

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

**AND IN THE MATTER OF a complaint filed by Jennifer McSwain against Government of
the Northwest Territories, Department of Justice**

Appearances: Jennifer McSwain (“the Complainant”) for herself

Erin Delaney, legal counsel for Government of the Northwest Territories,
Department of Justice (“the Respondent”)

Date of hearing: 10 and 11 September 2008

Place of hearing: Hay River NT

Adjudicator: Adrian C. Wright

1. Introduction

My authority comes from Part 5 of the *Human Rights Act*; this authority is distinct from that of the Human Rights Commission (“the Commission”) and the Director of Human Rights (“the Director”). The Director or her staff investigates complaints. The Director decides whether complaints should be adjudicated. If so, she refers such complaints to the Chair of the Adjudication Panel. The Chair refers complaints to individual adjudicators - such as me - for adjudication. I hold a hearing and then determine whether the *Act* has been violated and, if it has been violated, the remedy.

2. *Pre-hearing events*

The Complainant made a complaint dated 20 September 2006 to the Human Rights Commission (“HRC”). The complaint alleges the Respondent denied the Complainant the benefit of inmates of South Mackenzie Correction Centre (“SMCC”) in Hay River removing snow from her residence. The Complainant resides at 52 Stewart Drive Hay River with her husband, William McSwain. The Complainant maintains she was denied these services as the result of her marriage to Mr McSwain, a corrections officer at SMCC. “Marital status” is a prohibited ground of discrimination (s. 5 (1) *Human Rights Act*).

I convened six pre-hearing conferences. The parties agreed that I had no bias, and that I had jurisdiction to hear and decide the complaints. Before the hearing, the parties exchanged witnesses summaries, agreed on the documents that would be used in evidence and exchanged pre-hearing briefs. The issues in the hearing were clarified. I made a ruling about the production of some documents. These documents were made exhibits at the hearing.

The complaint and the Director’s file were exhibits at this hearing. The Director’s file included the investigator’s notes arising from the investigator’s interview of witnesses; various submissions by the Complainant and the Respondent to the investigator; and a report. The exhibits also included various lists of individuals in Hay River receiving snow removal from inmates at SMCC. One of these (a draft of the 2005/2006 Home Care snow shoveling list containing various handwritten markings) was produced by the Respondent at the hearing. It was made Exhibit 2.

William McSwain, David Gauthier, Cheryl Maurice, Frances Aylward, Bonnie Webb, Alvina Sibbeston, Quinn Groenheyde, Ken Boyer, Allen Studney, Vince McKay, and Roy Courtoreille gave evidence at the request of the Complainant; part of a statement given by Bob Haley was also entered as an exhibit at the request of the Complainant. Tom Hamilton was called by the Respondent.

3. *Facts*

I summarize the significant evidence in this case. There was no dispute about the facts. I therefore accept all the evidence I heard as fact.

Background

Inmates of SMCC periodically remove snow from the property of some Hay River residents. There is no fee for this service. The service is voluntary – neither SMCC nor the inmates at SMCC are obliged to remove snow.

Tom Hamilton is the present warden of SMCC. He testified this voluntary snow removal started before 1994. He became warden in 1994. The program is informal. Originally, any offenders who wanted to shovel snow did so. The number of residences receiving this snow removal assistance increased over time: inmates removed snow from some properties and, as a result, other property owners requested it.

At the time of the hearing (according to Mr Hamilton) there were 17 corrections officers, 4 corrections supervisors and 6 relief corrections officers at SMCC. There are an average of 45 to 50 inmates. Of these, between 6 and 12 are available for snow removal.

Before the fall of 2005, there were no written criteria governing snow removal by inmates of SMCC. Mr Hamilton testified, “the criteria has always been that we would help people that needed help who had no one to help them.”

The Complainant has multiple sclerosis. Her mobility is impaired. As a result, she moves around using a scooter. She is unable to remove snow from her property. She is married to William McSwain. The Complainant and Mr McSwain reside together at 37 John Maples Crescent. Mr

McSwain testified. He is a corrections officer at SMCC. He appears fit and able to remove snow.

Snow removal for Home Care clients

Many witnesses referred to “Home Care”. I understand this to be the portion of Hay River Health and Social Services Authority (“the Authority”) which provides assistance to people who cannot look after their own daily needs.

According to Mr Hamilton, some time after 1994, Home Care requested SMCC to “help them out”. SMCC agreed to put Home Care clients from the Home Care snow shovelling list on the SMCC snow removal list. SMCC also gave those people “priority status” because they were the people who seemed most in need.

Mr Hamilton was asked why no written criteria were provided at the time Home Care approached SMCC about providing snow removal for its clients. Mr Hamilton responded – SMCC assumed that Home Care had criteria for its clients. Home Care would be vetting its clients. As a result, there was no need for a protocol. SMCC assumed Home Care had its own criteria. SMCC was happy with that.

Two employees of Hay River Health and Social Services Authority (“the Authority”) testified. They were Frances Aylward and Bonnie Webb.

Ms Aylward was, from 2003 to 2007, acting manager of Community Health Services for the Authority – she looked after home care and public health. Ms Webb was a home support worker. The Authority provides “home care” based on an individual’s medical needs. Individuals who cannot, for example, do light housekeeping, or vacuuming receive “home support”. Usually, residences having able-bodied persons do not receive home support. The Authority looks at the needs of each house and provides what is needed. For example, if an able-bodied person provides a lot of care to a disabled person, the residence may receive home support.

