respondent; expenses incurred as a result of the loss from the discriminatory action, except for legal costs or expenses in the Tribunal proceeding.⁷ The Tribunal also may order the taking of measures to redress the discriminatory practice, or to prevent the same or similar practice from occurring in the future.

[50] The Supreme Court of Canada has allowed human rights tribunals a certain degree of latitude in the making of remedial orders.⁸ This is in keeping with the purposes and goals of anti-discrimination statutes. Of course, orders of a remedial nature must be linked or have a nexus⁹ to the *lis* or subject-matter of the complaint substantiated by the tribunal: the "four corners of the complaint" or "the real subject matter".¹⁰ The remedy must be commensurate with the breach. The orders also must be reasonable¹¹ and the remedial discretion exercised in light of the evidence presented.¹²

[51] Remedial orders also may include the involvement of the human rights commission or other parties in terms of consultation, or the appointment of a monitor for the implementation of the orders.¹³ Such involvement of other actors recognizes that the courts and tribunals have an adjudicative role and formal process that do not translate well into the technical or task-specific aspects of the implementation of orders often affecting the day-to-day operations of a governmental or corporate respondent.

XIV. ANALYSIS

Subsections 5(a) and 5(b) of the CHRA

[52] The Complainant and CCD argue that both subsections of section 5 have been violated here. EC says the case is one of subsection 5(b) and that the Tribunal need not address subsection 5(a). I find that both subsections have been infringed in the instant case.

[53] First, I am satisfied that EC provides a "service" and "facility" "customarily available to the general public" under the section. It is not just the provision of physical space in which to vote. EC provides a public service - a paramount one - of providing the means by which the public may exercise its democratic franchise. The service includes providing public information, barrier-free voting locations and polling stations, polite interaction of its officials with the voters, and the facilitation of accessible voting for all, including voters with disabilities.

[54] The foregoing applies the reasoning of the Federal Court of Appeal in *Watkin v. Canada (Attorney General)*,¹⁴ which is the recent case on "services" under section 5 of the CHRA. That case involved a complaint against Health Canada alleging discrimination in the regulation of herbal products based on ethnic origin. The Court held that the enforcement actions of Health Canada did not constitute a "service" as per section 5. The Court stated that not all governmental actions are "services" under the CHRA. At para. 28, the Court wrote: "Public authorities can and do engage in the provision of services in fulfilling their statutory functions." It then listed several examples of services provided by government departments and agencies. The running of elections by EC could fit easily into that list. At para. 31, the Court further stated: "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..."

[55] Various findings of liability fall, in the case before me, under either or both of the subsections here. The fact that Mr. Hughes was able to vote does not insulate EC from subsection 5(a): "to deny, or to deny access to,..."; e.g., his having to go down the stairs by "the seat of [his] pants", and be assisted into and out of the premises.

Liability of EC

[56] As indicated earlier, EC admitted at the outset of the hearing its liability under subsection 5(b) of the CHRA only. The Complainant and CCD argue that EC is liable under subsection 5(a) too. EC says its liability is based on the combined effect of various facts:

- (1) the long, sloped walk to entrance #2;
- (2) the insufficient signage leading to entrance #2;
- (3) the incline leading to entrance #2 had a slope of 1:8.8 (or 11.4%), which is significantly steeper than the slope of 1:12 (or 8.25%) set out in EC's Accessible Facilities Guide;
- (4) the doors to entrance #2 were heavy to open;
- (5) only one of the doors to entrance #2 could be opened from the outside;
- (6) with only one door open, entrance #2 was too narrow for a wheelchair to go through;
- (7) this was a polling location in downtown Toronto. Better alternative locations exist.

During his argument, counsel to EC stipulated a few more facts concerning liability:

- (8) the door to entrance #2 was stuck on the day of the by-election;
- (9) there was non-clearance of snow on the incline;
- (10) the ramp on the inside of the Church was inadequate;
- (11) there was a step and no handrails on both elections;
- (12) there was inadequate spacing between tables in the polling stations in both elections; and
- (13) EC accepts Mr. Hughes' description of the humiliation he felt and his evidence generally, but not his characterization of "segregation".

Counsel for the Complainant and CCD point out that none of the above admissions in #1-12 were made in the Agreed Statement of Facts or prior to the commencement of the hearing.

