

ONTARIO
DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE

ROY, LINHARES DE SOUSA AND R. SMITH, JJ. A.

06 250 003

BETWEEN:

Eagleson Co-Operative Homes, Inc.

Respondent on Appeal

- and -

Hélène Thériège

Appellant

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) Jacqueline M. Yost, for the Respondent on
) Appeal
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) François Kasenda Kabemba, for the
) Appellant
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) HEARD: May 2, 2006

(ON APPEAL FROM CHARBONNEAU J.)

ENDORSEMENT

Roy J.

- [1] This endorsement is a summary of the reasons given orally to the parties today.

- [2] The respondent behaved reasonably in this matter, subject to the exceptions detailed by Justice Smith in his reasons.

TRANSLATION

[3] Given the scope of subsection 171.21 of the *Co-Operative Corporations Act*, we agree that it was a error in law to allow the respondent to obtain a writ of possession without taking into consideration all of the appellant's medical evidence and all of the circumstances.

[4] The standard of review with respect to pure questions of law is the standard of correctness.

[5] In the specific circumstances of this matter, we allow the appeal.

[6] The appellant has 30 days to pay all of the rent arrears.

[7] We have considered the offer made by the appellant. It does not meet this judgment. Furthermore, because of the appellant's very difficult behaviour, no costs are awarded.

The Honourable Justice Roy

[8] I agree with the decision of Justice Roy and also with the reasons set out by Justice Smith.

The Honourable Linhares de Sousa

[9] I agree and I add the following reasons:

The Honourable Justice R. Smith

ADDITIONAL REASONS

R. Smith J.

[1] I agree with the result in this appeal based on the resolution of an issue of whether the provisions of the *Ontario Human Rights Code* should be considered, which was not argued by the appellant's former counsel at the initial hearing, and as a result was not considered by the application judge.

Overview

[2] The Eagleson Co-Operative (the Co-op) evicted Mrs. Théberge from her unit because she failed to perform the two hours of volunteer work each month, required by the Co-op's by-law. Mrs. Théberge had provided the Co-op with her doctor's written opinion that she was incapable of performing the volunteer work for medical reasons. The Co-op sought further medical details of Mrs. Théberge's medical condition, which she refused to provide, and then the Co-op proceeded to evict her. Mrs. Théberge ultimately did provide full details of her medical condition shortly before the application for a writ of possession was heard, but these were not considered by the Co-op or by the Court hearing the application, as evidence which could affect the decision to issue a writ of possession.

[3] The following issues must be decided in this appeal:

- a) Should the Court apply the provisions of the *Ontario Human Rights Code* ("OHRC") when deciding whether to evict a person with a mental disability from her Co-op unit under the *Co-Operative Corporations Act*?
- b) Does the Board of the Co-op have a duty under the *OHRC* to accommodate individuals with a disability?
- c) Is it a violation of the *OHRC* to force a person with a disability to divulge private medical information as a condition of maintaining their accommodation, and is it unfair in all of the circumstances to evict her?

Analysis

Issue #1 - Should the Court apply the provisions of the *Ontario Human Rights Code* when deciding whether to evict a person with a disability from a Co-op unit?

[4] Every person has a right to equal treatment with regard to the occupancy of accommodation, without discrimination based on a number of factors, including disability. *Section 2(1) of the Human Rights Code*, R.S.O. 1990, c. H.19.

[5] A disability is defined to include a condition of mental impairment or a mental disorder. *OHRC Section 2(b) and (d), supra*. In this case, the medical evidence confirmed that Mrs. Théberge suffered from a mental impairment due to Dysthymia, a chronic long-term depression, or a mental disorder as a result of her diagnosis of having a borderline personality disorder, and as a result, she is a person with a disability as defined under the *Human Rights Code*.

[6] In the recent Supreme Court of Canada decision in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, the Court held that a provincially created statutory tribunal was obligated to follow the provincial human rights legislation when rendering its decision. The Court stated that statutory tribunals, which were empowered to decide questions of law, are presumed to look beyond the enabling statute, to apply the whole law to a matter properly before them.

[7] The *OHRC* is a fundamental law. The Ontario legislature affirmed the primacy of the *OHRC* in the law itself, which is applicable both to private citizens and public bodies. Further, the adjudication of *OHRC* issues is no longer confined to the exclusive domain of the *Ontario Human Rights Commission: OHRC, Section 34, supra*. The legislature has clearly contemplated that this fundamental law could be applied by the Court and other administrative bodies and has amended the *OHRC* accordingly.

