

## COURT OF APPEAL

CANADA  
PROVINCE OF QUEBEC  
REGISTRY OF MONTREAL

No: 500-09-018422-089  
(500-53-000251-072)

DATE: SEPTEMBER 30, 2010

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**CORAM: THE HONOURABLE LOUIS ROCHETTE, J.A.  
MARIE-FRANCE BICH, J.A.  
NICHOLAS KASIRER, J.A.**

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**COOPÉRATIVE D'HABITATION L'ESCALE DE MONTRÉAL**  
APPELLANT – defendant

v.

**COMMISSION DES DROITS DE LA PERSONNE  
ET DES DROITS DE LA JEUNESSE**  
RESPONDENT – plaintiff

and

**SARA CARTIER**

IMPLEADED THIRD PARTY – impleaded third party

and

**SYNDICAT DE LA COPROPRIÉTÉ COMMUNAUTÉ MILTON PARC**

IMPLEADED THIRD PARTY – defendant

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### JUDGMENT

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[1] THE COURT: On appeal from a judgment of the Human Rights Tribunal (the Honourable Michèle Rivet, President), rendered on January 14, 2008, that held the following: declares that the refusal to lease Sara Cartier a dwelling located at [...] is discriminatory; orders that section 8.3.3.4 of the declaration of co-ownership regulating minimum standards for occupation of dwellings in the Communauté Milton Parc be amended to avoid discrimination; orders that the Coopérative d'habitation l'Escale de

Montréal reinstate Ms Cartier in an accessible dwelling in the housing cooperative when one becomes available, even if it is one otherwise reserved for two or more persons; orders that Ms Cartier be registered on a priority list for an accessible apartment should one become available in one of the other cooperatives that is a member of the Syndicat de la copropriété Communauté Milton Parc; and awards to Ms Cartier damages for moving expenses, for the costs associated with the eventual resiliation of a lease, as well as damages for material harm and for moral harm;

[2] After having examined the file, heard the parties and deliberated on the whole;

[3] For the reasons of Kasirer, J.A., with which Rochette and Bich, JJ.A. agree:

[4] **ALLOWS** the appeal for the sole purposes of

[5] (i) striking out the following conclusion:

**ORDONNE** aux défendeurs de modifier l'article 8.3.3.4 du règlement régissant la copropriété de la Communauté Milton Parc de façon à ce que la norme d'occupation minimale tienne compte de situations comme celle d'une personne seule affligée d'un handicap, afin de permettre que ladite norme puisse être interprétée et appliquée conformément à la *Charte des droits et libertés de la personne* et, plus spécifiquement, conformément à l'obligation d'accommoder raisonnablement de telles personnes sans contrainte excessive;

and

[6] (ii) replacing the following conclusion:

**ORDONNE** la réintégration de madame Sara Cartier au sein de la Coopérative d'habitation l'Escale de Montréal ou d'une autre coopérative membre du Syndicat de la copropriété Communauté Milton Parc en l'inscrivant en priorité sur la liste d'attente pour un logement de 3 ½ pièces ou 4 ½ pièces répondant à ses limitations fonctionnelles;

with the following revised conclusion:

**ORDONNE** la réintégration de madame Sara Cartier au sein de la Coopérative d'habitation l'Escale de Montréal en l'inscrivant en priorité sur sa liste d'attente pour un logement de 3 ½ pièces ou 4 ½ pièces, selon celui qui se libérera le premier, répondant à ses limitations fonctionnelles.

[7] Without costs.

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LOUIS ROCHETTE, J.A.

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MARIE-FRANCE BICH, J.A.

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NICHOLAS KASIRER, J.A.

Mtre Marie-Anaïs Sauvé  
SYLVESTRE, FAFARD, PAINCHAUD  
For the Appellant

Mtre Pierre-Yves Bourdeau  
COMMISSION DES DROITS DE LA PERSONNE  
ET DES DROITS DE LA JEUNESSE  
For the Respondent

Date of hearing: September 23, 2009

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REASONS OF KASIRER, J.A.

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[8] The outcome of this appeal turns on a conflict between a housing cooperative's policy promoting affordable rents and the right to equality of one of its members who has a disability. On the one hand, the housing cooperative espouses the socially valuable goal of providing inexpensive apartments to moderate and low-income households. Its avowed purpose is to help the greatest possible number of economically disadvantaged tenants obtain decent housing in an inner-city neighbourhood. On the other hand, Sara Cartier seeks to rent an accessible apartment on her own, free from discrimination based on her disability as protected under the *Charter of Human Rights and Freedoms*.<sup>1</sup> She says the housing policy stands in her way.

[9] In the absence of undue hardship, ordinarily valid pursuits to earn a profit or to save public funds must sometimes bend to accommodate an individual's right to equality. But here the housing policy is undertaken, like the protected right against discrimination, in service of the fundamental public good of combating inequality. Determining which of these competing interests takes precedence over the other, as mediated by the duty of reasonable accommodation, is at the heart of this dispute.

[10] The Commission des droits de la personne et des droits de la jeunesse instituted proceedings on behalf of Ms Cartier. The Human Rights Tribunal held that she had been subject to wrongful discrimination when the cooperative refused to rent her an apartment that would have been accessible for her. The cooperative appeals.

## **I The parties**

### **(i) Sara Cartier**

[11] Sara Cartier was 42 years old when the respondent Commission des droits de la personne et des droits de la jeunesse started the present action on her behalf in 2007. Ms Cartier lives on a fixed income. She is considered a moderate or low-income person according to the criteria in the declaration of co-ownership that governs the appellant Coopérative d'habitation l'Escale de Montréal. She is also a disabled person who lives alone. Ms Cartier has had medical difficulties dating back to 1992, including a degenerative bone and muscular disorder. In the various medical certificates and doctors' letters filed in support of her claim, she is described as a person who suffers from a number of different medical conditions that limit her mobility and stamina. While she is not wheelchair bound, she uses a cane and walks with difficulty.

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<sup>1</sup> R.S.Q., c. C-12.

[12] Ms Cartier joined the Escale cooperative as a member in 1999. Membership is granted, upon application, to economically disadvantaged tenants who undertake to respect the principles established for community living at the cooperative, which include participation in certain tasks in its day-to-day operation and an acceptance of the rules pertaining to its internal governance. At the time she applied for membership, Ms Cartier declared that she was disabled and that, as a result, she could not undertake certain community tasks that involved physical exertion. From 1999 to 2005, she lived in a 3½-room apartment on the second floor of a building at Escale that has no elevator.

[13] Over time her disabilities worsened and gaining access to her apartment became progressively difficult. In 2001, she asked the cooperative for a mechanical lift to be installed to assist her but the Board of Directors refused the request for financial reasons. The deterioration in her health prompted her to contemplate moving elsewhere for a ground floor apartment or one that would be accessible by elevator. As we shall see, her formal request to rent unit [...] at the cooperative, a 4½-room apartment with elevator access, was denied in 2004 because the apartment was reserved, under the applicable rules for allocation of apartments, for two or more persons. In the end, she was obliged to leave the neighbourhood in order to secure an accessible dwelling. Ms Cartier complained to the Commission, alleging that the effect of the two-person minimum occupation standard for the apartment was to exclude her entirely from the cooperative because of her disability. This constituted, she said, a violation of ss. 4, 10 and 12 of the *Charter*. After investigating Ms Cartier's complaint that she had been denied an apartment in the cooperative because of her disability and proposing a remedy to Escale, the Commission decided that there was sufficient merit in her claim to file a motion to institute proceedings, on her behalf and with her consent.

## **(ii) Syndicat de la copropriété communauté Milton Parc**

[14] In 1987, the Société d'amélioration Milton Parc inc., which owned a number of multi-unit residential buildings in the Milton-Park neighbourhood in downtown Montreal, was authorized by statute to convert its property so that it might be held in divided co-ownership.<sup>2</sup> The Syndicat de la copropriété communauté Milton Parc is a legal person in the private interest, constituted as a result of the publication of the authorized declaration of co-ownership at the registry office. Ownership of the immovables on seven different streets that make up the Communauté Milton Parc is organized in an unusual manner: the project was imagined as a "condominium for social purposes"<sup>3</sup> that has had, since its inception, a mission of making available low-cost, inner-city housing to economically disadvantaged persons while preserving the established architectural and social character of the neighbourhood. Section 3 of the *Act respecting the conversion of the immovable belonging to Société d'amélioration Milton Parc inc. to*

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<sup>2</sup> An *Act respecting the conversion of the immovable belonging to Société d'amélioration Milton Parc inc. to co-ownership by declaration*, S.Q. 1987, c. 144, s. 3.