The Authority had a list of clients needing snow removal (“the Home Care snow shovelling list”). This included clients receiving some home support who could not remove snow from their property. In the fall of each year, employees of the Authority – including nurses and home support workers – review the Home Care snow shovelling list. People who no longer need assistance with snow removal are taken off the list; individuals requiring snow removal are added. Ms Aylward knew of no criteria used before December 2005 to deny snow removal. She was unaware SMCC had any concerns about the Home Care snow shovelling list before Ms McSwain’s name appeared on the list.

Mr Hamilton testified, SMCC maintains a binder in the control room at the SMCC facility. This is the “work project book”. The binder included the Home Care snow shovelling list and, sometimes, the SMCC snow removal list. The SMCC snow removal list is always on the SMCC computer system. All staff (including corrections officers) at SMCC had access to this binder. All staff also have access to the SMCC snow removal list on the computer system. Anyone can change this list.

As a result, before the fall of 2005, the SMCC snow removal list consisted of people on the Home snow shovelling list, and others.

People over 65

Mr Hamilton testified people over 65 often have difficulty removing snow. SMCC thought helping them would be a good thing. SMCC likes inmates to participate with elders. Elders often come out and share something – for example, cookies – with the inmates. SMCC really wants this – offenders connect with the community so the community may realize “offenders are not all bad”. For all these reasons, inmates at SMCC remove snow from the property of people over 65.

Snow removal for the Complainant

In the fall of 2005, Ms Webb placed the Complainant on Home Care snow shovelling list. In Ms Webb’s view, the Complainant could not remove snow from her property. As a result, the

Complainant qualified for snow removal.

Mr Hamilton testified Lyla Belanger spoke to him in the fall of 2005. Ms Belanger was a corrections supervisor at SMCC. Ms Belanger told Mr Hamilton the Complainant's name was on the snow removal list. Mr Hamilton thought inmates should not remove snow from the Complainant's property: there was an able-bodied person in the residence (Mr McSwain) who could remove snow. As a result, Mr Hamilton instructed Ms Belanger that SMCC could not remove snow from the Complainant's property. He also called Ms Aylward and told her the Complainant's name should be removed from the snow removal list.

Mr Hamilton testified SMCC would prefer to remove snow for people that most need SMCC's help. If there are people at a residence who can remove snow, SMCC is not needed. As a result, SMCC did not remove snow from residences with able-bodied people.

In December 2005, Mr Hamilton met with Mr McSwain in the presence of deputy warden Quinn Groenheyde. The meeting occurred in the doorway of Mr Hamilton's office at SMCC. Mr McSwain worked at SMCC as a corrections officer. Mr Hamilton advised Mr McSwain that snow could not be removed from his residence by SMCC inmates. This would be a conflict-of-interest. In Mr Hamilton's view, there was a conflict between Mr McSwain's interest as an occupant of the house and his responsibilities as an employee at SMCC. There would be a perception by the community that a corrections officer was getting a service from SMCC. This would be seen as inappropriate by many members of the community. The evidence of Mr Groenheyde, about both the meeting and the conflict-of-interest, was similar to that of Mr Hamilton.

Snow removal criteria and the snow removal list

Mr Hamilton then determined eligibility criteria for snow removal. These appeared in a letter by Mr Hamilton to Ms Aylward dated 6 January 2006: a "client" is entitled to snow removal if he or she satisfies one or more of the following criteria:

- the client must not be able to remove the snow because of a disability
- the client is 65 years of age or older
- there are no able-bodied persons living in the client's residence that can remove the snow
- there can be no conflict of interest with businesses in the community that provide snow removal services
- no other conflict of interest exists.

Mr Hamilton acknowledged the letter was poorly worded. His intention was inmates remove snow for disabled individuals who satisfy the first item and the last three; and for persons 65 or over who meet the last four criteria. Even though the letter is confusing, he and Ms Aylward understood the criteria. He did not remember when the confusion in the letter was drawn to his attention. Home Care followed the criteria in the letter as intended by him. As a result, he did not change the letter.

Mr Groenheyde testified Mr Hamilton showed him a copy of the 6 January 2006 letter after Mr Hamilton sent it. Mr Groenheyde told Mr Hamilton the statement, "The Client will be put on the list if they meet one or more of the following criteria" may cause confusion. Mr Hamilton did not remember this conversation. He thought the issue was first brought to his attention by counsel for the Respondent shortly before this hearing.

Changes to the SMCC snow removal list

Mr Hamilton testified corrections supervisors manage the SMCC snow removal list. Home Care advises SMCC whether names should be added to the list or taken off the list. Corrections supervisors actually make these changes to the list. Mr Hamilton told the investigator from the Human Rights Commission who prepared the report at tab 11 in the book of exhibits that corrections supervisors go through the list to ensure people on it meet the criteria. Corrections supervisors provide the snow removal list to corrections officers when corrections officers take inmates to remove snow.

Mr Groenheyde testified disabled persons, senior citizens or people who want snow removal speak to a corrections supervisor or corrections officer. The corrections officer or corrections supervisor ensures the person meets the criteria – and does not reside with an able-bodied person. SMCC has always removed snow from residences of disabled people and senior citizens; not from residences with able-bodied people. The corrections supervisor then adjusts the SMCC snow removal list on the computer system. All staff at SMCC have access to this list and can change it. He thought corrections supervisors and corrections officers understood the program better than he did. In particular, corrections officers told their supervisors about residences with able-bodied people on the list.

Mr Groenheyde also testified that Home Care clients also appear on the SMCC snow removal list. Home Care communicates directly with Mr Hamilton. SMCC may change the Home Care list if it is aware of information – for example, an able-bodied person living in the residence of a person on the Home Care list.