[57] I agree with Mr. Hughes' comment that the August 6th letter was dismissive of his Complaint. Essentially it says:

- (1) St. Basil's Church provided "level access" as required by subsection 121(1) of the *CEA*. As we now know, that was not the case, as entrance #1 was locked.
- (2) EC "thoroughly" reviewed Mr. Hughes' Complaint, including interviewing election officers and conducting an on-site inspection of the polling station. The August 6th letter contains many incorrect facts, resulting in incorrect conclusions.
- (3) "It [St. Basil's Church] has three access doors which were unlocked during voting hours, two of which provide level entry." Again, only entrance #1 provides a barrier-free pathway, and it was locked.
- (4) Mr. Hughes did not see the posted signs. EC did not call the RO or any EC official who was present at St. Basil's that day to give evidence, nor did it enter into evidence the investigative report. I have Mr. Hughes' evidence regarding the signs and I accept it.
- (5) Every effort was made to keep the ramps cleared of snow on the advance poll and by-election polling days. I accept Mr. Hughes' testimony to the contrary, that the efforts weren't sufficient.
- (6) "[O]ther disabled electors made use of these level access [entrances] without difficulty..."
- (7) St. Basil's Church had been used in the 2004 and 2006 general elections and EC has no record of any other accessibility complaint being made about the polling location. Of course, one wouldn't know necessarily if a previous accessibility complaint had been made, given that Mr. Roussel testified that EC doesn't have a system for logging such complaints.
- (8) None of the officials interviewed could remember anything about the comment made by the official to Mr. Hughes regarding not having the money for accessibility accommodations

in by-elections. Indeed, no mention is made of his verbal complaint that day. As indicated earlier, I accept Mr. Hughes' version of this episode.

[58] Mr. Hughes indicated that he was quite upset with EC's August 6th letter. He stated that EC's response, or lack thereof in general, upset him as much as the frustrating voting experiences. He said the August 6th letter was dismissive and suggested that he was incompetent and unable to read signs: "The letter was a complete denial of my experience." I agree that the tone of the letter is somewhat dismissive. But more importantly, many of the factual statements given are clearly incorrect: in particular, that entrance #1 (the only accessible one of the three entrances) had been open on the day of the by-election. I find it difficult to accept that, after having interviewed its officials who were present at St. Basil's Church and investigated the matter, EC was under the illusion that entrance #1 had been available on the day of the by-election. That suggests that, notwithstanding the signs pointing away from entrance #1, no one told the EC investigating official that entrance #1 had been locked that day. I do not know from the evidence whether EC in its investigation contacted the Church to verify what entrances were open that day. At a minimum, EC's investigation was flawed.

[59] I find the following additional aspects of EC's liability in this matter:

- (1) EC denied the Complainant barrier-free access to voting in both the 2008 by-election and general election in that not one entrance was accessible to a person with the disability that Mr. Hughes has;
- (2) EC denied him a service and adversely differentiated against him in its sub-standard investigation of his verbal and written complaints to it. EC didn't even record his March 17th election day verbal complaint. EC's response to his written complaint to it and his CHRA Complaint was tardy and inaccurate, and its tone dismissive. It is disappointing that in its August 6th letter to the Commission addressing the CHRA Complaint (five months after his complaints to EC), EC made so many factual errors. The most glaring one was that all three entrances "were unlocked during voting hours." Notwithstanding EC said in the August 6th letter that in the course of its review of his complaint "election officers were interviewed and an on-site inspection of the polling station was conducted", no one at EC's national headquarters in Ottawa realized that the only accessible entrance (main, front door #1) had been locked on election day until November 2008 when the investigation was completed, according to Mr. Roussel's testimony. But the August 6th letter states that EC's investigation had been completed by then. Had EC done a competent investigation sooner, it no doubt would have realized this fact and rectified it for the October 2008 general election by either contacting St. Basil's Church and making sure it kept the door unlocked on election day or seeking out a different (and accessible) location. I accept Mr. Hughes' evidence that EC's poor handling of his verbal and written complaints to EC and his Complaint to the Commission, including the tone and content of the August 6th letter, upset him as much or more than the actual two voting events.

[60] Based on the evidence presented, I am satisfied that a *prima facie* case has been made out by the Complainant and no reasonable explanation, defence or exemption provided by the Respondent with regard to the additional facts triggering liability not admitted to by EC. The Respondent indicated that "mistakes were made" and they have learned from the incidents.

XV. REMEDY

[61] Having found liability, I turn to the question of remedy, which dominated much of the hearing.

