

HUMAN RIGHTS AND CONDOMINIUMS: THE DUTY TO ACCOMMODATE

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On July 18, 2009 the Ontario Human Rights Tribunal (the “Tribunal”) released a decision (*McMillan v. Bruce Condominium Corporation No. 6* [2009] O.H.R.T.D. No. 867) which essentially addressed the following question: Is a condominium unit owner with a physical disability required to pay for the costs of making alterations - necessary to accommodate the owner’s disability - to a part of the common elements of which the owner has exclusive use?

The unit owner, Marilyn McMillan, filed an Application with the Tribunal claiming discrimination in accommodation on the ground of disability in violation of the *Human Rights Code* of Ontario (the “Code”). Mrs. McMillan owns the unit jointly with her husband in a condominium project managed and administered by Bruce Condominium Corporation No. 6 (“BCC 6”). According to the Tribunal decision, the unit is 1 of 32 free-standing homes, and it was built with two exterior wooden steps extending from the landings at the front and rear of the house. The Tribunal goes on to state that the registered Declaration of BCC 6 provides that the front and rear entrances to Mrs. McMillan’s unit are to be used exclusively by the owners of the unit i.e. Mrs. McMillan and her husband.

¹ Presented on November 27, 2009 at ACO’s Legal Grab Bag Luncheon

Although the Tribunal decision does not provide any details on the exact nature of Mrs. McMillan's disability, it is noted as a physical disability which restricts her mobility. The Tribunal decision also indicates that by July 2006 Mrs. McMillan's mobility had decreased to the point where she could no longer safely leave her condominium unit without assistance. The Respondent, BCC 6, did not dispute or challenge the fact that the nature and degree of Mrs. McMillan's physical disability constitutes a "disability" under the *Code*.

Mrs. McMillan's husband made a request for the installation of hand railings on the front and back exclusive-use common element steps appurtenant to her unit to accommodate her disability. According to the testimony given by Mrs. McMillan's husband, the installation of the handrails was simple (and presumably inexpensive although this is not made clear in the decision), and it would prevent putting his wife's life in jeopardy.

It appears that Mrs. McMillan's human rights application was filed before the Board of Directors of BCC 6 had an opportunity to formally respond to her request. BCC 6 ultimately approved the request for the handrails; however, the condominium corporation took the position that the installation would have to be at the expense of Mr. and Mrs. McMillan and not BCC 6. Mrs. McMillan took the position that she and her husband should not have to bear the cost of the railings and that the Corporation has a duty to accommodate her.

The Tribunal initially notes that the issue before it is whether BCC 6 has a duty to accommodate Mrs. McMillan's disability and, if so, whether the applicant's disability can be accommodated without causing "undue hardship" to BCC 6. However, because BCC 6 allowed the request for the installation of handrails, the real issue was whether Mrs. McMillan experienced discrimination on the basis of disability and whether BCC 6 was in breach of the *Code* when the Board of Directors refused to pay for the installation of hand railings on the front and back exclusive-use common element steps appurtenant to Mr. and Mrs. McMillan's unit.

The Tribunal ultimately decided that there was no discrimination in this case and that BCC 6 was not in violation of the *Code* in allowing the installation of the handrails at the expense of Mr. and Mrs. McMillan. In reaching this conclusion, the tribunal states as follows:

"The circumstances of this case are distinct from a condominium corporation's obligation to make common areas accessible. BCC [6] approved the request to install hand railings within its authority *but it is not responsible* for areas defined as common elements that fall within a unit owner's exclusive use." (Emphasis Added)

The Tribunal provides the following reasons for its decision:

"The reason for defining the exterior areas of the unit as exclusive use common element is to ensure that a condominium development remains aesthetically consistent from property to property. However, the owners are responsible for maintaining the exclusive use common element area and, in this case at the time of the original human rights complaint, to seek Board approval if they wish to alter any part of it. *Other than the fact that the railings are needed for access*, the applicant's request to install them is no different than the McMillans' previous requests to install a hot tub or shed on the exclusive use common elements of their property at their own cost. The fact that Mr. McMillan expressed concern that the Board might not have been satisfied with railings that he would have installed *does not change his or the applicant's responsibilities for property that is within their exclusive use*. The Declaration provided that the Board must approve changes to any areas of the exclusive use common elements." (Emphasis Added)

Although, in the writer's respectful opinion, the Tribunal does not provide sufficient reasons in its analysis of this case, it appears that the decision stands for the principle that if an unit owner with a disability requests accommodation - which necessitates a change to a portion of the common elements of which the owner has exclusive use – then a condominium corporation will in all likelihood be required to grant the request (unless it causes “undue hardship”) but the owner must pay for the costs of making the change to accommodate his or her disability.

However, condominium corporations and property managers are cautioned not to take an overly-defensive approach when it comes to the general duty of condominium corporations to ensure that the common elements are accessible to individuals (including unit owners themselves) with disabilities. Although persuasive, decisions of one Tribunal member are not binding on other Tribunal members, nor are they binding on the courts. Furthermore, both tribunals and courts have repeatedly stated that human rights applications, especially with respect to the duty to accommodate, are to be treated and analyzed on a case-by-case basis.

When the Board of Directors and/or property manager of a condominium corporation receives a request for an accommodation of a disability - necessitating a change to the common elements - the following basic steps should be taken at a minimum. At the outset, readers should keep in mind that this a basic overview of a complex human rights analysis that has spawned a plethora of tribunal and court decisions, as well as various human rights policies.

Therefore, generally speaking and at bare minimum, a condominium corporation must consider, review and investigate the request for accommodation thoroughly and in good faith. In other words, it is ill-advised to deny a request in a summary or dismissive manner. A condominium corporation has a duty under the *Code* to ensure that the common elements accommodate occupants with disabilities, unless doing so causes “undue hardship” in a particular case. There are three basic factors that may be considered when determining whether the condominium corporation can raise the defence that the requested accommodation would cause undue hardship: (1) cost; (2) outside sources of funding, if any; and (3) health and safety requirements, if any. For a detailed analysis of these factors and other general principles applicable with respect to the duty of housing providers (such as condominium corporations) to accommodate people with disabilities, readers are referred to the Ontario Human Rights Commission *Policy on Human Rights and Rental Housing*, by visiting the following link:

<http://www.ohrc.on.ca/en/resources/Policies/housing/pdf>.

Finally, in addition to the foregoing and as a general recommendation, condominium Boards and property managers should always conduct an overall cost-benefit analysis when faced with a contentious issue concerning a request to accommodate a disability. In many cases, the costs of litigation will exceed those of accommodation in terms of the expense of making the requested alteration to the common elements. While there are some instances where litigation becomes necessary in order to establish a precedent and prevent the costs of further similar claims, in the case of human rights issues - and particularly issues regarding the duty to accommodate people with disabilities – given the

unique nature of individual disabilities and the associated requests for accommodation, there will not be many such cases which set a long-lasting precedent, if any at all.

In the *McMillan* case, although the Tribunal decision does not mention the costs of the change, in all likelihood the installation of the handrails entailed a fairly nominal expense. Nevertheless, it still remains to be seen whether this decision is precedent-setting i.e. whether courts and/or tribunals will follow it and find, as a general principle, that owners with disabilities are required to pay for the cost of their own accommodation, if it necessitates an alteration to a part of the common elements of which the owner has exclusive use.