Mr Courtoreille (a corrections supervisor) said corrections officers add people to the list. People called SMCC asking to be put on the snow removal list. Corrections officer do not check whether these people are legitimate. He only added senior citizens (that is, people 60 years of age and over) to the list. He referred people who said they were disabled to Home Care. Home Care prepared the list of residences having disabled people. Management at SMCC did not tell corrections officers whether snow should be removed from residences with able-bodied persons. He did not tell anyone when he learned able-bodied people lived in a residence which received snow removal. SMCC did not do work for staff – because of public perception.

Mr Boyer, Mr Studney, Mr McKay and Mr Haley (all corrections officers) had taken inmates from SMCC to remove snow from residences of disabled or elderly people. All had seen snow removed from residences which housed able-bodied persons. They did not describe how often this happened. Mr Boyer and Mr McKay both raised this with management at SMCC. Snow was removed from residences with able-bodied persons after they raised this issue. Mr McKay testified nothing was done about it so he did not mention it again.

Mr Hamilton was disappointed with Mr Courtoreille's understanding of his responsibilities as a corrections supervisor. He was also disappointed that corrections officers did not tell their supervisors about residences having able-bodied persons. This should be reported to their supervisors who should change the list. He discussed the snow removal criteria at staff meetings and corrections supervisors meetings. Staff meetings are not mandatory. As a result, not everyone may have been present for the discussion.

Awareness of the 6 January 2006 letter from Mr Hamilton to Ms Aylward

Mr Groenheyde said both Home Care and corrections employees applied the criteria in the 6 January 2006 letter to applicants for snow removal. Mr Groenheyde knew Home Care had the criteria in writing because the 6 January 2006 letter was directed to Home Care. Mr Groenheyde did not know if the 6 January 2006 letter was kept in paper form at SMCC.

None of Mr Boyer, Mr Studney, Mr McKay or Mr Courtoreille knew about the 6 January 2006 letter from Mr Hamilton to Ms Aylward..

Home Care clients removed from the SMCC snow removal list in January 2006

The Authority reviewed the Home Care snow shovelling list as a result of the 6 January 2006 letter. As a result, seven names (Cheryl Maurice, Manfred Rambovsky, Jenny Gauthier, Alphonse Cardinal, Clara MacNeil, Mary Pope and the Complainant) were removed from that list.

Cheryl Maurice and her common-law spouse, David Gauthier, both testified. They reside at 52 Stewart Drive. They have resided together for 32 years. Ms Maurice is disabled and cannot remove snow from their property. Mr Gauthier is able-bodied. He works for the Government of the Northwest Territories. He is an airport employee and does not work at SMCC. Inmates rarely work for him. Inmates from SMCC have removed snow from their property over the previous three to four years. Bonnie Webb arranged this.

Mr Hamilton testified Lyla Belanger told him (when she told him about the Complainant's name being on the SMCC snow removal list) that Cheryl Maurice was on the list. She also said Ms Maurice resided with an able-bodied person. Mr Hamilton told Ms Belanger that Ms Maurice's name should be taken off the list. Mr Hamilton indicated Ms Maurice's name should not be on the list and would be removed. Mr Groenheyde told the investigator at the Human Rights Commission (during the course of the Commission's investigation of this complaint) that SMCC did not know Cheryl Maurice resided with an able-bodied person.

Ms Webb explained why the seven names were stroked off the 2005/2006 Home Care snow shovelling list. All resided with able-bodied people who could remove snow. None of these names appeared in the version of the 2005/2006 Home Care snow shovelling list included in the book of exhibits.

One of the documents (document 23) in the book of exhibits is entitled, "Senior and Home Care Snow Removal List". It was the version of the SMCC snow removal list on the date of the hearing. The document states the first 28 people on the list are Home Care clients and are priority. I will call the remainder of this list, "the second part" of this list. Five of the seven names stroked off the 2005/2006 Home Care snow shovelling list (Cheryl Maurice, Manfred Rambovsky, Jenny Gauthier, Alphonse Cardinal and Clara MacNeil – shown as Barney MacNeil on the SMCC snow removal list) appear in the second part of this list. Of the seven names, only the Complainant's name and that of Mary Pope are not on this list. Mary Pope is the mother of Bonnie Webb. I understand she is now deceased.

Cheryl Maurice's name does not appear in the 2005/2006, 2006/2007, and 2007/2008 Home Care snow shovelling lists in the book of exhibits.

Other recipients of SMCC snow removal

Alvina Sibbeston is a licenced practical nurse. She is 63. She has osteoarthritis and cannot shovel snow. She resides in Hay River with her husband. Her husband suffered a heart attack in October 2006. Shortly after, she called a close acquaintance SMCC and had her residence put on the SMCC snow removal list. She thinks a person from SMCC did ask if there was an able-bodied person in house. She thought many people in Hay River (because it is a "small town") knew her husband had a heart attack. She told the person from SMCC that there was no one in the house who could shovel snow. Her husband still cannot work. He also cannot shovel snow. SMCC removed snow from their property in the winter of 2007/2008. Ms Sibbeston's name appears in the second part of the SMCC snow removal list. Her name does not appear in any of the Home Care snow shovelling lists in the book of exhibits.

Mr Hamilton testified that, around the same time (I understand he meant as the Complainant's name came off the SMCC snow removal list), Home Care flagged Dan Norris's residence for snow removal. Mr Norris's name was removed because his common-law spouse, Stella Wasylicia, was a corrections officer. The name, "Dan Norris" appears on the 2007/2008 Home Care snow shovelling list but not on the SMCC snow removal list.