Compensation and Interest

[62] The Complainant has asked for \$10,000 under paragraph 53(2)(e) of the *CHRA* to compensate him for the pain and suffering he experienced, plus interest. Counsel directed me to my decision as Chair of the Ontario Human Rights Board of Inquiry in a case dealing with denial of equal treatment and services to persons with disabilities attempting to go to the movies. In that case, *Turnbull, supra*, I awarded damages for loss arising out of the infringement to the complainants, varying from \$8,000-10,000. Counsel says voting is as important as or more so than going to the movies. Also, Mr. Hughes had to endure the indignity on two occasions. Counsel for EC suggests a more appropriate range is \$2,500-5,000. I award Mr. Hughes \$10,000 under paragraph 53(2)(e). I consider the following to be relevant:

- (1) voting is one of the most sacred rights of citizenship and that includes the right to do so in an accessible context;
- (2) the violation of Mr. Hughes' rights occurred in two separate elections within a 7-month period; and
- (3) EC also infringed his right to a competent and prompt investigation and handling of his verbal and written complaints.

[63] I also award interest on the above amount, pursuant to rule 9(12) of the Tribunal's *Rules of Procedure* and subsection 53(4) of the *CHRA*.

Systemic Remedies

[64] Counsel for the Complainant and CCD urge me to make extensive systemic remedies. They say that there were many errors and by more than one individual, they were system wide and not a simple, isolated error.

[65] EC does not agree that there is a systemic problem here and consequently, no such type of orders should be made. Given EC's apology to Mr. Hughes at the hearing via Mr. Roussel's testimony and its promise not to use St. Basil's Church again, there is no need for such orders, says EC.

[66] EC's counsel also points to a series of emails among counsel where Commission counsel indicated that he did not think "this file gives rise to systemic remedies." He also wrote notwithstanding, that the Commission would be willing to monitor any systemic remedy ordered by the Tribunal: "The Commission will always participate in systemic remedies, especially if the Tribunal asks for our involvement." I appreciate the Commission's willingness to monitor any systemic remedy that I may grant.

[67] I wish to add that EC, through Mr. Roussel's testimony and its counsel's closing argument, has consented, in whole or in part, to many of the systemic "future practices" orders requested by the Complainant and CCD.¹⁵ I acknowledge the candour and co-operative approach that EC showed with regard to the question of remedy.

[68] The findings I have made clearly indicate a systemic problem. The following exchange took place in final argument between EC's counsel and me:

COUNSEL: But this wasn't a case of what went wrong focused on the system. It's one where what went wrong focused on people not quite doing the right things under the system.

TRIBUNAL: But that is part of the system too. The system is made up of people.

COUNSEL: That's true...We saw this basically as a case of human error.

In EC's case, the "system" is a large "pyramid" from the top (the CEO and management in Ottawa) down to the 200,000 election day officials. There is no divisibility to EC: the governmental entity is responsible for the actions of all of its officers and employees, full-time or part-time, permanent or temporary, acting in the course of their employment.¹⁶ EC's statement that it will no longer use St. Basil's Church as a polling location does not sufficiently redress the discriminatory practice before me or prevent its recurrence, as per paragraph 53(2)(a) of the *CHRA*.

[69] I am mindful of the importance of courts and tribunals being sensitive to their role as judicial and quasi-judicial arbiters respectively. In particular, they should not "fashion remedies which usurp the role of the other branches of governance": *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, at 6. The Supreme Court of Canada also points out: "The boundaries of the courts' proper role will vary according to the right at issue and the context of each case."¹⁷ My Order attempts to prevent similar future discriminatory practices from occurring while respecting the mandate given by the Parliament of Canada to the Respondent.

[70] I indicated that in fashioning these systemic remedies, I would try to strike a fair balance - neither "over-kill" nor "under-kill". It is an art, and not a science. EC's counsel asked me not to "use the remedial salvo in the first round." The Complainant and CCD said it's more akin to the third round - the CPA case in 1992 with its many striking similarities to the Hughes' Complaint, and the two occurrences in Mr. Hughes' case. I agree. However, much progress has been achieved by EC in providing accessible voting before (e.g., the 1988 general election) and since the 1992 CPA Decision. Nevertheless, it is disappointing that in the disability rights/accessibility-heightened time in which we find ourselves living as we enter the second decade of the 21st century, Mr. Hughes would have had to experience the humiliation and indignities of those two voting events, within a 7-month time span, followed by the tardy investigation, inaccurate conclusions and poor handling of his verbal and written complaints. Of particular relevance is that, in the wake of Mr. Hughes' verbal and written complaints to EC about the by-election incident, EC failed to improve the accessibility of the polling location in the general election seven months later. So notwithstanding EC does a lot of good things re: accessibility, the deficiencies here suggest the need for improvement via a "future practices" Order.