<sup>3</sup> Advocate Susan Altshul described the Milton-Park community project and its mission in "Condominium for Social Purposes" (1989) 92 R. du N. 219.

*co-ownership by declaration* provides for the registration of the declaration of co-ownership bearing on numerous buildings on the condition that registration be authorized by the Minister responsible, who in turn is charged with considering whether the declaration:

[...] favorise l'accès à des logements de qualité pour des personnes à revenu faible ou modéré, préserve la trame urbaine et l'unité architecturale et socio-économique du voisinage [*sic*] et prévoit des mécanismes de nature à empêcher la spéculation.

[...] makes good quality dwellings available to persons of low or moderate income, preserves the social fabric of the community and the architectural and socio-economic characteristics of the neighbourhood and provides mechanisms to prevent speculation.

[15] There are over 600 dwellings in various buildings that make up the Communauté Milton Parc. The Syndicate, which is constituted by the co-owners as a group in the manner contemplated by art. 1039 C.C.Q., has replaced the Société d'amélioration Milton Parc inc. There are 26 co-owners in the group, including fifteen housing co-operatives, one of which is the Escale. According to the Fact Sheet of the Syndicate filed in evidence, the group includes 146 residential buildings and three commercial buildings.<sup>4</sup> Called as a co-defendant at trial, the Syndicate chose not to appeal from the trial judgment and, while impleaded, did not appear in proceedings before this Court.

### (iii) **Coopérative d'habitation l'Escale de Montréal**

[16] Escale is a non-profit housing cooperative that shares the Syndicate's goal of making low-cost dwellings available to individuals and households who otherwise could not afford them. As one of the co-owners of the Communauté Milton Parc, Escale is recognized as "autonome en ce qui a trait à sa gestion et à son fonctionnement interne, mais il a des droits et obligations à l'égard de l'ensemble immobilier [...]" according to the Fact Sheet of the Syndicate, consonant with rights and obligations of a co-owner under articles 1063 C.C.Q. *et seq.* It is governed by the *Cooperatives Act*<sup>5</sup> and defined as a legal person, in part, by its mission:

**3.** Une coopérative est une personne morale regroupant des personnes ou sociétés qui ont des besoins économiques, sociaux ou culturels communs et qui, en vue de les satisfaire, s'associent pour exploiter une entreprise conformément aux

**3.** A cooperative is a legal person in which persons or partnerships having economic, social and cultural needs in common unite for the prosecution of an enterprise according to the rules of cooperative action to meet those needs.

<sup>4</sup> Because the outcome of this appeal does not depend directly on the juridical characterization of the immovable project as divided co-ownership under the Civil Code, and given that all the necessary evidence to make such a determination is not in the record, I will leave that question for another day.

<sup>5</sup> *Cooperatives Act*, R.S.Q., c. C-67.2.

règles d'action coopérative.

[...]

**220.** Une coopérative d'habitation est celle qui a pour objet principal de faciliter à ses membres l'accès à la propriété ou l'usage d'une maison ou d'un logement.

[...]

**220.** A housing cooperative is a cooperative whose principal object is to assist its members in acquiring the ownership or use of a house or dwelling.

The "déclaration d'association", filed with the competent government authorities on May 13, 1981 by which Escale was constituted, expressly records that one of the cooperative's purposes is to "Promouvoir l'habitation coopérative sous son double aspect économique et social".

[17] Practically speaking, Escale is composed of two contiguous apartment buildings. There are a total of 21 dwellings in the cooperative: fifteen apartments are in one building, and six are in the other. There are eight 3½ room-apartments, ten with 4½ rooms, and three with 5½ rooms. The 3½-room units are available for single persons but, by reason of their location in the buildings, they are mostly inaccessible for persons with disabilities such as Ms Cartier.

[18] The declaration of co-ownership applicable to members of the Syndicate including Escale contains references to the social mission espoused by the cooperative. Section 1.9 notes that the Communauté Milton Parc was founded by persons who opposed a development project "qui menaçait de porter atteinte au caractère socio-économique et physique de leur milieu". The founding members sought to preserve the "style architectural traditionnel du quartier Milton Parc" and to protect the interests of the "clientèle habituelle du quartier" (section 1.10). The description of the destination of the immovable also makes the social mission plain. Section 5 states in part that the immovable must be devoted principally to providing residential housing, by lease, that offer "un accès à des unités d'habitation de qualité pour des gens à revenus modéré et à faible revenu pour ainsi promouvoir les intérêts des résidents actuels et futurs de l'immeuble". The destination of the immovable is also intended to preserve the architectural and socio-economic character of the Milton-Park neighbourhood.

[19] Used for residential properties throughout the Syndicate, the declaration of co-ownership contains rules on the attribution of apartments. These rules, which apply to Escale, bear on one aspect of the shared mission as it relates to the provision of appropriately-sized dwellings to a maximum number of low-income members. New leases for the larger 4½ and 5½ room apartments in Escale are reserved for two or more persons pursuant to section 8.3.3.4 of the declaration:

8.3 En considération de la destination de l'immeuble :

[...]

8.3.3 Tout nouveau bail relatif à des locaux sis dans des parties exclusives réservées à l'habitation sera assujéti aux conditions suivantes, savoir :

8.3.3.1 De ne pas porter préjudice aux droits des occupants actuels des locaux de demeurer sur les lieux et d'en jouir à titre de locataire ou autrement sans avoir, de suite ou ultérieurement, à se qualifier en regard des normes ci-dessous mais néanmoins en respectant les obligations leur incombant en vertu des baux déjà consentis.

8.3.3.2 D'être accordé prioritairement aux personnes faisant partie des catégories suivantes :

Catégorie A :

celles qui reçoivent des prestations en vertu de la Loi sur l'Aide sociale du Québec ou le supplément de revenu mensuel garanti pour les personnes âgées selon la *Loi sur la sécurité de la vieillesse du Canada*;

Catégorie B :

celles qui ont un revenu maximum inférieur à 125 % du revenu pour les ménages à faible revenu déterminé par Statistiques Canada dans le cas de grandes villes; ou un revenu maximum égal au salaire minimum selon la Province de Québec;

Catégorie C :

celles qui ont un revenu maximum inférieur au revenu moyen ou médian pour les ménages selon Statistiques Canada pour les grandes villes.

8.3.3.3 Hormis insolvabilité ou risque d'insolvabilité, de respecter, dans l'attribution des baux accordés aux personnes faisant partie des catégories ci-haut mentionnées relativement à des locaux sis dans l'ensemble des parties exclusives d'un copropriétaire réservées à l'habitation, la proportion d'au moins deux (2) baux sur cinq (5) pour les personnes de la catégorie A, d'un maximum de deux (2) baux sur cinq (5) pour les personnes de catégorie B et d'un maximum de un (1) bail sur cinq (5) pour les personnes de la catégorie C.

8.3.3.4 Hormis insolvabilité ou risque d'insolvabilité de ne pas enfreindre, dans l'attribution des baux en la manière prévue aux dispositions ci-dessus, la norme d'occupation minimale suivante garantissant l'accès à des



locaux d'habitation au plus grand nombre possible de personnes visées à l'article 8.3.3.3 :

- a) deux (2) personnes pour un local d'habitation de 4 ½ à 5 ½ pièces;
- b) trois (3) personnes pour un local d'habitation de 6 ½ à 7 ½ pièces;
- c) quatre (4) personnes pour un local d'habitation de 8 ½ pièces et plus.

8.3.3.5 D'être conforme, d'une façon générale, aux dispositions de la loi en la matière.

[Emphasis added.]

[20] Section 8.3.4 provides that Escale may be penalized by the Syndicate should it approve a lease in breach of the allocation rules. These penalties include "la réprimande accompagnée de l'obligation de mettre, si possible, un terme aux baux consentis" and, in some circumstances, the loss of the right to grant leases in the future.

[21] Escale adopted by-laws for its internal governance, amended in 2003, which restate the purpose of promoting the social and economic aspects of cooperative housing. By-law 4.7 sets a rule for priority allocation of apartments to members. By taking into account the number of occupants and the household income, the rule confirms, once again, the mission of the cooperative to promote low-cost housing in the neighbourhood to the greatest possible extent:

#### **4.7 PRIORITÉ**

Avant d'être mis sur le marché libre de la location, les appartements vacants appartenant à l'association, doivent d'abord être offerts aux membres de la coopérative de la façon suivante : en premier lieu aux membres ordinaires par ordre d'ancienneté en tenant compte du nombre de personnes qui occuperaient le logement et du revenu familial. Cette procédure est menée par le comité de sélection. Chaque cas doit être traité confidentiellement. La décision finale est annoncée par le comité de sélection et affichée sur les babillards. Toute contestation est acheminée au conseil d'administration dans les 48 heures, lequel conseil d'administration peut convoquer une assemblée générale extraordinaire.