Volume of snow removal

Sometimes the inmates are divided into crews. If so, one crew did one part of Hay River; the other crew did the rest. A corrections officer supervised each crew. Sometimes the crew took a few hours to go through the entire SMCC snow removal list. On other occasions, the crew needed a few days. This depended on the amount of snow, and number of inmates removing snow.

Security

Mr Hamilton also testified security reasons justified not removing snow from the McSwain residence. Inmates should not know where corrections employees live. The employer should not provide this information to inmates – even though inmates may find it out for themselves. The

corrections officers who testified all preferred that inmates not know where they live. Inmates did learn this information because their names and addresses may appear in the telephone directory; and because, inmates may see their residences when driving around town. Inmates who were Hay River residents may also know the residences of corrections employees.

3. *Legislation*

The *Human Rights Act* says:

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

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

4. *Issues*

In this case, there is no dispute the Respondent denied the Complainant “goods, services, accommodation or facilities that are customarily available to the public”. Inmates at SMCC remove snow from the property of Home Care clients who cannot remove snow themselves. The Respondent denied these services to the Complainant’s property even though she is a Home Care client and cannot remove snow from her property.

As a result, the issues are,

- Did the Respondent deny inmate snow removal to the Complainant on the basis of a prohibited ground of discrimination?
- If the answer to this question is “yes”, did the Respondent have a *bona fide* and reasonable justification for denying the services to the Complainant?

The onus is on the Complainant to satisfy me the Respondent denied snow removal to her because of a prohibited ground of discrimination. She must do so on a balance of probabilities.

If the Complainant succeeds, the onus shifts to the Respondent to satisfy me, on a balance of probabilities, it had a *bona fide* and reasonable justification for denying snow removal to the Complainant.

5. *Positions of the Parties*

a. Position of the Complainant:

First issue: Did the Respondent deny inmate snow removal to the Complainant on the basis of a prohibited ground of discrimination?

The Complainant's access to snow removal should be the same as that of any other Home Care client in Hay River. Before the fall of 2005, snow removal was provided to residences with able-bodied persons. This limitation did not exist until the Complainant's name appeared on the snow removal list. No eligibility criteria then existed. The Respondent removed only her name from the snow removal list. Individuals taken off the list in 2005/2006 are again on the list. As a result, the Respondent denied her snow removal because of her marriage to Mr McSwain. This is contrary to s. 5 (1) of the *Human Rights Act*.

Second issue: If the answer to this question is "yes", did the Respondent have a *bona fide* and reasonable justification for denying the services to the Complainant?

– The rule (that is, inmates should not clean snow from the residences of corrections officers) is not rationally connected to the performance of the job. The rule does not prevent inmates from discovering where corrections officers live. Inmates know where corrections officers live. In any event, the Respondent is not really concerned about security but, in developing positive relationships between inmates and disabled and elderly people.

- The Respondent also did not honestly and in good faith establish the snow removal criteria outlined in Mr Hamilton’s 6 January 2006 letter. The Respondent created these criteria only to justify not removing snow from the Complainant’s residence.
- Accommodating the Complainant would not unduly inconvenience the Respondent.
- The Respondent has no risk or responsibility for safety or security of anyone.
- The Complainant provided no specific response to the Respondent’s position that an able-bodied person (that is, Mr McSwain) could remove snow from her property. The Complainant contends that snow is removed from the residences of other able-bodied persons. This rule is therefore not applied to all applicants. The rule was created only to justify not removing snow from her property.

b. Position of the Respondent

First issue: Did the Respondent deny inmate snow removal to the Complainant on the basis of a prohibited ground of discrimination?

The Respondent relied on *Law v. Canada* [1999] 1 S.C.R. 497:

- a. Did the criteria “disadvantage” the Complainant? The Complainant was removed from the snow removal list because she lived with an able-bodied person or because she lived with a corrections officer. The Respondent contends I must compare the group including the comparator to a comparator group. The appropriate comparator group (as defined in *Hodge v. Minister of Human Resources Development*, 2004 SCC 65) is recipients of home support services who do not live with a corrections officer. As a result, the Complainant’s removal from the list resulted from her living with a corrections officer and an able-bodied person, not from her being married to such a person. The denial does not result from a prohibited ground of discrimination.
- b. Was the disadvantage based on an enumerated ground? No: the Respondent denies snow removal to the Complainant because she lives with a corrections officer who is also able-bodied and not because she is married to such a person.

c. Was there an impairment of the Complainant's human dignity? Factors to consider are pre-existing stereotyping, prejudice or vulnerability. Does the distinction correspond with the claimant's circumstances? Is there an ameliorative purpose?

Again, the answer is "no": snow removal is a limited service. There must be eligibility criteria. Further, the Complainant's interest is not as significant as some which, for example, affect liberty. Also, the Complainant could either pay for snow removal herself or her husband could remove the snow.

Second issue: If the answer to this question is "yes", did the Respondent have a *bona fide* and reasonable justification for denying the services to the Complainant?

If I find discrimination, there is a *bona fide* and reasonable justification. One such justification is conflict-of-interest – the public would decide Mr McSwain received an advantage as a result of his employment. The Respondent referred to paragraph 78 of the Government of the Northwest Territories Code of Conduct.

Also, SMCC should not give inmates the home addresses of correctional staff. This would necessarily occur if inmates removed snow from the McSwain property. It does not matter if inmates learned this information elsewhere – it should not come from SMCC.

Finally, the inconsistent application of the snow removal criteria by SMCC is an administrative issue. It is not evidence of discrimination.

6. *Analysis*

First issue: Did the Respondent deny snow removal to the Complainant on the basis of a prohibited ground of discrimination?

