

Building Accessibility Appeal Tribunal
Service NL

Tim Horton's Countertop Heights
Appeal Hearing
Tuesday, May 15, 2015

Residential Tenancies Hearing Room
Motor Registration Building
Mount Pearl, NL

Appellant:



Section 40(1)

WD Partners

Respondent:

Mr. Dennis Eastman, P. Eng.
Director of Engineering & Inspection Services
Service NL

SUMMARY NOTES

1. The Building Accessibility Appeal Tribunal did not reach a consensus during the hearing of March 31st, 2015. Service NL offered to retain independent legal counsel for the Tribunal to consult with. The decisions made by the Director of Engineering & Inspection Services, Service NL were not set aside during the hearing.
2. The Appeal Tribunal, which consisted of Mr. John Hearn, as Chairman; Mr. Leon Mills; and Ms. Carrie-Ann Bugden agreed to pause the hearing to allow the Tribunal to seek legal guidance. Section 40(1)
3. The Appellant, [REDACTED] contacted Mr. Dennis Eastman on March 12th, 2015 via email to contest Inspector's Order # 16471 issued March 4th, 2015 and Inspector's Order # 16439 issue March 6th, 2015 relating to Countertop Heights at Tim Hortons restaurants in one of the Mount Pearl locations and one location in Marystown. Section 40(1)
4. Mr. Eastman responded via email on March 13th, 2015 mistakenly dating his attached letter as February 13th, 2015, which pre-dates the Inspector's Orders. He also referred to [REDACTED] of March 12th, 2015 as February 12th, 2015.
5. The Appellant [REDACTED] filed an official appeal on March 17th, 2015, under Section 23(1) of the *Buildings Accessibility Act* relative to the Respondent's interpretation of Section 33 of the *Buildings Accessibility Regulations* in respect to Countertop Heights at Tim Hortons restaurants in Mount Pearl and Marystown. [REDACTED] stated: Section 40(1)

"Section 33 of the *Building Accessibility Regulation* states that:

Counters

33. (1) All counters serving the public shall have at least one barrier-free section in conformance with subsections (2) and (3).

(2) Barrier-free counter surfaces shall not be more than 865 millimeters above the floor.

As shown on the attached millwork drawings for the restaurants.....one(1) counter has been constructed.....at the required 865mm height, as per Section 33 of the Building Accessibility Regulations."

6. Mr. Eastman responded formally on March 13th, 2015 via email regarding Service NL's interpretation of Section 33 of the Building Accessibility Regulations. In his letter Mr. Eastman stated:
 - "It is my opinion that the counters where orders and financial transactions are conducted provide a distinctly different service than the food pass-thru area and are, themselves, counters serving the public. Consequently, they must have at least one barrier free section with a barrier free counter surface not more than 865mm above the floor as required by section 33 (1) and (2) of the Schedule to the Buildings Accessibility Regulations."

Section 40(1)

7. The tribunal first heard submissions from the Appellant, [REDACTED] followed by submissions from the Respondent, Mr. Dennis Eastman. Mr. Eastman reiterated in detail Service NL's broad interpretation of the Act, previously submitted in writing.

Section 40(1)

Section 40(1)

8. On April 29th, 2015, the Chairman, John Hearn, met with [REDACTED] Curtis Dawe Lawyers and Donna Kelland, Assistant Deputy Minister, Service NL at the 2nd Floor, West Block, Confederation Building. The wording of Section 33 of the Buildings Accessibility Regulations was reviewed for legal interpretation. [REDACTED] Curtis Dawe Lawyers advised when interpreted strictly, the wording indicates the drawings are compliant with the Act. She further advised however that a judge may interpret the legislation more broadly given that a more strict interpretation could be seen as compromising the spirit of the Accessibility Act.

Section 40(1)

Section 40(1)

9. On May 5th, 2015, the Chairman, John Hearn, participated in a conference call with Mr. Dennis Eastman, representing Service NL and [REDACTED] representing Tim Hortons. Countertop height was discussed at length during the call. [REDACTED] confirmed that going forward, Tim Hortons has confirmed they will lower countertop heights at both the financial transaction areas and food pass-through areas to not exceed 865mm in height on their next 3 planned locations.

Section 40(1)

10. On May 20th, Donna Kelland contacted the Tribunal members by email and provided the following clarification:

- 1) Contrary to the Tribunal's assumption, the applicant had not originally been given approval by the Department to renovate their countertops to a new height.
- 2) The approval letter for Marystown specifically instructed that barrier-free sections be provided at all counters.
- 3) The crux of the matter seems to be whether having "one counter" serving the public at the lower height (i.e. the "Order pick up counter") meets the test of the legislation which requires "all counters serving the public to have at least one barrier free section".
- 4) The design company who submitted the applications appealed after the inspector did his inspection and discovered that the counters had been changed and were no longer in compliance with the barrier free height requirements.
- 5) In other cases where owners have not received specific approval and have done something which is contrary to the legislation, they have been required to do whatever work is necessary to comply, notwithstanding the cost.

11. On May 29th, the Chairman, Mr. John Hearn and Mr. Leon Mills met to discuss the matter once again. After viewing photographs of the recently renovated Tim Horton's on Merchant Drive in Mount Pearl, the Tribunal concluded that the counters: a) are not continuous, b) the counters are clearly used for different transactions, and c) that the intent and spirit of the Accessibility Act can only be met if both the ordering counter and the counter where customers pay are installed at the lower accessible height. Furthermore, the Tribunal members felt that the "fix" to correct the counter height was relatively easy and inexpensive. It appears that the extended semicircular counter lip can be cut and dropped to the accessible height without destroying the main counter behind. This will allow a wheel chair to pull up to the counter under the cantilevered extended counter top, in front of the main counter behind.

12. We would further recommend that the Regulations be revised as soon as possible to clearly outline the intent and spirit of Section 33, so as to give clear direction to designers and builders who rely on the strict wording of the legislation.

Respectfully submitted,



John Hearn, MNLAA, MRAIC
Chairman, Building Accessibility Appeal Tribunal