[Emphasis added.]

[22] Escale receives a subsidy from the Canadian Mortgage and Housing Corporation ("CMHC") pursuant to the latter's statutory mission to promote affordable housing. That subsidy was secured by a hypothec granted by Escale to the CMHC on December 21, 1987. Paragraph 1 of the preamble to the hypothec states that the subsidy is designed

"de supporter le coût d'un projet d'habitations à loyer et d'en diminuer les loyers et ainsi fournir un logement à des familles et à des individus ayant des revenus faibles ou modérés".

[23] In answer to Ms Cartier's complaint, Escale points its mission as justification for its refusal to grant her a lease for apartment [...]. It says that Ms Cartier was not denied the apartment by reason of her disability but because the unit for which she had applied was reserved for low-income persons in groups of two or more based on its size.

## **II The facts giving rise to the complaint**

[24] The appellant and respondent are in agreement as to the principal facts as they relate to the complaint.

[25] In early April 2004, a notice was placed on the bulletin board of the cooperative indicating that apartment [...], a 4½-room unit, had become vacant. In keeping with by-law 4.7 of the internal rules of Escale, members were invited to apply for the apartment prior to the vacancy being advertised to persons from outside the cooperative. Apartment [...] is located on the third floor of the building of the cooperative that has an elevator. A ten-day time limit was fixed for receiving applications.

[26] Section 8.3.3.4 of allocation rules in the Syndicate's declaration of co-ownership applied to apartment [...]. As a 4½-room unit, the apartment was subject to the two-person minimum occupation requirement.

[27] Applying as a single person, Ms Cartier sought to rent apartment [...] because it would be accessible notwithstanding her worsening disability. She was particularly interested in staying in the Escale cooperative. It had been her home for several years and she knew many of the other occupants of the building. She wanted to stay in the Milton-Park neighbourhood as it was close to her doctors and to her mother.

[28] Ms Cartier was the only member of the cooperative to apply for apartment [...]. In the letter she addressed to the apartment selection committee on April 6, 2004, Ms Cartier was most explicit that her request for the larger apartment was made for health reasons and supplied letters from doctors and social workers attesting to her need for an accessible dwelling. She wrote again on April 22, 2004, this time directly to Guylaine Gélinas, the chairperson of the Board of Directors of Escale, in which she explained that she had been looking for alternate housing for two years without success. She recognized that the allocation rules required two persons in a 4½-room apartment but asked that an exception be made because of her disability.

[29] Ms Gélinas decided to call a special general meeting of all the members of the cooperative to deliberate on the matter. On May 2, the membership met to consider whether or not to grant the exception from the two-person occupancy rule. The minutes of that meeting record the fact that members were apprised of the nature of Ms Cartier's

request and of the supporting letters that confirmed her need of an accessible apartment. The minutes further record that "[a]près un long débat sur l'opportunité et les conséquences de déroger au règlement de la Coop et de la Communauté Milton-Parc relatif à la non-éligibilité d'une personne seule à un 4½" the matter was put to a vote by secret ballot. The majority of the members present – Ms Cartier was herself away at the time – voted against making an exception and rejected Ms Cartier's application for the apartment.

[30] On May 24, Ms Gélinas wrote to Ms Cartier to inform her of the decision, invoking the rule in the declaration that 4½-room apartments be occupied by two or more persons, adding "[d]e plus, comme tu le sais Montréal connaît une pénurie de logement et par conséquent plusieurs familles à faibles revenus souhaiteraient habiter dans une coopérative. Les nombreuses demandes reçues récemment à l'Escale le démontrent. Pour ces raisons, les membres dans une majorité des votes ont refusé d'acquiescer à ta demande." The consideration of her disability was not mentioned in the letter.

[31] Disappointed with the result, Ms Cartier resigned herself to moving in order to secure accessible living quarters. With the help of Margo Lemay, a member of the Board, she found an accessible apartment in a building for retired and pre-retired persons that was outside the Milton-Park neighbourhood. It was more expensive but within her budget. She moved in 2005.

[32] In the end, apartment [...] was rented to a household of three, none of whom had previously been members of the cooperative.

[33] After investigating the complaint of Ms Cartier that she had been denied an apartment in the cooperative because of her disability, the Commission issued a resolution on July 21, 2006 proposing that Escale reinstate Ms Cartier by placing her on a priority list for an accessible dwelling in the cooperative. When the proposed measures proved to be unsuccessful, the Commission instituted proceedings against Syndicate and Escale on Ms Cartier's behalf. The substance of the complaint before the Human Rights Tribunal was that in refusing Ms Cartier's application, the co-defendants had breached Ms Cartier's right to equal treatment, without distinction, exclusion or preference based on a disability, to rent a 4½-room dwelling, accessible by elevator, at the Escale cooperative, the whole in violation of ss. 10 and 12 of the *Charter of Human Rights and Freedoms*. The Commission also alleged that the co-defendants had breached Ms Cartier's right to dignity, without distinction, exclusion or preference based on a disability, pursuant to ss. 4 and 10 of the *Charter*.

[34] In addition to compensatory damages for Ms Cartier, the Commission sought the following conclusions in first instance:

DE CONSTATER que le refus de louer le logement situé au [...], appartement [...], était fondé sur une application discriminatoire de l'article 8.3.3.4 (norme

d'occupation minimale) du règlement régissant la copropriété de la Communauté Milton Parc;

D'ORDONNER aux défendeurs d'interpréter et d'appliquer ou à défaut de modifier l'article 8.3.3.4 du règlement régissant la copropriété de la Communauté Milton Parc (norme d'occupation minimale) de manière à tenir compte de la situation d'une personne seule affligée d'un handicap;

D'ORDONNER la réintégration de la plaignante au sein de la Coopérative d'habitation l'Escale de Montréal ou d'une autre coopérative membre du Syndicat de la copropriété Communauté Milton Parc en l'inscrivant en priorité sur la liste d'attente pour un logement de 3 ½ ou 4 ½ pièces répondant à ses limitations fonctionnelles [...].

### **III The judgment of the Human Rights Tribunal**

[35] On January 14, 2008, the Tribunal found for the Commission and provided redress for Ms Cartier. The judge held that she had suffered wrongful discrimination based on her disability when Escale refused to rent her the larger apartment in the cooperative. The Tribunal ordered that the provision of the declaration of co-ownership regulating minimum standards for occupation be amended to avoid discrimination. It was also ordered that Escale reinstate Ms Cartier in an accessible dwelling in the housing cooperative when one became available, even if it were one otherwise reserved for two or more persons, as a reasonable accommodation of Ms Cartier's disability. The Tribunal directed that Ms Cartier be registered on a priority list for an accessible apartment should one become available in one of the other cooperatives that are members of the Syndicate. Lastly, the Tribunal held Escale and the Syndicate solidarily liable to compensate Ms Cartier for moving expenses, for the eventual costs associated with the resiliation of her current lease, as well as for damages of \$1,009 for material harm and of \$4,000 for moral harm.

[36] The Tribunal found that section 8.3.3.4 of the declaration of co-ownership is a neutral rule that applies to all members of the cooperative and does not, on its face, attribute apartments based on a prohibited ground under s. 10 of the *Charter*. Escale was wrong, however, to say that disabled persons are treated as are all others in the application of the rule. In particular, Ms Cartier was not refused the apartment because she lived alone but because she was disabled. The Tribunal held that as a result of the application of the rule, Ms Cartier suffered adverse effect discrimination on the basis of her disability. When the situation of Ms Cartier is compared to that of a single, able-bodied member of Escale, the indirect effect of the standard for minimum occupation is to exclude her from the cooperative. The able-bodied person could live in a 3½-room unit. Ms Cartier cannot do so, because of her disability, and the effect of section 8.3.3.4 is to preclude her from being considered for a larger unit. In the result, Escale

compromised her right to conclude the contract of lease in violation of ss. 10 and 12 of the *Charter*.

[37] The Tribunal held further that Escale had failed to offer Ms Cartier a reasonable accommodation for her disability.

[38] The cooperative could not invoke its mission of providing housing to the largest possible number of low-income persons to justify the refusal to accommodate Ms Cartier. While section 8.3.3.4 was rationally connected to a legitimate purpose, Escale did not show that making an exception for Ms Cartier would cause it undue hardship.