Appropriate test

I must decide the test or framework to resolve this question. There are two alternatives:

- a. the traditional “*prima facie* case approach”; and,
- b. the analysis used by the Supreme Court of Canada in *Law v. Canada*, (cited above) often called “the *Law* analysis”.

The *prima facie* case approach comes from *Ontario Human Rights Commission and O’Malley v. Simpsons-Sears Limited*, [1985] 2 S.C.R. 536. It requires the Complainant establish,

- First, she is, or is perceived to be, a member of a group possessing a characteristic or characteristics protected under the *Human Rights Act*;
- Second, she suffered some adverse treatment; and
- Third, a reasonable inference is the protected characteristic contributed to the adverse treatment.

Preiss v. British Columbia Attorney-General (No. 3), (2006), 58 C.H.R.R. D/378 (B.C.H.R.T.) at para 216.

The Respondent argues I should use the *Law* analysis:

- a. Do the eligibility criteria treat the Complainant differently than other comparable individuals?
- b. If so, is the differential treatment the result of an enumerated ground in the *Human Rights Act*?
- c. Does the differential treatment demean the Complainant’s human dignity?

The *prima facie* approach works in fact-driven cases in private settings (*Preiss* (cited above) at para 235. Here, the government is the respondent. There are policy issues. As a result, I use the *Law* analysis: is there substantive or purposive discrimination?

I use the three *Law* factors listed above. I recognize they may not apply in every case. They may overlap. They are not absolute or exclusive. They do, however, help to evaluate discrimination

(*Gosselin v. Quebec (Attorney-General)*, [2002] 4 S.C.R. 429 and *Preiss*, cited above, at paragraphs 230 and 231).

Use of evidence arising after the complaint

I must first decide what I can do with the evidence arising after the complaint. In the fall of 2005, Home Care put the Complainant on the snow removal list. Not long after, Mr Hamilton, on behalf of the Respondent, decided the Complainant should not be on the SMCC snow removal list. The complaint is dated 20 September 2006. I admitted evidence of both the snow removal list after the date of the complaint and who received snow removal after the date of the complaint. The Complainant and Respondent agreed to admit all this evidence.

I refer to sections 52 (2), 56 and 59 of the *Act*. These give me

- The authority to determine the appropriate practice and procedure for the hearing so as to facilitate the just and timely resolution of the complaint.
- The authority to receive evidence in any manner I consider appropriate. I am not bound by the rules of law respecting evidence in civil actions.
- The powers of a board of inquiry under the *Public Inquiries Act*.

A number of decisions of the British Columbia Human Rights Tribunal address amending human rights complaints: a complaint may be amended so long as the amendment gives accurate expression to the allegations in the complaint. In other words, the amendment must not change the issues in the hearing. *Price v. Freightliner Ltd et al*, 2003 BCHRT 21; *Metcalfe v. I.U.O.E. Local 882* (No. 6), 2005 BCHRT 78.

This reasoning also applies to the use of evidence: it must be consistent with the allegations in the complaint. Here, the complaint alleges denial of snow removal on the basis of marital status.

The denial is ongoing. It commenced when Mr Hamilton denied snow removal to the Complainant's property. It continues to the present day. Using evidence arising after the date of the complaint does not change the complaint.

As a result, I may consider any evidence relevant to this issue, even if it arises after the date of the complaint.

Law analysis

a. Was the Complainant treated differently than other comparable individuals?

I agree with the Respondent that I must determine the appropriate comparator group. This must "mirror" the Complainant's characteristics except for the characteristic that is an enumerated ground of discrimination – *Hodge v. Minister of Human Resources Development*, 2004 SCC 65 at para 23 and 40 to 46; *Auton v. British Columbia (A-G)*, 2004 SCC 78, at para 53. Here, the enumerated ground is marital status. I must identify the "universe" of people potentially entitled to equal treatment in relation to the subject-matter of the claim. Here, this is all Home Care clients who cannot remove snow from their property. As a result, in this case, the comparator group is Home Care clients who cannot remove snow from their property and who are not married to corrections officers or able-bodied persons.

The Respondent argued the comparator group should be other home care recipients with an able-bodied person in their residence. This group does not align with the alleged ground of discrimination (in this case, marital status) as required by *Hodge* and *Auton*: it does not test whether the Respondent treats the Complainant's group differently because of marital status. The comparator group therefore must be individuals similar to the Complainant except for the prohibited ground of discrimination. This must be Home Care clients who cannot remove snow from their property and are not in marital relationships with corrections officers; or in marital relationships with able-bodied persons.

Also, I disagree with the Respondent that I should only examine whether the *eligibility criteria* treat the Complainant differently than comparable individuals. I must determine whether the Complainant *was* treated differently; not just whether the eligibility criteria treated her differently.

Are all the members of the comparator group eligible for snow removal?

The facts appear above. I conclude:

- According to Mr Hamilton, the only eligibility criteria before the fall of 2005 was SMCC “would help people that needed help who had no one to help them.” SMCC relied on Home Care to vet its list. Before the 6 January 2006 letter, Home Care allowed individuals living with able-bodied persons on the Home Care snow shovelling list.
- the 6 January 2006 Hamilton letter did not preclude snow removal from residences having able-bodied persons. The letter was unclear. It did not reflect Mr Hamilton’s intention. The Home Care staff at the Authority had the letter and understood SMCC would not remove snow from residences with able-bodied persons.
- As a result, I find SMCC controlled the Home Care portion of the SMCC snow removal list. Home Care and SMCC reviewed the Home Care snow shovelling list. Home Care added names to its list when it decided Home Care clients required snow removal; it removed names when its client no longer qualified. SMCC also made some effort to remove the names of Home Care clients who no longer qualified for snow removal.