[71] To ensure the right balance is struck when determining the scope of this Order, one must ask: what did the discriminatory practice consist of; how serious was it; what was

its source; and how does one redress it? As I indicated in the foregoing, the problem is not so much the standards or policies on accessibility, or EC's training in regard to them. They can be improved no doubt, updated, etc. To its credit, EC has indicated a willingness to engage in this process and with the involvement of the other parties. The problem is more in the nature of the policies and guidelines and training not being followed or applied by EC officials. There was also a stark problem in EC's internal mechanisms for handling complaints about access barriers to voting by persons with disabilities.

[72] I also find there was a lack of communication of information between the "ground troops" - officials at the St. Basil's polling location - and the Toronto Centre RO; between the RO and EC headquarters in Ottawa; and between various parts of headquarters (Commissioner's office, EC's legal services branch, etc.). The most glaring example is EC's inaccurate conclusion, after they "thoroughly" reviewed the matter, that all entrances were open and two of the three were accessible. Moreover, EC's legal services section only concluded that entrance #1 had been closed in November 2008, eight months after Mr. Hughes raised the issue and a month after a repeat of the inaccessible election at St. Basil's in the general election. Earlier, I made the finding and inferred that, given the EC yellow sign pointing away from entrance #1, some EC official obviously knew that entrance #1 was locked. But that information did not trickle up to the RO or Ottawa headquarters. Unfortunately, unlike the *CPA* hearing in 1990, neither the RO nor any other official at the polling location in question testified before me.

[73] The Complainant, supported by CCD, submitted a 5-page list of remedies sought. EC's counsel responded verbally and in writing to them. Mr. Roussel also testified about the various remedial measures that EC would be willing to accept or consider, including co-operation and consultation with the other parties. I am impressed by the number of remedies that were agreed to in whole or in part by EC. Some of course were not agreed to and strongly opposed by EC. There is overlap among some of the remedies sought by the Complainant and CCD and agreed to by EC.

[74] What follows is my award of the systemic or "future practices" remedies after careful consideration of the submissions of all the parties. The implementation of this Order will depend on the collaboration and co-operation of all the parties, and in particular, EC given it's the Respondent organization that the Order is directed at. Given the positive attitude of EC at the hearing and the non-adversarial, co-operative interaction among the parties at the hearing, I am confident that the Order will be effective. Of course, I will be available to speak with the parties and issue any Directions or further Orders as required, dealing with implementation of the Order herein.

Monitoring, Consultation, etc.

[75] The Complainant and CCD asked that I appoint a monitor to deal with the implementation of my Order, similar to my role as monitor in the Human Rights Tribunal of Ontario cases of *Lepofsky*, *supra* (footnote 13). They also cite the decision in *McKinnon*, *supra* (footnote 13) where the Ontario Human Rights Board of Inquiry ordered the creation of a Compliance Committee and appointment of a third party to develop and monitor training programs. They have also asked for the Commission and

CCD to be involved in various aspects of the Order, as well as the Complainant himself. EC argues that a monitor is not necessary and that the Commission could take on a monitor-like role, and EC and the Commission would report back to the Tribunal.

[76] I have given careful consideration to the parties' submissions on this subject. I am also in the unique position of having been the monitor in the *Lepofsky* cases since 2005. I have come to the conclusion that an external monitor is not necessary in the case before me. This case is not *Lepofsky* or *McKinnon*. In particular, I note the positive steps taken by EC during the hearing, including its admission of liability; its consent to many of the remedies proposed, in whole or in part; EC's agreement to the post-hearing involvement of the Commission and consultation with CCD or other disability groups and the Complainant; and the co-operation among all the parties during the hearing. If future events show me that I was incorrect, I reserve the right to appoint a third party monitor.

[77] Instead of appointing a third party as the monitor, I accept the offer of the Commission that it will monitor the implementation of my Order. This exercise should be a collaborative one. EC will consult with the other parties (i.e., the Commission, the Complainant and CCD) about various aspects of my Order, including the implementation of them. EC will pay the reasonable expenses of CCD and the Complainant to participate in the implementation phase, but not legal fees in this proceeding; see *Mowat, supra*, footnote 7.