#### IV Analysis

[39] Escale raises seven issues in support of its appeal that may conveniently be reviewed under three heads. First, did Ms Cartier establish, *prima facie*, that she was the victim of adverse effect discrimination pursuant to ss. 4, 10 and 12 of the *Charter*? If so, was it reasonable to refuse to make an exception to the housing policy or would that cause undue hardship to Escale by compromising its socially-valuable mission? Finally, in the event that a *Charter* violation is established, what is the appropriate remedy and, in particular, does that remedy extend to other cooperatives in the Syndicate and should the declaration of co-ownership be amended?

[40] The principal provisions of the *Charter* relevant to the complaint lodged on behalf of Ms Cartier are the following:

**4.** Toute personne a droit à la sauvegarde de sa dignité, de son honneur et de sa réputation.

[...]

**10.** Toute personne a droit à la reconnaissance et à l'exercice, en pleine égalité, des droits et libertés de la personne, sans distinction, exclusion ou préférence fondée sur la race, la couleur, le sexe, la grossesse, l'orientation sexuelle, l'état civil, l'âge sauf dans la mesure prévue par la loi, la religion, les convictions politiques, la langue, l'origine ethnique ou nationale, la condition sociale, le handicap ou l'utilisation d'un moyen pour pallier ce handicap.

**4.** Every person has a right to the safeguard of his dignity, honour and reputation.

[...]

**10.** Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

[...]

12. Nul ne peut, par discrimination, refuser de conclure un acte juridique ayant pour objet des biens ou des services ordinairement offerts au public.

[...]

12. No one may, through discrimination, refuse to make a juridical act concerning goods or services ordinarily offered to the public.

**(i) Establishing a *prima facie* case of adverse effect discrimination**

[41] Ms Cartier complained that Escale's decision that denied her apartment [...] violated ss. 10 and 12 of the *Charter*.

[42] The Commission bears the burden of showing three elements recognized by the jurisprudence in order to establish *prima facie* proof that Ms Cartier suffered wrongful discrimination based on her disability:<sup>6</sup> First, it must demonstrate the existence of a distinction, exclusion or preference experienced by Ms Cartier; second, that the distinction, exclusion or preference is based upon a disability, one of the prohibited grounds enumerated at s. 10 of the *Charter*, and, third, that this distinction, exclusion or preference has the effect of compromising the equal recognition and exercise of a right or freedom guaranteed by the *Charter*. The Commission alleges on behalf of Ms Cartier that her right to full and equal recognition and exercise of the right, pursuant to s. 12 of the *Charter*, to conclude a residential lease has been compromised because of her exclusion from the cooperative by reason of her disability.

[43] There is no debate between the parties that Ms Cartier is disabled. Nor is there disagreement as to whether she was a member of the cooperative at the time she made her application for apartment [...]. Finally, the parties agree that she is a moderate or low-income person as contemplated by the rules for the allocation of apartments in section 8.3.3.2 of the declaration quoted above.

[44] The parties also agree that section 8.3.3.4 is a neutral rule that, on its face, establishes no distinction or exclusion based on a prohibited ground in s. 10 of the *Charter*.

[45] The Commission pleads, however, that a *prima facie* case for violation of ss. 10 and 12 of the *Charter* is founded on indirect discrimination felt by Ms Cartier as a result of the effects of section 8.3.3.4. While on its face the allocation rule is neutral, its consequence is to exclude Ms Cartier from apartment [...] and, by extension, from the cooperative. As a disabled person, unlike a member of the cooperative who is single and has no disability, she cannot live in a 3½-room apartment because those apartments are effectively inaccessible to her. As a member, she availed herself of her

<sup>6</sup> *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525, 538.

priority status in applying for a 4½-room apartment that would be accessible. Section 8.3.3.4 operates to disqualify her because she is a single person. The combined effect of section 8.3.3.4 and her disability is thus to exclude Ms Cartier from Escale.

[46] Escale argues that the rule at section 8.3.3.4 serves only to fix the minimum occupation standards for apartments and applies equally to disabled persons as it does to others. Ms Cartier, contends the cooperative, is not excluded from renting the 4½-room apartment because she is disabled, but because she wishes to occupy the apartment alone. Proof that she has not been the object of discrimination, it says, rests in the fact that had she applied to rent the apartment with another person, she would have been allocated the apartment without regard to her disability.

[47] I agree with the judge's decision that (1) a distinction, exclusion or preference was made between Ms Cartier and single, able-bodied members of the cooperative; (2) the distinction was based on her disability, which is an enumerated ground in s. 10, paragraph 1 of the *Charter*; and (3) that the distinction, exclusion or preference had the effect of nullifying or impairing her right, under s. 12 of the *Charter*, to conclude a contract of lease of an apartment that is ordinarily offered to the public.

[48] The judge applied the principle of adverse effect discrimination to conclude that the Commission had succeeded in presenting a *prima facie* case of discrimination:

[27] En l'espèce, il est manifeste que la norme d'occupation minimale affecte davantage Sara Cartier que les autres, et que cette distinction est due à son handicap. En effet, n'eût été son handicap, elle n'aurait eu aucun problème à conserver son logement au 2<sup>e</sup> étage du bâtiment sans ascenseur de la Coop l'Escale, puisque hormis les difficultés qu'elle éprouvait à accéder à son logement, elle adorait demeurer à la Coop. N'eût été son handicap, elle n'aurait pas non plus mis quatre ans à trouver un autre appartement convenable où déménager, puisque sa condition de personne valide ne l'aurait pas restreinte dans ses recherches. En cela, la bonne comparaison à effectuer afin de comprendre la distinction qui résulte de la norme d'occupation minimale n'est pas de mettre en opposition une personne seule handicapée et une famille constituée de plusieurs personnes, mais bien une personne seule handicapée versus une personne seule qui ne l'est pas.

[49] Escale failed to consider, in first instance and again in its argument on appeal, that section 8.3.3.4 causes adverse effect discrimination for Ms Carter in the circumstances. It is true that the rule for minimum occupation applies to Ms Cartier because she is a single occupant for the apartment, but the effect of the rule is to exclude her from the cooperative because she is disabled. This is an example of

indirect or adverse effect discrimination, explained by McIntyre J. in *Simpsons-Sears*<sup>7</sup> in the employment context:

[...] the concept of adverse effect discrimination [...] arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. For essentially the same reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the Code I am of the opinion that this Court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the Code. An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply. From the foregoing I therefore conclude that the appellant showed a prima facie case of discrimination based on creed before the Board of Inquiry.

[50] The same principle has been held applicable in respect of adverse effect discrimination on the basis of disabilities,<sup>8</sup> and has been applied specifically by this Court in the housing context.<sup>9</sup>

[51] The judge was right to compare the circumstances of Ms Cartier to those of an able-bodied member of the cooperative to discern the adversely discriminatory effect of section 8.3.3.4 of the declaration at paragraph [27] of her reasons. Single persons without disabilities but who, like Ms Cartier, are members of the cooperative and economically disadvantaged, constitute the appropriate comparator group which, as Binnie J. noted in *Hodge*,<sup>10</sup> "mirrors" the characteristics of the claimant except for the factor of the allegedly prohibited ground of discrimination. By reason of her worsening disability, Ms Cartier could not have access to a 3½-room apartment as would a single person without her disability. An able-bodied, single member of the cooperative would not have had difficulty living in a 3½-room dwelling at Escale, notwithstanding the 26 stairs that must be scaled to access the apartment. As a result, the rule for minimum occupation would not have had the effect of excluding that person from the cooperative. When the appellant argues, as it did in its factum, that the "norme ne l'affecte pas en raison de son handicap, mais en raison du fait qu'elle était seule," it misidentifies the comparator group and thereby wrongly discounts indirect discrimination.

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<sup>7</sup> *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, 551.

<sup>8</sup> *Eldrige v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

<sup>9</sup> *Desroches v. Quebec (Commission des droits de la personne)*, [1997] R.J.Q. 1540 (C.A.).

<sup>10</sup> *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, 2004 SCC 65, para. [23] which deals with s. 15(1) of the *Canadian Charter of Rights and Freedoms*.



[52] In point of fact, apparently neutral rules in the housing setting can have a particularly insidious adverse effect where disabled persons are placed at a disadvantage as against a norm imagined with able-bodied persons in mind:

This phenomenon is most obvious in the built environment. Architects design structures with a model of the "normal" user in mind, and that model has typically been a person without any discernible impairments. This "assumption of able-bodiedness as the norm" can be seen in buildings with unnecessary stairs, doorways that are too narrow to accommodate wheelchairs, and entrances that fail to provide any detectable warning for people with visual impairments.<sup>11</sup>

[53] In this case, the "assumption of able-bodiedness as the norm" is implicit not just in Escale's built environment but also in its apartment allocation rules. Those rules operate like doors that are too narrow or steps that are too steep for a disabled person living alone. The declaration of co-ownership creates a barrier for single persons with disabilities to live at Escale in that it has the effect of limiting the availability of apartments for single persons to units that are inaccessible to persons with disabilities and, as a result, of excluding single, disabled persons from the accessible apartments because of their size.