I find as follows about the second part of the SMCC snow removal list.

- Everyone who worked at SMCC had access to the SMCC snow removal list on the SMCC computer system. As a result, anyone could change it.

- There was no written policy governing addition or deletion of names from the second part of the SMCC snow removal list. Corrections staff did not have the 6 January 2006 letter. There was no documentation of the snow removal eligibility criteria other than the 6 January 2006 letter.

- Some staff thought they could only add senior citizens to the list (Courtoreille); others (Belanger) appeared to think inmates should not remove snow for people living with able-bodied individuals; still others (McKay) thought management was not interested in whether able-bodied people resided with individuals receiving snow removal. I accept Mr Hamilton and Mr Groenheyde both thought SMCC staff understood inmates should not remove snow for individuals living with able-bodied people. I find, however, there was no clear and consistent understanding amongst SMCC staff regarding both who could be added to the second part of the list and whether inmates could remove snow for individuals residing with able-bodied people .

- SMCC did not review the list to ensure Home Care clients removed from the Home Care snow shoveling list were not subsequently added to the second part of the list. It did not review the second part of the list to ensure individuals living with able-bodied people were not on the list. SMCC did not control which staff added names to the second part of the list. Any employee at SMCC could alter the SMCC snow removal list. As a result, any SMCC employee could add a name to the second part of the list.

- Names which were removed from the Home Care snow shovelling list in January 2006 appeared in the second part of the SMCC list. So, other than the Complainant, none of the Home Care clients taken off the SMCC snow removal list in January 2006, remained off that list.

As a result, I find:

- SMCC included residences with able-bodied persons on its snow removal list;

- Inmates at SMCC removed snow from residences which SMCC knew or ought to have known included able-bodied persons; and,
- Only the Complainant and Dan Norris were removed from the SMCC snow removal list and not returned to it. They were both in marital relationships with corrections officers at SMCC. I heard no evidence that any other potential snow removal recipient was both removed from the SMCC snow removal list and not subsequently returned to it.

So, the group which includes the Complainant (Home Care clients in a spousal relationship with a corrections officer) does not receive inmate snow removal; the comparator group (Home Care clients not in spousal relationships with corrections officers) does. As a result, the Respondent denied inmate snow removal to the Complainant (and others in marital relationships with correctional officers). The Complainant's group therefore was treated differently than the comparator group.

Further, SMCC did not, in fact remove individuals residing with able-bodied persons from the SMCC snow removal list. Inmates removed snow from such residences. As a result, some individuals in the group which includes the Complainant (Home Care clients in a spousal relationship with an able-bodied person) were not treated differently than those in the comparator group (Home Care clients not in a spousal relationship with an able-bodied person).

The Respondent therefore treated the Complainant's group differently than Home Care clients who cannot remove snow from their property and are not in marital relationships with corrections officers. The Respondent did not treat the Complainant's group differently than Home Care clients who cannot remove snow from their property and are not in marital relationships with able-bodied persons.

- b. Is the differential treatment the result of an enumerated ground in the *Human Rights Act*?

The answer to the second of the three *Law* questions is also "yes". The differential treatment is

the result of marital status (to a corrections officer) which is a prohibited ground of discrimination.

- c. Thirdly, does the differential treatment deny the Complainant her equal human worth and dignity?

Law requires me to look at four factors. These factors and my analysis of them in this case appear next.

- i. Are the spouses of corrections officers subject to pre-existing disadvantage, vulnerability, stereotyping or prejudice?

There is no pre-existing disadvantage, stereotyping or prejudice affecting spouses of correctional employees; spouses are, however, vulnerable to differential treatment. Abella, J., in *Ontario Human Rights Commission v. Mr B. et al* (2000), 38 C.H.R.R. D/506 (Ont. C.A.) at para 54 described discrimination on the basis of marital status as limiting opportunities available to individuals on the basis of characteristics relating to their marriage (or non-marriage).

Examples of such vulnerability are:

Brossard v. Quebec (1988) C.H.R.R. D/5515 (S.C.C.) – a municipality relied on its anti-nepotism policy and denied the complainant summer employment as a lifeguard. The complainant's mother was a typist for the municipal police.

Mark v. Porcupine General Hospital (1984), 6 C.H.R.R. D/2538 (Ont. Bd. Inq.) – complainant terminated from employment as housekeeper when employer learned that complainant's husband was employed as a maintenance worker.

Marquardt v. School District No. 59 (Peace River South) (1990), 12 C.H.R.R. D/299

(B.C.H.R.C.) – School Board refused two complainants positions as counselors in schools in which their husbands were employed as teachers.

These cases are similar to this one. In each, the respondent refused an opportunity to the complainant as a result of the complainant's relationship to a family member or parent. The complainants were all vulnerable because of their relationships with spouses or family members. The same applies to the Complainant in this case.

- ii. Does the differential treatment correspond with the needs, capacities and circumstances of the Complainant?

The Respondent decided inmates could not remove snow from the Complainant's property: This would conflict with William McSwain's employment. Further, inmates could discover where William McSwain lived. Moreover, the Complainant lived with an able-bodied person who could remove snow from her property.

As a result, the Respondent did not consider the Complainant's circumstances. It did not look at whether she needed snow removal even though she lived with an able-bodied person; or whether work could be assigned at SMCC so as to avoid the potential conflict-of-interest. It did not balance its security concerns with the Complainant's needs. Indeed, the Respondent did not consider whether the Complainant, herself, could remove snow from her property.

The differential treatment therefore does not correspond with the needs, capacities or circumstances of the Complainant.

- iii. Does the differential treatment have an ameliorative purpose or effect for a more disadvantaged group than spouses of corrections officers?