[78] If there is disagreement between EC and any of the parties during the implementation phase, that party may bring a motion before me. Of course, collaboration and co-operation are essential for the implementation process to work. I expect that a party would request the assistance of a Commission or Tribunal mediator before bringing a motion.

Greater Consultation with Voters with Disabilities

[79] I believe that greater consultation by EC with voters with disabilities and disability groups, such as CCD, will prevent similar discriminatory practices from occurring in the future. Such individuals and groups could greatly assist EC in almost all of the remedial areas that my Order touches upon: e.g., choice of polling locations and stations, standards of accessibility, signage, training manuals and programs. The foregoing is distinct from, and does not conflict with, the finding of the Federal Court that the duty to accommodate does not include a legal duty to consult.¹⁸

[80] Mr. Roussel testified about the various groups that are consulted by EC about location of polling stations, such as Members of Parliament, aboriginal elders, student leaders, etc. Why not also consult persons with disabilities and disability groups? Mr. Roussel was quite open to various suggestions about greater involvement of, and consultation with, persons with disabilities and their group organizations by EC. He also testified about the numerous surveys, studies and "post-mortems" initiated by EC following each general election. For example, EC conducts a "Survey to Aboriginal Elders and Youth". Why not also embark upon a "Survey to Persons With Disabilities and Disability Groups"? EC shall consider the above and discuss same with the other parties, and in particular, with CCD, and formulate a consultation plan within six months.

Cease Order

[81] EC shall cease from situating polling stations in locations that do not provide barrier-free access in any electoral district in Canada, within the meaning of section 5 of the *CHRA*. This is subject to the standard of *bona fide* justification and the duty to accommodate to the point of undue hardship under paragraph 15(1)(g) and subsection 15(2) of the *CHRA* respectively, once a *prima facie* case of discrimination has been established.

[82] Nothing in my Reasons and Order is meant to govern the exercise of the CEO's discretion under subsection 121(2) of the *CEA* to exempt a polling station from the "level access" premises requirement. No subsection 121(2) exemption was given for St. Basil's Church by the CEO in the present Complaint. As indicated earlier in these Reasons, EC already provides for greater accommodation in the accessibility area than mere "level access" (i.e., flat access, no stairs to climb). My concern is not what the *CEA* requires in terms of disability accommodation and accessibility, but rather, what the *CHRA* calls for. EC acknowledges the applicability of the *CHRA* to it. However, in his opening statement, EC's counsel talked about the separation of powers. While not challenging the Tribunal's jurisdiction in this matter, he remarked that, "Some things are better left to Parliament and its agencies."

National Inventory of Electoral Facilities Database

[83] The Complainant and CCD urge me to order EC to review, update and report on this inventory of over 27,000 polling locations across Canada. EC submitted that such a country-wide audit of each and every location would be extremely difficult from a logistical point of view. EC counsel correctly points out that the Complainant has not proven the existence of an error in the computerized inventory, other than in regard to St. Basil's. And he says the error was not due to the information about St. Basil's in the inventory or its physical structure. Rather, the error was due to the fact that entrance #1 was locked during the two electoral events.

[84] I agree that checking all 27,000 locations is a huge undertaking. However, Mr. Roussel testified that EC used to visit every site (current and prospective) before the recent elections of minority governments. The last national audit was done in 2002. And the Guidelines and Manuals require ROs to consider locations before an election is called and to secure them after the election is called. The national inventory is a tool or means of achieving the goal of barrier-free voting facilities for Canadians. I am not going to order EC to conduct such an audit or publicly report on it. The discriminatory practice in which EC was found to have engaged was not a result of the data entered for St. Basil's in the inventory of electoral facilities. However, I note that EC consents to, within six months, "Implement a procedure for verification of the accessibility of facilities on the day of the electoral event". EC shall do so and consult with the other parties about same.

Standards of Accessibility

[85] Regarding the issue of standards of accessibility, this was not the source for EC's liability in this case. There was not enough of a *nexus* with the discriminatory practice.

Of course, standards change and evolve, in terms of philosophy, attitudes and technology. Accordingly, I recommend, but do not order, EC to review the standards of accessibility employed by EC and consult with the other parties regarding same. These standards are included at, but not limited to, page 2, para. 4 of the revised list of remedies sought by the Complainant.