[54] The consequence is to deprive Ms Cartier of the right to lease an apartment at Escale. In order to establish a *prima facie* case of discrimination, Ms Cartier must show not just a violation of s. 10 of the *Charter*, but also either s. 4 or s. 12 on these facts. It is enough for present purposes to fix on s. 12. The lease of a dwelling is a "juridical act concerning goods or services ordinarily offered to the public" as required by that section. The allocation of an apartment to a member in the cooperative falls within the meaning of "ordinarily offered to the public". In keeping with s. 221.1 of the *Cooperatives Act*, the by-laws for the internal governance of Escale provide that to be accepted as a member a person must be party to a lease for an apartment in the cooperative. This means that even though membership is limited, the leases in the cooperative are no less "offered to the public", as s. 12 requires, because they happen to pertain to a housing cooperative. I would add, however, notwithstanding the limited membership of a housing cooperative, the criterion for determining the public character of the relationship spoken to in human rights provisions such as s. 12 is qualitative, not quantitative.<sup>12</sup> Membership in Escale is not one of the limited familial, intimate or social relationships that would mean the lease is removed from scrutiny under ss. 10 and 12. Moreover, it would do a disservice to Escale, given its publicly-purposed housing mission, to insulate its members from the protection offered by the combined effect of these two sections of the *Charter*.

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<sup>11</sup> Samuel R. Bagenstos, *Law and the Contradictions of the Disability Rights Movement* (New Haven: Yale University Press, 2009) at 18.

<sup>12</sup> *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, 384.

[55] The third and final element outlined above from *Bergevin* of a *prima facie* case for wrongful discrimination has thus been established.

[56] What is the relevance, at the *prima facie* discrimination stage of the analysis, of the social mission of the cooperative to provide low-cost housing to as many tenants as possible?

[57] Escale says Ms Cartier was excluded from renting apartment [...] as a single person pursuant to the mission of the cooperative to house as many low-income persons as possible. The cooperative argues that while Ms Cartier was indeed a member of the cooperative when she applied for apartment [...], she could not avail herself of the priority status accorded to members in by-law 4.7 and adopted pursuant to its overarching mission. Her application was as a single person and, as such, she was not qualified to apply for a 4½-room unit that was reserved for households of two or more tenants. Priority would only have been afforded to a member who, because that member sought to rent the apartment for two or more persons, was qualified under section 8.3.3.4 to be considered. Ms Cartier was disqualified from priority status, notwithstanding the fact that she was a member, because she was single.

[58] In essence, Escale argues that the priority clause operates subject to the cooperative's overarching mission to provide rented premises to the largest number of economically-disadvantaged persons possible. It would give priority to a member who was in the same situation as a group of two or more persons from outside the cooperative who wanted the apartment. But it cannot give priority to a single person – able-bodied or disabled – who is excluded simply because they are single and thus enjoy no priority. As a result, Ms Cartier, they say, suffered no *prima facie* discrimination.

[59] The judge rejected this argument. In the judge's account of the facts, which is consonant with the evidence, the cooperative's apartment selection committee and its Board of Directors considered Ms Cartier's application as a priority request from a member. At its special general meeting, the membership did as well. The decision Escale was called on to make was not a choice between Ms Cartier and another prospective tenant, but simply whether or not to make an exception to the rule on minimum occupation standards for a member who had a right to apply before consideration of external candidates: "[...] au moment où les membres de la Coop Escale se sont réunis pour discuter de la demande de dérogation qui leur était adressée [by Ms Cartier], ils n'avaient pas de choix à soulever; ils n'avaient qu'à considérer la question de savoir si une contrainte excessive les prévenait d'accepter l'accommodement envisagé" (para. [35] of the trial judgment). On this basis, the judge quite rightly distinguished the *Tournesol*<sup>13</sup> case in which the Human Rights Tribunal was called upon to decide whether the attribution of an apartment to a couple with two

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<sup>13</sup> *Quebec (Commission des droits de la personne) v. Coopérative d'habitation Tournesol de Longueuil*, [1994] R.J.Q. 843 (H.R.T.).

children, as opposed to a single mother with a child, constituted wrongful discrimination. *Tournesol* dealt with a choice between two external applications, whereas Ms Cartier was the only member of the cooperative to have applied to rent apartment [...].

[60] Escale's mission is relevant to the question as to whether the *Charter* has been violated but the cooperative is wrong to argue that it is relevant at this stage of the analysis. Ms Cartier does not have to answer the argument that the mission justifies adverse effect discrimination as part of establishing her *prima facie* burden. To hold her to that burden would undermine the very reason courts developed adverse effect discrimination where direct discrimination is absent by reason of the neutral character of a rule such as section 8.3.3.4. By arguing that Ms Cartier was excluded by reason of being single, Escale confuses the application of the neutral rule with its effects. It fails to recognize that at the first stage of the analysis, the victim can make the case that he or she has suffered discrimination not just when a rule expressly applies to exclude that person on prohibited grounds, but also when a rule has the effect of doing so behind a façade of neutrality. In order to reveal adverse effect discrimination, analysis must proceed at the *prima facie* stage on the basis of the ground of discrimination in s. 10 alleged by the complainant which, on the facts of this case, is discrimination based on disability.

[61] The mission of the cooperative is certainly relevant to the ultimate determination as to whether or not there is, in this case, a violation of the *Charter*. But its relevance is to be measured against the duty to accommodate, specifically that accommodating Ms Cartier in a larger apartment would impose undue hardship on the cooperative in the legitimate pursuit of its mission. As such, the significance of the mission is part of the defence that the defendant has the burden of demonstrating in order to justify its behaviour as non-discriminatory. I now turn to that stage of the analysis as it related to undue hardship and the duty to accommodate Ms Cartier's disability.

### **(ii) The duty to afford reasonable accommodation**

[62] Did Escale fail in its duty to accommodate Ms Cartier by refusing her request to rent her apartment [...]?

[63] The cooperative had already made allowances for Ms Cartier's disability prior to her application for the 4½-room apartment in 2004 by exempting her from certain community tasks. But the limited resources Escale has at its disposal means that not all requests can be reasonably accommodated. Escale said no to Ms Cartier's request in 2001 to install a mechanical lift for access to her 3½-room unit on the second floor. When she applied in April 2004 to rent the accessible 4½-room unit, she explicitly asked Escale's apartment allocation committee and its Board of Directors to make an exception to the minimum occupation standard because of her disability. Ms Cartier's application for apartment [...] was, in substance, a request for reasonable accommodation.

[64] Escale argues that even if it did have a duty to accommodate Ms Cartier – which, of course, it contests – that its refusal to make an exception to the minimum occupancy rule was justified by the undue hardship that would result for the cooperative, in particular in respect of its mission to provide low-cost housing to as many tenants as possible.

[65] The judge rightly held that Escale had a duty to accommodate Ms Cartier in the circumstances as an integral part of her right to equality. Once the rule for minimum occupation standards in section 8.3.3.4 has been established to be, *prima facie*, the source of adverse effect discrimination, the burden falls to Escale to demonstrate, on the balance of probabilities, that accommodating Ms Cartier's request would result in undue hardship. In *Grismer*,<sup>14</sup> the Supreme Court explained the three-step burden for a defendant such as Escale, who must show that:

- (1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
- (2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
- (3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

[66] The judge correctly decided that Escale met the first leg of the test. The rule at section 8.3.3.4 was adopted pursuant to the purpose of helping the maximum number of economically disadvantaged persons rent low-cost dwellings. The judge then inquired, in keeping with the *Grismer* test, whether section 8.3.3.4 was rationally connected to this purpose. She found that it was:

[56] [...] Dans le cas qui nous occupe, peut-on conclure que l'adoption d'une norme d'occupation minimale empêchant une personne seule d'habiter un logement de plus de 3 ½ pièces est rationnellement liée à l'objectif des défendeurs de permettre au plus grand nombre de personnes à revenu faible et modéré de se loger à la Coop?