There is only one group more disadvantaged than spouses of corrections officers who could

benefit from inmates not removing snow from the Complainant's property – inmates at SMCC. There is no evidence inmates benefit from not removing snow from residences of Home Care recipients who cannot remove snow from their property and are in marital relationships with corrections officers. As a result, this factor does not justify treating the Complainant differently than similar individuals not in marital relationships with corrections officers. It therefore cannot be used to deny snow removal to the Complainant.

iv. What is the nature or scope of the interest affected by the differential treatment?

The Respondent argues the nature of the interest – removing snow from property – is not as important as other interests – such as those affecting liberty. The question is whether differential treatment of the Complainant and other spouses of corrections officers enhances their being viewed as less capable or less deserving of concern, respect and consideration. In my view it does because it does not consider their needs or circumstances. The only reason they do not receive this assistance is their relationships to corrections officers. They may still require snow removal even though their spouses are corrections officers. For example, a spouse may be unable to remove snow or already providing a lot of care.

Snow removal is significant to the Complainant. As she said in her complaint,

“no matter how big or small a service provided to someone with a disability is, those services are always gratefully accepted and provide some relief to an already stressful daily situation.”

Conclusion of Law analysis

The *Law* factors shows SMCC's denial of inmate snow removal services deny the Complainant her equal human worth and dignity.

So, the answer to the first issue, “Did the Respondent deny inmate snow removal to the Complainant on the basis of a prohibited ground of discrimination?” is “yes”.

Second issue: Did the Respondent have a bona fide and reasonable justification for denying the services to the Complainant?

There are two possible justifications:

- inmates removing snow from the Complainant’s property create a conflict-of-interest – the conflict is between Mr McSwain’s obligations as an employee at SMCC and his spouse’s private interest in having snow removed from the property.
- inmates would necessarily learn Mr McSwain’s address. Employers should not provide a corrections officer’s address to inmates.

I must determine whether the Respondent satisfied the following from *B.C. Public Service Employee Relations Commission* v. *B.C.G.E.U.* (1999), 35 C.H.R.R. D/257 (S.C.C.) (“the *Meiorin* decision”):

- i. It adopted the standard for a purpose or goal that is rationally connected to the function being performed (here, inmates removing snow from the Complainant’s property);

Conflict-of-interest

The Respondent relies on paragraphs 17 and 78 of the Code of Conduct;

17. A conflict of interest exists where there is an actual or perceived incompatibility between an employee’s duties and responsibilities of office and the private interests of the employee or an immediate family member which can include but is not limited to pecuniary interests including investments whether voluntary or otherwise, on a board council or committee or other organization; and personal relationships, including immediate family and spouse.

An employee must at all times avoid being in a position of conflict of interest in

order to ensure that:

- a) the responsibility to act in the public interest and perform the duties of office in an appropriate and objective manner is not nor is perceived to be impaired; and/or
 - b) public confidence and trust in the public service and the GNWT generally is upheld not impaired.
78. Employees must conduct themselves in a manner that promotes confidence in an unbiased, professional public service. It is therefore important that employees not be seen to be taking actions to further the private interests of their immediate family, friends or relatives.

These address conflicts between the duties and responsibilities of employees and the private interests of, in this case, spouses. Inmates at SMCC do remove snow from the properties of people – such as the Complainant – who cannot remove snow from their own property. The Complainant’s husband, William McSwain, works for SMCC. Inmates removing snow from the Complainant’s property may cause a conflict-of-interest for Mr McSwain. Rules which inhibit conflicts-of-interest (like paragraphs 17 and 78 of the Code of Conduct) are rationally connected to whether inmates should remove snow from the Complainant’s property. As a result, the Code of Conduct has a valid purpose which is “rationally connected” to removing snow from the Complainant’s property.

Security

Similarly, inmates may learn Mr McSwain’s address if they remove snow from his property. As a result, there is a rational connection between the standard and removing snow from the Complainant’s property.

- ii. It adopted the standard in the good faith belief that it is necessary for the fulfillment of the purpose or goal

Conflict-of-interest

It appears the Respondent relies on paragraphs 17 and 78 to disqualify all spouses of correctional officers from snow removal. Mr Hamilton's evidence is that it is inappropriate for corrections officers to, in effect, benefit from snow removal by inmates. Mr Hamilton testified the corrections officer benefits because inmates remove snow from the corrections officer's property even though the snow is really being removed for the officer's spouse. Paragraph 17 is also the general provision in the Code of Conduct which applies to all possible employee conflicts of interest. Paragraph 78 applies specifically to employees. Although paragraph 17 of the Code of Conduct may not disentitle the Complainant to snow removal, I am satisfied the Respondent, in good faith, believes it should.

Security

I am not satisfied the Respondent believes, in good faith that denying snow removal to the Complainant is necessary for security reasons. Mr Hamilton did not raise the issue either when he spoke to the Complainant or Mr McSwain at his office. The issue is also not listed in the 6 January 2006 letter. Counsel for the Respondent did not mention it in its initial letter (dated 24 October 2006) in response to the complaint . The Respondent raised it first in the 11 January 2007 interview of Mr Hamilton by the investigator.

- iii. The standard is reasonably necessary to accomplish its purpose or goal, in the sense that the Respondent cannot accommodate persons with the characteristics of the Complainant without incurring undue hardship.

Conflict-of-interest

Paragraph 17 covers both "actual" and "perceived" incompatibility between employee duties and responsibilities and private interests of a family member. This case concerns a "perceived"

incompatibility: the Respondent is concerned about the perception of the other staff and the community. Mr Hamilton and Mr Groenheyde both testified if inmates removed snow from the Complainant's property, the community and staff would perceive William McSwain received an unfair advantage because he works at SMCC.