[8] In *Tranchemontagne, supra*, the Supreme Court of Canada found that an administrative Tribunal should apply the provisions of the *OHRC* when interpreting statutes because:

- (i) The *Ontario Human Rights Code* states that it has primacy over other legislative enactments, which would include the provisions of the *Co-Operatives Corporations Act* in this case; and

- (ii) The recent amendments to the *OHRC* have removed the exclusive jurisdiction over interpretation and the application of the *Code*, from the Human Rights Commission.

In addition, the provisions of Section 11(2) and Section 17(2) and (3) of the *OHRC* specifically state that “a Court, as well as the Tribunal or the Commission, could apply these provisions of the *OHRC* when deciding if the needs of a person with a disability can be accommodated without undue hardship.”

[9] Section 47(2) of the *OHRC* states that the *OHRC* is paramount over other legislation. The Supreme Court of Canada has also held that the *Human Rights Code* takes precedence over agreements and contracts: *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551.

[10] In the *Tranchemontagne* case, *supra*, the Supreme Court of Canada also stated that for vulnerable applicants, a prompt, final and binding resolution would be beneficial and it would be rare for the statutory tribunal not to be the most appropriate forum. In this case, I find that the Court is the most appropriate forum to apply the provisions of the *OHRC* when deciding Mrs. Théberge’s right to continue to occupy her Co-op unit, as the application was brought to the Court for a writ of possession. Any remedy for a breach of the *OHRC* would become meaningless if a Court could not consider and apply the provisions of the *OHRC* when deciding whether to issue a writ of possession under the *Co-Operative Corporations Act*, against a person suffering from a disability.

[11] If a statutory tribunal must consider the provisions of the *Ontario Human Rights Code* when deciding a matter of law, then it logically follows that a Court would also be required to apply the provisions of the *Human Rights Code* when deciding a matter of law, such as whether to evict a person for reasons related to their disability.

[12] Based on the Supreme Court of Canada decision in *Tranchemontagne*, which had not been released when the application was heard, and the circumstances of this case, I find that the provisions of the *Ontario Human Rights Code* must be considered and applied by the Co-op and by the Court hearing an application for a writ of possession under the *Co-Operative Corporations Act*, before evicting a resident with a disability for reasons related to the disability.

Issue #2 - Does the Board of the Co-op have a duty under the OHRC to accommodate individuals with a disability?

[13] The *OHRC* states that, “Any requirement or qualification, which has the effect of discriminating against someone or a group of persons on a prohibited ground, is exempted if it is reasonable and *bona fide* in the circumstance. A requirement or qualification will not be reasonable and *bona fide*, unless the Tribunal or a Court is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating these needs, considering the cost, outside sources of funding, if any, and health and safety requirements.”: *OHRC, Section 11(1)(a) and Section 17(1) and (2)*.

[14] Section 17 (1) and (2) and Section 11(1)(a) of the *OHRC* create an obligation to accommodate a person with a disability. The guiding principle for accommodation encompasses a respect for dignity of the person with a disability: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R., 497.

[15] The limitation on the rights of a disabled person in Section 17 must be read narrowly, as befits the purpose of the *Act*, and the requirement for accommodation of the needs of the person is a keystone of the *OHRC*: *Walmer Developments v. Wolch* (2003), 67 O.R. (3rd) 246 at para. 34.

[16] The *Ontario Human Rights Commission Policy and Guidelines on Disability and the Duty to Accommodate* (“*Guidelines on Disability*”) at p. 19 states as follows:

The duty to accommodate persons with disabilities means accommodation must be provided in a manner that most respects the dignity of the person, if to do so does not create undue hardship. Dignity includes consideration of how accommodation is provided and the individual’s own participation in the process.

Human dignity encompasses individual self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. It is harmed when individuals are marginalized, stigmatized, ignored or devalued. Privacy, confidentiality, comfort, autonomy, individuality and self-esteem are important factors as well as to whether an accommodation

maximizes integration and promotes full participation in society.

Different ways of accommodating the needs of persons with disabilities should be considered along a continuum from those ways which are most respectful of privacy, autonomy, integration and other human values, to those which are least respectful of those values [emphasis added].

[17] The need for and the extent of accommodation must be dealt with on a case-by-case basis. Before accommodation may be considered it must be determined whether discrimination has taken place by applying the “three broad inquiries” as set out in *Law, supra*, at para. 39. In this case, there was *different treatment* based on Mrs. Théberge’s *disability* and the *differential treatment discriminated by imposing a burden* on Mrs. Théberge by requiring her to disclose her private medical information as a condition of maintaining her accommodation and by requiring her to perform two hours of volunteer work which she was unable to perform due to her disability, according to the medical evidence.