[57] Le Tribunal répond par l'affirmative. Il est légitime pour les défendeurs de s'employer à ce qu'un maximum de personnes satisfaisant aux conditions d'admissibilité économique soient en mesure de se loger à la Coop et, conséquemment, de régir la grandeur d'appartement dont devraient normalement avoir besoin une personne seule, un couple ou une famille. Il ne fait pas de doute que les défendeurs ne rencontreraient pas leur mission sociale

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<sup>14</sup> *B.C. (Superintendent of Motor Vehicles) v. B.C. (Human Rights Council) [Grismer]*, [1999] 3 S.C.R. 868, 881.

s'ils permettaient que les appartements de la Coop soient attribués sans aucun égard aux pièces qu'ils comptent et au nombre de personnes devant les habiter.

[67] Furthermore, there is no dispute that Escale was in good faith in its belief that the rule on minimum occupation standards is necessary for the fulfilment of the purpose of maximizing the number of qualified tenants at the cooperative. The second leg in *Grismer*, which many feel is not important in Quebec law in any event, poses no issue on the facts here.<sup>15</sup>

[68] According to the third part of the test in *Grismer*, the remainder of the burden is as follows: to show that the minimum occupation standard is reasonably necessary to accomplish the goal identified by the judge, in the sense that Escale cannot accommodate the request of Ms Cartier and persons in her circumstances without incurring undue hardship.

[69] In measuring what amounts to "undue hardship" in respect of the duty to accommodate, courts have refrained from presenting an exhaustive list of relevant factors,<sup>16</sup> and the injunction to adopt a flexible approach to the question, with due regard to the circumstances of the case, is regularly observed.<sup>17</sup> In connection with a residential lease, the focus tends to be on the cost of the accommodation requested to the landlord, and the degree of interference the accommodation would represent in the exploitation of his or her business, as well as the possible impact on other tenants. Typically, landlord-tenant relations are established in a for-profit setting, and where the question arises as to what hardship a landlord must endure in accommodating a tenant who solicits a measure of reasonable accommodation, emphasis is generally placed on the cost, although not to the exclusion of other factors.<sup>18</sup>

[70] In the government and non-profit sector, cost can also be a relevant factor. Limited resources explain part of Escale's refusal to accommodate Ms Cartier. But understanding the hardship faced by Escale requires one to consider factors beyond whether or not Ms Cartier's request precludes the cooperative from operating efficiently. The broader issue is whether the proposed accommodation would cause hardship to Escale's raison d'être as a housing cooperative which, as we have seen, is to protect the architectural environment in the Milton-Park neighbourhood, to reduce economic inequality in the community and improve the quality of life for the category of residents who have traditionally lived in this inner-city part of Montreal.

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<sup>15</sup> On the relevance of this aspect of the test under s. 10 of the Quebec *Charter*, see Mélanie Samson, "Le droit à l'égalité dans l'accès aux biens et aux services: l'originalité des garanties offertes par la Charte québécoise" (2008) 38 R.D.U.S. 413, 457.

<sup>16</sup> *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, 520-1.

<sup>17</sup> See, e.g., *Bergevin*, *supra*, note 6, 546.

<sup>18</sup> See, e.g., Christian Brunelle, "Les droits et libertés dans un contexte civil" in, *Droit public et administratif: Collection de droit*, vol. 7 (Cowansville: Éd. Yvon Blais, 2009) 41, 70, and Denis Lemay, *Le bail résidentiel, la Charte québécoise et les dommages exemplaires* (Montreal: Wilson & Lafleur, 2008) 171-2.

[71] It is at this stage of the analysis that the public interest character of Escale's mission is relevant. Considering a university's particular purpose, for example, this Court has observed that the "bon fonctionnement de l'entreprise ou de l'institution débitrice de la mesure d'accommodement" is a relevant factor in measuring undue hardship.<sup>19</sup> As one scholar has put it, the "entrave indue" caused to the operation of the institution in question can justify the refusal to offer an accommodation.<sup>20</sup> In advancing the argument that the minimum occupancy standards at section 8.3.3.4 cannot be compromised without undue hardship, Escale relies on a similar principle for the proper operation of a non-profit housing cooperative. It argues that accommodating Ms Cartier would compromise its institutional mission to such an extent that the request to rent apartment [...] cannot be considered a reasonable accommodation.

[72] What aspects of Escale's institutional goals are threatened by the accommodation? Professor Pierre Bosset has written that the mission of a publicly-purposed institution that is relevant to undue hardship is often spoken to in the legislative and regulatory rules that apply to them.<sup>21</sup> As a cooperative, as opposed to an ordinary landlord, Escale is bound by statute, by its declaration of association, by the declaration of co-ownership and the by-laws of the cooperative to follow a housing mission designed to preserve the quality of life, architecturally and socioeconomically in the Milton-Park neighbourhood. Some aspects of Escale's overall mission would suffer little or no hardship as a result of the accommodation of Ms Cartier, notably the goal stated in section 5 of the declaration for all of the immovables in the Communauté Milton Parc to protect the architectural style of the neighbourhood. But the various instruments that apply to Escale as a non-profit housing cooperative also make plain that mission is to come in aid to moderate and low-income tenants. As we have seen, the statute that created the Syndicate of which Escale is a member, the declaration of co-ownership in provisions dealing with the destination of the immovable and the priority allocation of apartments, and the by-laws for internal governance of Escale, all speak to this purpose relating to combating economic inequality in the neighbourhood. Its most focussed expressions are found in section 8.3.3.4 concerning the minimum occupation standard and by-law 4.7 of the rules on internal governance establishing members' limited priority for new apartments. The purpose is not just to assist economically-disadvantaged persons to rent low-cost housing, but to maximize, within certain limits, the number of people who can benefit from the policy. It is this aspect of the mission that is most directly threatened by the accommodation and upon which the hardship analysis should focus.

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<sup>19</sup> *Université Laval v. Commission des droits de la personne et des droits de la jeunesse*, 2005 QCCA 27 para. [120].

<sup>20</sup> Stéphane Bernatchez, "Les enjeux juridiques du débat québécois sur les accommodements raisonnables" (2007) 38 R.D.U.S. 233, 258.

<sup>21</sup> Pierre Bosset, "Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable" in Myriam Jézéquel, ed., *Les accommodements raisonnables: quoi, comment, jusqu'où?* (Cowansville: Éd. Yvon Blais, 2007) 3, 24-6.

[73] However relevant this aspect of the mission might be to demonstrating the presence of "undue hardship", Escale must do more than simply cite the policy and its sense of the penury of affordable housing facing larger households to justify its refusal to accommodate Ms Cartier, as it did in its letter to her of May 24, 2004. The invocation of a social mission for a non-profit institution does not, on its own, serve to immunize a defendant from allegations that they have failed to accommodate persons complaining of discrimination. The *Charter* does provide, at s. 20, a regime separate from that of the duty to accommodate whereby distinctions, exclusions or preferences are deemed non-discriminatory where they are justified by the nature of certain non-profit institutions and the missions they pursue. Escale did not claim that it is a charitable, philanthropic, political or other institution that qualifies under s. 20, so it must make its case within the confines of the general exception to the duty to accommodate implicit in s. 10.<sup>22</sup>

[74] Escale was bound to make proof of the undue hardship caused to its mission in the circumstances and, in my view, the judge was correct to hold that it failed to do so. In assigning the burden of proof to the defendants in cases such as these, courts have uniformly imposed on them the requirement of showing the specifically "undue" character of that hardship.<sup>23</sup> The hardship suffered by Escale must be "undue" not just in the sense of being "inappropriate" or "unsuitable" but it must be "excessive" or "disproportionate". The French expression "contrainte excessive" might be thought of as lending itself to less ambiguity in this respect.

[75] The standard of proof was explained in the employment setting by the Supreme Court in *Meiorin*: a defendant may justify a norm such as that found in section 8.3.3.4 by establishing, on the balance of probabilities, that it would be "impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer".<sup>24</sup> Recently in *VIA Rail*, the Supreme Court reaffirmed the view that this vulnerability highlights the importance of reasonable accommodation in respect of persons with disabilities. In that case, Abella J. wrote that "[t]he point of undue hardship is reached when reasonable means of accommodation are exhausted and only unreasonable or impracticable options for accommodation remain".<sup>25</sup> Plainly the burden of showing that the accommodation would cause undue hardship to Escale by constraining its mission is a heavy one. To my mind, Escale would have to show that the proposed accommodation would fundamentally alter the proper operations of the cooperative in a way that the pursuit of its broader mission is no longer possible.

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<sup>22</sup> Non-profit housing cooperatives that do not fall into one of the categories in s. 20 cannot avail themselves of that provision and must respect the general anti-discrimination norm at s. 10: Pierre Sylvestre *et al.*, *La cooperative d'habitation et la loi* (Montreal: Wilson & Lafleur, 2000) 58.