Policies and Guidelines

[86] EC's policies and guidelines about accessibility can be improved and updated, but they were not a major source for my findings of liability. However, EC consents to, within twelve months, "Review the Accessible Facilities Guide, Accessibility Checklist, and accessibility sections of the Manuals for the Returning Officers and the above categories of election workers [CPSs, DROs, Poll Clerks, Information Officers and Registration Officers]." I order EC to do so, and to consult with the other parties about same.

Standard Lease for Polling Locations

[87] The Complainant and CCD ask that I order EC to revise its standard lease for polling locations to include the requirement that the leased premises provide level access and are barrier free. If the lease with St. Basil's had included such a term and condition, it may have triggered a discussion about entrance #1 and prevented it from being locked on the day of the by-election and general election. Such a provision raises the consciousness of accessibility issues to the lessor and lessee and could reasonably prevent similar practices from occurring in the future. I order EC to do so within six months, and consult with the other parties about same.

Signage at Polling Locations and Stations

[88] I accept Mr. Hughes' evidence about the lack of sufficient signage during the by-election and general election. EC also made an admission about insufficient signage leading to entrance #2. Signage is particularly important given that most voters would be less familiar with the layout of their polling location than their home or workplace. EC consents to the Complainant's request that the Tribunal order that EC provide sufficient and appropriate signage at elections, including the universal accessibility symbol so that voters with disabilities can easily find the shortest and most appropriate route to all accessible entrances at polling stations. I order EC to do so, and consult with the other parties about same.

Training

[89] Training materials and protocols can always be improved. Here, the problem was more of officials not following instructions, rather than the training itself. For example, Mr. Roussel testified that it was the job of the Central Poll Supervisor to check that the polling stations were in proper operation on election day, including that entrance #1 (the only accessible one) was open. However, the officials' non-application of the training instructions is also a factor of how they are trained. Better training, including its application, could prevent the recurrence of the comment by the EC official to Mr.

Hughes about the lack of sufficient funding for accessible facilities during by-elections, and the lack of proper spacing of tables in polling stations.

[90] Training about accessibility complaints and the proper handling of them by polling station officers and national headquarters should also be provided. I was surprised by Mr. Roussel's evidence concerning the lack of training about accessibility issues for the many public servants at EC's national headquarters who deal, in whole or in part, with disability and accessibility issues.

[91] The Complainant and CCD request orders for the review and updating of training materials and training programs for all management, staff, and officers, full-time or part-time, permanent or temporary, dealing with accessibility issues. This would include the CEO at the apex of the "pyramid" of EC, down to the 200,000 election day officials. They also ask that the training materials include these Reasons for Decision (or a summary) and that it form the basis of a case study in the training sessions. I note that EC had an interactive session dealing with case studies in their training of ROs. EC agrees within twelve months to review its training materials and program for ROs and officials below them, but is concerned with extending it to the CEO. EC is also concerned about the logistical complexities of training the 200,000 temporary election day officials.

[92] The training materials and programs or sessions should be reviewed, revised and updated concerning accessibility issues. Training should be given to every officer or employee who deals with disability and accessibility issues, including the CEO and senior management, the accessibility officers at national headquarters, the ROs and others in the electoral districts (i.e., the army of 200,000 election day officials). I note that in *Lepofsky*, *supra* the Tribunal ordered training for all appropriate officers and employees, including the Commissioners and senior management of the Toronto Transit Commission. The training may be customized to the individual, depending on his/her responsibilities at EC. I also agree with the request that the materials include my Reasons for Decision or summary thereof, and a case study be made from it.

Accessibility Complaints Process

[93] The poor handling of Mr. Hughes' verbal and written complaints by EC, including its investigation, triggered liability and are of concern to me. EC agrees within six months to: "Implement a procedure for receiving, recording and processing verbal and written complaints" about lack of accessibility.

[94] I agree that a public complaints process needs to be established by EC about accessibility issues. It should also be suitably publicized (e.g., in polling stations, on the EC website, on the Voter Information Card). It should include the tracking of complaints and their disposition. The number of complaints received about accessibility issues should be publicly reported, perhaps in the post-election report of the CEO. And of course, EC employees need to be trained regarding same.

[95] It is important that the reporting of said complaints about lack of accessibility in polling locations and stations be done. EC consents "to such a reporting requirement for a period of three complete general election cycles, as long as it may be implemented in a

manner consistent with its operational constraints." It will be reported in the CEO's post-election report to Parliament. I order EC to do so, as per the terms set out in its counsel's October 23, 2009 letter to the Tribunal.