[18] The *Guidelines on Disability* state that once it has been determined that there is a *prima facie* discrimination, it is necessary to consider whether the duty to accommodate has been met, by applying the three-step test that was proposed by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U. (Meiorin Grievance)*, [1999] 3 S.C.R. 3 [Meiorin] at para. 54. Only the third part of the test is relevant in this case, which is as follows:

- (3) That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[19] While this test arose in an employment situation, it has application to general questions of discrimination, as is evident from the general reference to “person responsible for accommodation” in the *Disability Guidelines, supra*, at page 17, as opposed to “employer.”

[20] The *Guidelines on Disability* further state that in determining whether the person responsible for accommodation has met the onus of showing that accommodation has been provided to the point of undue hardship, the following factors, as set out in *Meiorin, supra*, should be considered:

- Whether the person responsible for accommodation investigated alternative approaches that do not have a discriminatory effect;
- Reasons why viable alternatives were not implemented;
- Ability to have differing standards that reflect group or individual differences and capabilities;
- Whether persons responsible for accommodation can meet their legitimate objectives in a less discriminatory manner;
- Whether the standard is properly designed to ensure the desired qualification is met without placing undue burden on those to whom it applies; and
- Whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles: *Disability Guidelines, supra*, at p. 18 [emphasis added].

[21] Subsection 17(2) of the *OHRC* sets out three factors to consider in assessing undue hardship. They are as follows: cost, outside sources of funding, and health and safety requirements, if any. These are the only factors that may be considered.

[22] In *Walmer, supra*, the Divisional Court heard an appeal from an order of the Ontario Rental Housing Tribunal terminating a tenancy. The tenant had schizophrenia and was disruptive when she did not take her medication. The Court discussed accommodation at paragraph 31:

It was submitted that the tenant could not, because of her disability, act as is reasonably required of a tenant, so as not to disturb her neighbours. On the evidence before us, however, that is only true when she goes off her medication, which she apparently does on occasion. This would seem to be an example of a case where a

reasonable accommodation of the kind proposed by counsel for the tenant would be appropriate.

[23] In this case, the Co-op's by-law creates a requirement that every unit occupant must perform two hours of volunteer work every month. This requirement would have the effect of excluding occupants who, because of their disability, are unable to perform the required volunteer work. For the Co-op to rely on the exception provided in the *OHRC*, it must show that the requirement to perform two hours of volunteer work is reasonable and *bona fide*. To do so, it must show that the needs of a person such as Mrs. Théberge, with a mental disability, cannot be accommodated without undue hardship to the Co-op. I find that it would be reasonable and appropriate for the Co-op to obtain answers from Mrs. Théberge's doctor to determine if any of the volunteer tasks could be performed by Mrs. Théberge, notwithstanding her medical condition. If Mrs. Théberge is able to perform any of the assigned volunteer tasks, then she could be reasonably accommodated by assigning her one of the tasks that she is able to perform.

[24] If Mrs. Théberge is not able to perform any of the volunteer tasks for valid medical reasons, then the cost of accommodating her by exempting her from the requirement of performing two hours of volunteer work per month would be unlikely to impose undue hardship on the Co-op, especially when the Co-op had no requirement, for Mrs. Théberge to perform any volunteer work, as a condition of maintaining occupancy, for many years before this condition was imposed.

[25] I find that that the Co-op Board did have a duty under the *OHRC* to attempt to accommodate Mrs. Théberge's mental disability, before proceeding to evict her.

Issue #3 - Was it a violation of the *OHRC* to force a person with a disability to divulge private medical information as a condition of maintaining her accommodation and was it unfair in all of the circumstances to evict Mrs. Théberge?

[26] I acknowledge that the Co-op Board used their best efforts to deal with a complicated situation namely Mrs. Théberge's refusal to perform the two hours of volunteer work, based on medical reasons. However, it is the effect of the Board's actions and not their intent that must be considered. In my view, it was a violation of the *Human Rights Code* to require a person with a mental disability to divulge private medical information as a condition of maintaining her accommodation, and it was unfair in the circumstances to evict her because:

- a) The Board had received an un-contradicted written medical opinion from her doctor stating that she was unable to participate in any volunteer work due to medical reasons; and
- b) The Board requested that she appear before it to provide more information to explain her inability to perform the participatory volunteer work. This meeting could only have been arranged to seek additional medical information as indicated in the subsequent letter to Mrs. Théberge's doctor; and
- c) The Board did not attempt to accommodate Mrs. Théberge's disability after it became aware of her mental disability, when she disclosed the full details of her medical condition.