<sup>23</sup> *Central Okanagan School District No 23 v. Renaud*, [1992] 2 S.C.R. 970, 974.

<sup>24</sup> *B.C. (P.S. Employee Relations Commission) v. B.C.G.S.E.U. [Meiorin]*, [1999] 3 S.C.R. 3, 32-33.

<sup>25</sup> *Council of Canadians with Disabilities v. VIA Rail*, [2007] 1 S.C.R. 650, 2007 SCC 15, para. [130].

[76] When viewed from this perspective, Escale fell well short of establishing undue hardship. Escale did not show that by accommodating Ms Cartier it will expose itself to claims from similarly situated persons with the result of fundamentally compromising its mission. Moreover, any speculation as to what making an exception for Ms Cartier represents today by way of a damaging precedent for the future – *i.e.* that the hardship is not excessive now, but promises to be someday – cannot justify refusing the apartment to Ms Cartier in the absence of convincing evidence that the coming hardship is a present certainty. This is a simple corollary of the oft-repeated principle that undue hardship is to be established on a case-by-case basis. The judge took pains to say, and rightly so, that the decision in respect of Ms Cartier "ne doit pas être interprétée comme liant la Coop l'Escale ni toute autre coopérative quant à tous les cas d'accommodement raisonnable qui pourraient se présenter dans l'avenir" (para. [64]).

[77] The fact that Ms Cartier is herself a person with a moderate income is strongly suggestive of the view that the decision to rent her apartment [...] would have been a reasonable accommodation. First, the broad terms in which Escale's mission is cast in its declaration of association, as well as in the 1987 Act that led to the creation of the Syndicate, certainly does not exclude helping single persons from obtaining inexpensive housing where that is possible. Contrary to what Escale argued in its factum, the subsidy from the CMHC does not require Escale to allocate apartments strictly according to the minimum occupancy norms at section 8.3.3.4. As we have noted, the terms of the hypothec stipulate that Escale had to offer dwellings to "des familles et à des individus ayant des revenus faibles ou modérés" but did not specify further restrictions. It is true that section 8.3.4 creates theoretical penalties when the cooperative fails to adhere to the rules for the allocation of apartments. But it is difficult to imagine that the CMHC would cancel its subsidy, or that the authorities of Escale would be subject to a valid sanction under the rules of the Syndicate's declaration of co-ownership, on the grounds that the housing cooperative had granted an accommodation to a person with disability pursuant to the public order rules in the *Charter*.

[78] As a person on a modest, fixed income, Ms Cartier is part of the very group that the social mission of Escale is devoted, in part, to helping. The judge rightly recognized this: "[e]n accommodant Sara Cartier, la Coop n'aurait donc pas dérogé à sa mission sociale, madame Cartier étant elle-même une personne à faible revenu, au surplus atteinte d'un handicap lui imposant des limitations fonctionnelles" (para. [50]). By allocating the larger apartment to her Escale would, to be sure, impinge on the mission, but only in the number, and not in the character, of the prospective tenant that the policy is designed to support. This means the "hardship" caused to Escale's policy by the accommodation is lesser than it would have been had she not herself qualified as a moderate or low-income person. By accommodating Ms Cartier, Escale would no doubt suffer some hardship in that it would be deflected, in this instance, from maximizing the number of tenants in the building. Yet because Ms Cartier is herself an economically disadvantaged person, the hardship to Escale and its mission cannot be thought of as excessive. The degree of hardship suffered by Escale, when considered in the



particular circumstances of this case, is also lessened by the fact that Ms Cartier applied to rent one of the smallest accessible apartments in the cooperative.

[79] Finally on this point, it bears mentioning that the fact that Ms Cartier testified that the invalidity benefits she receives represents her sole income. In this sense her disability may be seen as confirming if not deepening her economically vulnerable status, as the two bases for inequality "intersect".<sup>26</sup> While Ms Cartier did not claim that she was discriminated on the basis of social condition or civil status, one risks doing a disservice to her circumstance by framing the discrimination issue simply in terms of her disability, without regard to how inequalities arising from disabilities and economic disadvantage arise together. This intersection is especially relevant to the hardship issue in respect of the pursuit of Escale's mission given its focus on economic inequality. It should have been a consideration for the cooperative as it weighed the reasonableness of the request for accommodation.

### (iii) Remedies

[80] By way of remedy for the wrongful discrimination pursuant to ss. 10 and 12 of the *Charter*, Ms Cartier was awarded damages for eventual moving expenses and costs, should they be incurred, if she must resiliate a lease when the moment comes to be reinstated in the Escale housing cooperative. While it is unusual to award such expenses prospectively, I understand the Tribunal to have made this order to avoid further proceedings for Ms Cartier in respect of this modest amount and subject to the condition that these expenses be unavoidable in the circumstances. She was also granted moral and material damages. These orders should stand.

[81] The judge also ordered that Ms Cartier be reinstated in an accessible apartment in Escale or in one of the other cooperatives that make up the Syndicate:

**ORDONNE** la réintégration de madame Sara Cartier au sein de la Coopérative d'habitation l'Escale de Montréal ou d'une autre coopérative membre du Syndicat de la copropriété Communauté Milton Parc en l'inscrivant en priorité sur la liste d'attente pour un logement de 3 ½ pièces ou 4 ½ pièces répondant à ses limitations fonctionnelles;

[82] Escale argues that there is no proper jurisdiction for the order in so far as it bears upon cooperatives other than Escale that are members of the Syndicate. None of the other cooperatives was a party to the original action. Escale submits that the judge's conclusion breaches the principle of *audi alteram partem* as the other cooperatives were not given the opportunity to have their say as to whether the order would be appropriate.

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<sup>26</sup> On the intersection of grounds of discrimination based on a disability and other sources of inequality, including economic inequality, see Colleen Sheppard, "Grounds of Discrimination: Towards an Inclusive and Contextual Approach" (2001) 80 Can. Bar Rev. 893, 914.

[83] In support of the order, the Commission argues that the judge was right to observe the need for flexibility and creativity in remedies for human rights violations.<sup>27</sup> In the circumstances, argues the Commission, there is no violation of the other cooperatives' right to be heard. The Syndicate is composed of, among others, the fifteen housing cooperatives to which the order applies. Moreover, section 8.3.3.4 is found in the declaration of co-ownership that binds all the cooperatives in the Syndicate. The Syndicate was a defendant in first instance and was represented by counsel at the hearing. The manager of the Syndicate testified at trial as to the organization and governance of the Communauté Milton Parc. The conclusions of the Tribunal apply as much to defendant Escale as they do to the Syndicate. Finally, the Commission observes that the Syndicate did not appeal to contest the conclusions against it.

[84] It is certainly true that, through the Syndicate and, by reason of the shared declaration of co-ownership, all the cooperatives in the Communauté Milton Parc have a stake in the outcome of this case. It is not true, however, that the individual cooperatives had the opportunity to be heard as parties to the action. No evidence was led as to their own circumstances, in particular on how they treat applications from persons with disabilities for accessible apartments in pursuit of their mission. The court record includes the "Règlement de régie interne" for Escale, but there is no comparable information about rules for the other cooperatives. We thus have no evidence as to how an order of reinstatement for Ms Cartier would affect their own internal governance. Moreover while it may be necessary to place Ms Cartier on a waiting list for both 3½ and 4½-room apartments at Escale, we have no evidence as to whether it is necessary to place her in a larger apartment in the other cooperatives to accommodate her disability.

[85] As noted above, while each of the fifteen cooperatives, like Escale, has duties to the group represented by the Syndicate, each co-owner is autonomous in respect of the management and use of its immovable within the Communauté Milton Parc as a whole, just as would be a co-owner in respect of his or her fraction under the regime of divided co-ownership in the Civil Code. I think it inappropriate, in the circumstances, that the reinstatement order apply to the cooperatives other than Escale. In so deciding, I am mindful that an accessible apartment in one of the other cooperatives in the Milton-Park neighbourhood other than Escale would meet Ms Cartier's needs and that, given the small size of Escale, she may be inconvenienced by having to wait for the first accessible 3 ½ or 4 ½-room apartment to become vacant in that cooperative. But to rule otherwise, I think, would be unfair to the other cooperatives and their members.

[86] The judge also ordered that section 8.3.3.4 of the declaration of co-ownership be amended rather than simply ordering the parties to interpret and apply the existing rule in a manner that takes the situation of a person with disabilities who lives alone into account. The formal order provides:

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<sup>27</sup> Citing *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, [2004] 1 S.C.R.789, 2004 SCC 30, paras. [25] and [26].