Exemptions Under Subsection 121(2) of the CEA

[96] The Complainant requests an order that any such exemptions be reviewed with consultants from local disability groups and if found to be valid, publicly advertised, including the alternative arrangements for voters with disabilities. The CEO currently lists in his post-election report to Parliament the number of s. 121(2) exemptions given in the campaign period. Neither the Complainant nor CCD challenges the validity of s. 121(2). I do not find the discriminatory practice in which EC engaged in this case flowed from s. 121(2) or its operation and accordingly do not issue any "future practices" order concerning same.

Three Month Suspension If Election Called

[97] I agree to EC's request that the timelines and activities concerning the above remedies shall be suspended for a period of three months in the event of a general election. This is a reasonable request given the evidence I heard about the hectic schedule of EC national headquarters staff and riding officials when an election is called. Of course, this does not affect the award of compensation and interest, and the cease order.

Reporting to the Tribunal

[98] EC shall report to me in at least three-month intervals about its progress in implementing my Order. The Commission is encouraged, but is not required, to periodically report to me about any matter relating to its monitoring of the implementation of my Order.¹⁹

Tribunal Staying Seized

[99] The parties agree to the Tribunal staying seized of this matter. I will stay seized of this matter until my Order has been fully complied with, including the making of additional implementation orders or directions, as required. However, EC through its counsel's letter to the Tribunal dated October 23, 2009 consented to the phasing-in of a full reporting system over a 3-general election cycle. This could occur as late as 2020. I do not think it would be wise to remain seized for that long a period. Accordingly, I will stay seized to the later date of the reporting on the next general election and the implementation of the other parts of this Order, including any further implementation Orders.

XVI. ORDER

[100] Having found EC engaged in a discriminatory practice within the meaning of section 5 of the *CHRA*, the Complaint of James Peter Hughes is substantiated and the following Order is made:

Compensation and Interest

- (1) EC shall pay Mr. Hughes \$10,000 for the pain and suffering experienced as a result of the discriminatory practice, per paragraph 53(2)(e) of the *CHRA*, plus interest on the above amount, pursuant to rule 9(12) of the Tribunal's *Rules of Procedure* and subsection 53(4) of the *CHRA*.

Monitoring, Consultation, etc.

- (2) As per the Commission's offer, it will monitor the implementation of this Order, and any subsequent implementation Orders. EC will consult with the other parties (i.e., the Commission, the Complainant and CCD) about various aspects of my Order, including the implementation of them. EC will pay the reasonable expenses of CCD and the Complainant to participate in the implementation phase, but not legal fees in this proceeding.

Greater Consultation with Voters with Disabilities

- (3) Within six months, EC shall formulate a plan for greater consultation with voters with disabilities and disability groups, upon discussion with the other parties.

Cease Order

- (4) EC shall cease from situating polling stations in locations that do not provide barrier-free access in any electoral district in Canada, within the meaning of section 5 of the *CHRA*. This is subject to the standard of *bona fide* justification and the duty to accommodate to the point of undue hardship under paragraph 15(1)(g) and subsection 15(2) of the *CHRA* respectively, once a *prima facie* case of discrimination has been established.

Verification of Accessibility of Facilities

- (5) Within six months, EC shall implement a procedure for verification of the accessibility of facilities on the day of an electoral event, and consult with the other parties about same.

Policies and Guidelines

- (6) Within twelve months, EC shall review the Accessible Facilities Guide, Accessibility Checklist, and accessibility sections of the Manuals for the Returning Officers and the other categories of election workers (i.e., AROs, CPSs, DROs, Poll Clerks, Information Officers and Registration Officers). EC shall consult with the other parties about same.

Standard Lease for Polling Locations

- (7) Within six months, EC shall revise its standard lease for polling locations to include the requirement that the leased premises provide level access and are barrier-free. EC shall consult with the other parties about same.

Signage at Polling Locations and Stations

- (8) EC shall provide sufficient and appropriate signage at elections, including the universal accessibility symbol so that voters with disabilities can easily find the shortest and most appropriate route to all accessible entrances at polling stations. EC shall consult with the other parties about same.

Training

- (9) Within twelve months, EC shall review, revise and update its training materials and programs concerning accessibility issues for ROs and officials below them. Training should be given to every officer or employee who deals with disability and accessibility issues,

including the CEO and senior management, the accessibility officers at national headquarters, the ROs and others in the electoral districts. The training may be customized to the individual, depending on his/her responsibilities at EC. EC officials shall be trained also on the new public complaints process. The materials will also include these Reasons for Decision or a summary thereof, and a case study made from it for training purposes. EC shall consult with the other parties about same.