[27] The mutual obligations of the Co-op Board and the members were discussed in *Changemakers Co-Operative Homes (Kitchener) Inc. v. Andrassy*, [1999] O.J. No. 791 (Gen. Div.) at paragraphs 21 and 23 as follows:

It is clear from the bylaws the whole theory of co-operative living contemplated by the statute and the bylaws is dependent upon the mutual co-operation of the members in order to foster the enjoyment of all members in the co-operative lifestyle. This requires that all members comply with the bylaws and regulations associated with the co-operative corporation and the mutual respect by all member occupants for the other member occupants.

It seems to me that the board of directors has an obligation to all the members, including the respondent, to foster a spirit of collegiality and co-operation by exercising and encouraging dialogue among the members and members should be cognizant of the particular circumstances and disabilities of each other in dealing with enforcement of the bylaws and regulations under which they are all required to live.

Therefore, while it is important that members abide by the bylaws and regulations of the Co-op, it is equally important that the Co-op Board respects all members and lives up to their obligations to the members, which includes respecting the dignity of the members, and their rights under the *Ontario Human Rights Code*.

[28] In addition, Section 171.21(3) of the *Co-Operative Corporations Act* provides that a judge shall refuse to issue a writ of possession if the reason for the application is that a person has attempted to enforce his or her legal rights. Mrs. Théberge was attempting to enforce her right to keep her medical information private and this is an additional factor which weighs against evicting her.

[29] I find that the Board's request that Mrs. Théberge's doctor provide her opinion on whether the appellant was able to perform certain tasks for two hours per month was a reasonable request. However, the request regarding specific tasks should have been made to Mrs. Théberge, or directly to her doctor if Mrs. Théberge consented. The appellant should have consented to allow her doctor to respond to the specific questions and to that extent foiled the Co-Operative's attempt to provide an opportunity to discuss a reasonable accommodation. However any request requiring a Co-op member to provide full details of their medical conditions and history to the members of the Board, as a condition of remaining a member and being permitted to continue to reside in their Co-op unit would not be respectful of their right to privacy and confidentiality as set out in pages 12-13 of the *OHRC Guidelines on Disability*, especially in cases of mental illness. I find that such conduct would constitute an undue invasion of privacy, and would not be respectful of the dignity of an individual suffering from a disability.

[30] In the case of *Tamil Co-Operative Homes Inc. v Arulappah* (1999), 122 O.A.C. 280, 44 O.R. (3d) 120, 25 R.P.R. (3d) 85, the majority of the Divisional Court panel held that a hearing should be held to decide whether it would be unfair in all of the circumstances to issue a writ of possession under the *Co-Operative Corporations Act*. In dissent, Cumming, J., held that deference should be given to decisions of democratically elected Co-op Boards, provided they were acting reasonably. The reasoning of Cumming, J. has been followed in a number of subsequent decisions, including the application judge.

[31] In the appeal of *Tamil Co-Operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566, the Court of Appeal overturned the Divisional Court's decision on the basis of mootness but stated that "[i]t is impossible, in my view, to hold that s. 171.13(12) of the *Act* creates a single standard of review applicable to each and every challenge..." The Court of Appeal's decision indicated that a case-by-case interpretation process was the appropriate approach.

[32] Shortly before the hearing, Mrs. Théberge disclosed the full details of her medical condition to the Court and the Co-op, which confirmed that the initial medical opinion, provided to the Board by her doctor, was well founded and that she suffered from a mental disability. From the Court's point of view the detailed medical information also confirmed that the Board's decision to evict Mrs. Théberge and to ignore the medical opinion they had received or to have substituted their own medical opinion for that of the appellant's doctor, was not reasonable in these circumstances. The Co-op Board does not have any special expertise in the area of assessing the medical condition of members, and their ability to perform certain tasks. This is a factor which weighs against giving deference to their decision to evict Mrs. Théberge.

[33] As a result, for the above reasons I agree that it would be unjust in all the circumstances to issue a writ of possession and evict Mrs. Théberge.

The Honourable Mr. Justice R. Smith

I agree _____

The Honourable Mr. Justice Roy

I agree _____

The Honourable Madam Justice Linhares de Sousa

Released: September 5, 2006

COURT FILE NO.: 05-DV-1081

DATE:

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N:

Eagleson Co-Operative Homes, Inc.

Respondent on Appeal

- and -

Hélène Théberge

Appellant

REASONS FOR DECISION

The Honourable Mr. Justice R. Smith
The Honourable Mr. Justice Roy
The Honourable Madam Justice Linhares de Sousa

Released: September 5th, 2006

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