**ORDONNE** aux défendeurs de modifier l'article 8.3.3.4 du règlement régissant la copropriété de la Communauté Milton Parc de façon à ce que la norme d'occupation minimale tienne compte de situations comme celle d'une personne seule affligée d'un handicap, afin de permettre que ladite norme puisse être interprétée et appliquée conformément à la *Charte des droits et libertés de la personne* et, plus spécifiquement, conformément à l'obligation d'accommoder raisonnablement de telles personnes sans contrainte excessive.

[87] The judge made this order because she was of the view that the rule at section 8.3.3.4, as cast, precludes those charged with the allocation of the apartments from offering any reasonable accommodation in the event that the rule causes *prima facie* discrimination. She wrote at paragraph [47] of her reasons that a failure to meet the duty of reasonable accommodation arises at times from "application inflexible de la norme", and at other time from the "norme inflexible à la base", or a combination of the two. The judge was of the view that the rule itself was inflexible in this instance: she concluded that section 8.3.3.4 is drafted in absolute terms, excluding all possibility of a reasonable accommodation when the standard for minimum occupation has been breached. Citing *Meiorin* on this point,<sup>28</sup> she decided that section 8.3.3.4 has to be redrafted to conform to the *Charter* and allow explicitly for the duty of reasonable accommodation.

[88] While in some circumstances, recasting a norm may be necessary, courts should only undertake the modification of a complex agreement like this one, between multiple parties who have established a balance of rights and obligations extending over 62 pages, with great caution. With due respect for the judge's view, I do not think that this is one of those cases. Some of the genius of contract is captured in the idea that the parties themselves – in part through the language they choose in their agreements – create the law. The terms of the contract are the touchstone of this idea. By their choice of words, by what they make explicit and what they omit, even in the idiosyncratic expression of the mutual understanding of their obligations, the parties themselves control the intention that will later guide the courts in divining the meaning of the agreement. When a court changes that language – and in some cases it must – the expression of the parties' intention in the form that the parties themselves have chosen is necessarily upset. The chosen terms – even those that are ill-chosen – reflect that intention and may be relevant elsewhere in the agreement as contractual clauses are interpreted one in consideration of another. This leads me to think that if we can fairly read the declaration to include the duty to accommodate, we should do so using the terms that the parties themselves have chosen.

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<sup>28</sup> In *Meiorin, supra*, note 23, para. [68], McLachlin J., as she then was, wrote: "To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard itself is required to provide for individual accommodation, if reasonably possible". [Emphasis in the original].

[89] To my mind, the refusal to offer Ms Cartier a reasonable accommodation was not dictated by a "norme inflexible à la base", to use the judge's expression, but an inappropriately rigid interpretation of the text undertaken by the authorities at Escale.

[90] As it was drafted, section 8.3.3.4 does not preclude all exceptions. As the judge observed, in at least two instances fewer persons than the number required by the minimum standards occupy apartments following changes in the composition of their households. Evidence was given to the effect that should a household of two persons be granted a larger apartment and one person leave before the end of the lease, the person remaining will not be expelled from the apartment because the two-person rule is no longer respected. Authorities at Escale allow an exception in these circumstances, seeing them as "acquired rights" or a "right to maintenance in the premises", even though this exception is not expressed in the text of section 8.3.3.4.

[91] Moreover, a fair reading of the whole of section 8.3.3 suggests that the rule is not incompatible with the existence of discretion to make exceptions to the norm. I note that the text as it was drafted specifically provides that the allocation of apartments is 'subject to applicable law', which would include the public order rules on residential leases in the Civil Code as well as, among other rules, the mandatory anti-discrimination norm in the *Charter*.

8.3.3 Tout nouveau bail relatif à des locaux sis dans des parties exclusives réservées à l'habitation sera assujéti aux conditions suivantes, savoir :

[...]

8.3.3.5 D'être conforme, d'une façon générale, aux dispositions de la loi en la matière.

[Emphasis added.]

[92] As a consensual juridical act, the declaration of co-ownership is of course subject to the *Charter*.<sup>29</sup> The presence of section 8.3.3.5 is an encouragement for the parties to interpret the declaration in a manner consonant with rights enshrined in the *Charter*, including ss. 10 and 12 as it relates to the lease of an apartment. This is further encouragement for the view that the text can be read and applied so that it does not violate the anti-discrimination rule, rather than rewriting it or invalidating the rule pursuant to s. 13 of the *Charter*.

[93] This position is comforted by the evidence. It is important to note that the apartment allocation committee of Escale did not choose simply to apply the rule to Ms

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<sup>29</sup> As one author has observed, "il faut bien se garder de ne pas introduire des restrictions dissimulant, en réalité, de la discrimination, sous prétexte de préciser la destination de l'immeuble": Christine Gagnon, *La copropriété divisée* (Cowansville: Éd. Yvon Blais, 2000) n° 155.

Cartier and thereby exclude her, without deliberation, from consideration for the 4½-room unit. The Board of Directors, to which the matter was referred, did not do so either. When the special general meeting was convoked, the matter was discussed at length and a vote was taken. The chair of the Board of Directors testified that the nature of the request – coming from a member of the cooperative with a disability who needed an accessible dwelling – meant that "ça va de soi qu'il fallait se réunir et décider de ce cas-là, que peut-être, c'était à l'assemblée de décider, puisqu'elle est souveraine, qu'on pouvait accommoder madame". The whole of the correspondence between the officers of Escale and Ms Cartier was read out before the membership prior to the vote. Even if the majority of members present at the meeting voted, after what the minutes describe as a long debate, to reject the request for an exemption, it is plain that this was a deliberative, and not a mechanical decision. This serves to confirm that it was the rigidity of the interpretation of the rule, rather than the inflexible character of the rule itself, that resulted in the refusal of Ms Cartier's request for accommodation.

[94] The judge noted this at paragraph [33] of her reasons. According to the judge, Ms Gélinas, the chair of the Board of Escale, explained at trial that "l'assemblée générale est souveraine dans les limites de la loi et a le pouvoir, dans un tel cas, de déroger à la norme applicable". Yet later in her reasons, the judge wrote "bien que l'assemblée ait étudié la question, elle n'avait pas la possibilité intrinsèque de conclure autrement qu'elle ne l'a fait si elle voulait respecter les termes précis de la déclaration de copropriété" (para. [49]). I respectfully disagree with this latter suggestion that the norm was absolute. I believe this does not take into account section 8.3.3.5, which the judge did not cite in her reasons, and it does not sufficiently account for the fact that Escale allowed exceptions to the rule when they were mandated by circumstance or the public order rules in the Civil Code. Escale was not bound by the language of section 8.3.3.4 to refuse reasonable accommodation. It did so by reason of a mistaken albeit well-meaning interpretation of the text. The same text could be interpreted differently had the membership recognized the duty to accommodate in the circumstances. In fact section 8.3.3.5 required Escale to consider whether reasonable accommodation should be afforded Ms Cartier so that the lease would be "conforme [...] aux dispositions de la loi en la matière", including ss. 10 and 12 of the *Charter*.

[95] I would therefore allow the appeal for the sole purposes of

- (i) striking out the following conclusion:

**ORDONNE** aux défendeurs de modifier l'article 8.3.3.4 du règlement régissant la copropriété de la Communauté Milton Parc de façon à ce que la norme d'occupation minimale tienne compte de situations comme celle d'une personne seule affligée d'un handicap, afin de permettre que ladite norme puisse être interprétée et appliquée conformément à la *Charte des droits et libertés de la personne* et, plus spécifiquement, conformément à l'obligation d'accommoder raisonnablement de telles personnes sans contrainte excessive;

and

(ii) replacing the following conclusion:

**ORDONNE** la réintégration de madame Sara Cartier au sein de la Coopérative d'habitation l'Escale de Montréal ou d'une autre coopérative membre du Syndicat de la copropriété Communauté Milton Parc en l'inscrivant en priorité sur la liste d'attente pour un logement de 3 ½ pièces ou 4 ½ pièces répondant à ses limitations fonctionnelles;

with the following revised conclusion:

**ORDONNE** la réintégration de madame Sara Cartier au sein de la Coopérative d'habitation l'Escale de Montréal en l'inscrivant en priorité sur sa liste d'attente pour un logement de 3 ½ pièces ou 4 ½ pièces, selon celui qui se libérera le premier, répondant à ses limitations fonctionnelles.

[96] As success on the merits is divided between the parties, there will be no order as to costs.

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NICHOLAS KASIRER, J.A.