Accessibility Complaints Process

- (10) Within six months, EC shall implement a procedure for receiving, recording and processing verbal and written complaints about lack of accessibility. It should also be suitably publicized (e.g., in polling stations, on the EC website, on the Voter Information Card). It should include the tracking of complaints and their disposition. The number of complaints received about accessibility issues should be publicly reported. EC shall execute this reporting requirement for a period of three complete general election cycles, in the CEO's post-election report to Parliament, and as per the terms set out in its counsel's October 23, 2009 letter to the Tribunal. EC shall consult with the other parties about same.

Three Month Suspension If Election Called

- (11) The timelines and activities concerning the above remedies shall be suspended for a period of three months in the event of a general election, except for the award of compensation and interest, and the cease order.

EC to Report to Tribunal

- (12) EC shall report to the Tribunal in at least three-month intervals about its progress in implementing this Order.

Tribunal Staying Seized

- (13) The Tribunal will remain seized in this matter to the later date of the reporting of accessibility complaints by EC after the next general election and the implementation of the other parts of this Order, including any further implementation Orders as required.

"Signed by"

Matthew D. Garfield

OTTAWA, Ontario
February 12, 2010

¹There was no formal motion to amend the Complaint.

²In these Reasons for Decision, Mr. Hughes' "Complaint" refers to the one made to the Commission vs. his verbal and written "complaints" made to EC in March 2008.

³[2005] 1 S.C.R. 667.

⁴[2007] 1 S.C.R. 650.

⁵*Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150.

⁶This is reflected in subsection 53(3) of the *CHRA* which allows the Tribunal to award "special compensation" to a complainant where a respondent has engaged in the discriminatory practice "wilfully".

⁷*Canada (Attorney General) v. Mowat*, 2009 FCA 309.

- ⁸See *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114, in the context of the Tribunal ordering an employment equity program on an employer in a systemic discrimination case.
- ⁹*Ibid.*, at 1145 where the order must be "rationally designed" to the discriminatory practice.
- ¹⁰*Entrop v. Imperial Oil Limited* (2000), 50 O.R. (3d) 18, at paras. 46 and 57.
- ¹¹*Turnbull v. Famous Players Inc.*, [2001] O.H.R.B.I.D. No. 20, at para. 235.
- ¹²*Canadian Human Rights Commission v. Dumont*, 2002 FCT 1280, at para. 14.
- ¹³See *Lepofsky v. Toronto Transit Commission*, 2005 HRT0 21 and 2007 HRT0 23 for the appointment of a monitor. See also *McKinnon v. Ontario (Ministry of Correctional Services)*, [2002] O.H.R.B.I.D. No. 22 for the appointment of a Compliance Committee to monitor compliance of orders at a detention centre, and of a third party to develop, oversee and monitor training programs.
- ¹⁴2008 FCA 170. See also *Dreaver v. Pankiw*, 2009 CHRT 8; judicial review application heard on November 24, 2009.
- ¹⁵In closing argument, EC's counsel filed a written document entitled "Remedies Consented to by Elections Canada ("EC")."
- ¹⁶Section 65 of the *CHRA*.
- ¹⁷This case involved remedies made under s. 24(1) of the *Canadian Charter of Rights and Freedoms* for the realization of minority language education rights in Nova Scotia.
- ¹⁸*National Capital Commission v. Brown*, 2008 FC 733, at para. 148; reversed on other grounds, 2009 FCA 273.
- ¹⁹Subsection 53(2) of the *CHRA* empowers the Tribunal to make an Order against a respondent only.

PARTIES OF RECORD

| | |
|---------------------------------|---|
| TRIBUNAL FILE: | T1373/10308 |
| STYLE OF CAUSE: | James Peter Hughes v. Elections Canada |
| DATE AND PLACE OF HEARING: | October 5 to 9, 2009 Toronto, Ontario Last written submissions filed on October 23, 2009. |
| DECISION OF THE TRIBUNAL DATED: | February 12, 2010 |
| APPEARANCES: | |

| | |
|---|--|
| Kate A. Hughes Janet Borowy | For the Complainant |
| No one appearing | For the Canadian Human Rights Commission |
| Andrew Lokan Maya Bhusari | For the Respondent |
| Ivana Petricone Kerri Joffe Amy Spady | For the Interested Party |