A rule prohibiting conflicts-of-interest must prevent only real conflicts-of-interest or reasonable potential conflicts-of-interest; it must account for the degree of likelihood of an abuse of power; it must prohibit reasonable apprehension of bias. (*Brossard v. Quebec* (1988) 10 C.H.R.R. D/5515 at para 41023 (S.C.C.) per Beetz J). Does the Code of Conduct do this?

Here, the question is whether there is any reasonable potential for a conflict-of-interest. Bonnie Webb placed the Complainant on the 2005/2006 Home Care snow shoveling list. William McSwain had no influence on this decision. He did not use his position to get the Complainant on the Home Care snow shoveling list – nor could he. Home Care and Mr Hamilton decided whether Home Care clients should be added to the SMCC snow removal list – not Mr McSwain.

Furthermore, Mr McSwain may be instructed to supervise inmate snow removal. If so, he would supervise a group of inmates. Often the inmates are divided into more than one group. Some corrections officers supervise one group of inmates; others supervise another group. SMCC could organize the groups so William McSwain does not accompany the inmates who remove snow from his property. Since inmates are not obliged to participate, some may stay behind at SMCC. If only one crew goes out, Mr McSwain could be assigned other duties at SMCC – such as supervising inmates who choose not to remove snow.

It is not apparent to me how William McSwain's employment could otherwise cause a conflict-of-interest.

There must be a "reasonable apprehension of bias" (*Brossard*) giving rise to a "justifiable appearance" of conflict-of-interest. The reasonable apprehension of bias test requires that a

reasonably informed bystander could reasonably perceive a conflict – *Newfoundland Telephone Co v. Newfoundland (Board of Commissioners of Public Utilities)* (1992), 89 D.L.R. (4th) 289 (S.C.C.). The reasonably informed bystander is aware of all the information necessary to decide whether there is a conflict-of-interest. The standard is not “what the community or staff would perceive”.

The circumstances of this case are similar to *Mark v. Porcupine General Hospital* and *Marquardt v. School District No. 59 (Peace River South)* (see above). In both cases, adjudicators decided that spouses working together do not create an irreconcilable conflict-of-interest. Work may be assigned to minimize workplace contact. So long as one does not supervise the other, there is no conflict.

In this case, a conflict could only arise if Mr McSwain supervised inmates removing snow from his property. SMCC should be able to arrange snow removal supervision so Mr McSwain does not supervise snow removal at his residence.

The Respondent argues there is “a potential for abuse” because corrections officers have “a considerable amount of control over inmates”. The Respondent argued (in its pre-trial brief) that, though it produced no evidence, this is “common sense”. It relied on Hogg, *Constitutional Law of Canada* (5th Ed), at p. 38-8. There may be many inmates doing snow removal. The inmates removing snow from the Complainant’s property may change from week to week. It is not clear to me how any control exercised by corrections officers over inmates causes “incompatibility” between the corrections officer duties and his or personal interests. I am not prepared to accept there is an incompatibility in the absence of evidence.

As a result, a reasonably informed bystander would not reasonably perceive a conflict-of-interest. So, the Respondent can accommodate removing snow from the Complainant’s residence without undue hardship – that is, placing Mr McSwain in a conflict-of-interest.

Security

As argued by the Respondent, all the corrections witnesses testified they do not want inmates to know where they live. I accept this. Many of the corrections witnesses testified inmates often find out on their own where corrections officers lived.

On the other hand, the Respondent allows inmates to remove snow from other Hay River properties. In the absence of evidence, I am not convinced the risk to those properties is any less than that to properties owned by corrections officers. I heard only that corrections officers do not want inmates to know where they reside. This does not imply there is a higher risk of damage to the property of corrections officers than to that of other Hay River residents.

The issue is whether the Respondent can accommodate the Complainant without causing itself “undue hardship”? For the reasons given, I am not convinced the Respondent views the security issue as a substantial concern. I therefore conclude inmates can remove snow from the Complainant’s property without undue risk to the Complainant or Mr McSwain.

As a result, the Respondent has not satisfied me under the third ground of the *Meioran* test it cannot accommodate inmates removing snow from the Complainant’s residence without undue hardship. As a result, the Respondent has not established a *bona fide* and reasonable justification under s. 11 (1) of the *Act*.

One final point – the Respondent argued SMCC snow removal is a limited service – the number of inmates may be limited. It may take some time, perhaps weeks after a snow fall to get through the list. The corrections officers testified that often the snow removal list was completed soon after a snowfall - perhaps even within a day. I am not convinced that either the number of inmates or the number of corrections officers limited the service in any way. There is no evidence that the availability of either inmates or corrections officers affected the number of names on the snow removal list.

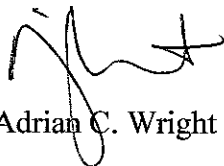
7. *Conclusion and Remedy*

I therefore find, under s. 62 of the *Act*, the complaint has merit.

I heard some submissions from the Complainant on remedy. During argument, I told the parties I would hear evidence on remedy if I found the complaint had merit. Also, the Respondent made no argument about remedy. As a result, I will allow the parties to both present evidence and make submissions on remedy.

So, I remain seized of this matter. I will hear submissions on remedy and costs. The parties should contact the office of Adjudication Panel so that a pre-hearing conference can be scheduled. The conference will concern whether evidence will be called, what that evidence will be and the time, date and location of the hearing to decide remedy.

DATED at the City of Yellowknife in the Northwest Territories this ^{16th} day of March 2009.



Adrian C. Wright
Adjudicator