HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF: A Complaint by DIANNE BROCKMEYER against THE CORNERSTONE HOUSING CORP operating as THE CORNERSTONE LIFE LEASE. alleging a breach of sections 13 AND 16 of *The Human Rights Code*;

AND IN THE MATTER OF: *The Human Rights Code*, C.C.S.M., Chapter H175, as amended.

BETWEEN

DIANNE BROCKMEYER,

Complainant,

- and -

THE CORNERSTONE HOUSING CORP.
operating as THE CORNERSTONE LIFE LEASE,

Respondent.

Panel: Peter Sim, adjudicator

Appearances:

Dianne Brockmeyer, in person

For the respondent: Mr. Charles Huband

For the Commission: Ms. Isha Khan

Decision

[1] This is a complaint of discrimination under sections 13 and 16 of *The Human Rights Code,* C.C.S.M., Chapter H11 (the "***Code"***) by Dianne Brockmeyer on behalf of her mother Dorothy Englot. Ms. Brockmeyer and Mrs. Englot jointly leased a life-lease apartment from the respondent Cornerstone Housing Corporation. The complaint alleges that the respondent discriminated against Mrs. Englot by failing to provide reasonable accommodation for her disability related needs.

Facts

[2] Mrs. Englot has given a power of attorney to her daughter and son-in-law. However, when she testified at the hearing it was evident that she was alert and fully capable of managing her affairs. She explained that she did manage her own affairs for the most part and used the power of attorney only when she required assistance because of her mobility problems.

[3] Mrs. Englot has been living with disabilities since 2003. She had a fused right leg which cannot bend from hip to ankle. It is also three inches shorter than her left leg so she requires platform shoes. She also has corneal dystrophy and has received two live donor corneal transplants. This has left her with restricted vision. She requires a four prong-cane or walker in order to walk short distances. She uses a scooter or wheelchair to move longer distances.

[4] Despite her disabilities, Mrs. Englot is capable of living independently, cooking her own meals and attending to her personal needs without assistance. She is not a candidate for assisted living at this stage in her life. Prior to moving to the Cornerstone, she lived in her own home. She had lived there alone since her husband died. The house had been modified in a number of ways to meet her particular needs.

[5] Sometime in 2010, Mrs. Englot began to consider moving to an apartment. She was still comfortable in her own home but the house needed work and she knew that she would have to move eventually. Ms. Brockmeyer began searching for apartments and eventually settled on the Cornerstone, which was a life-lease complex that was still under construction. She explained that the Cornerstone was attractive because it was advertised as a 55 plus complex intended for older adults. It was in the neighbourhood of Mrs. Englot's existing house and had an open plan layout.

[6] Mrs. Englot and Ms. Brockmeyer went to the Cornerstone leasing office and met with John Vander Kooy, the leasing agent on or about August 9, 2010. They were not able to view and actual suite because the building was still under construction so they had to rely on plans and artists renderings.

[7] At the meeting, Ms. Brockmeyer raised the question of whether the suite could be modified to accommodate Mrs. Englot's disabilities. Mrs. Englot required the following items as a result of her disabilities:

(a) specially modified kitchen cabinets;

(b) under cabinet lighting in the kitchen because of her limited vision;

(c) a garburator to avoid the need to carry wet garbage;

(d) a device called a "toilevator" which was installed under the toilet to lift the toilet to a comfortable height;

(e) a moveable shower head;

(f) grab bars in the bathroom to assist in getting on and off the toilet; and

(g) a handicapped parking spot.

[8] Ms. Brockmeyer was able to order custom modified kitchen cabinets from the cabinet supplier without difficulty. The deadline for ordering the garburator and under cabinet lighting from the contractor had passed but, after some communications back and forth, the respondent did arrange to have these items installed before Mrs. Englot moved in.

[9] Ms. Brockmeyer explained that the bath lift was a free standing device which would work in any standard size bath and did not require any special installation. She simply asked if the bath in the suite was a standard sized bath and Mr. Vander Kooy assured her that it was.

[10] Ms. Brockmeyer said that she was prepared to buy the toilevators and give them to Cornerstone to install. She also said that she could bring her own contractor to install the grab bars and moveable shower head. Mr. Vander Kooy said that he would have to

take these matters up with the board. The board agreed to these changes, which were all minor.

[11] The evidence on the discussions of handicapped parking is somewhat vague. Each suite was to have one assigned indoor parking space. It appears that Ms. Brockmeyer informed Mr. Vander Kooy that Mrs. Englot had a handicapped parking permit and assumed that a handicapped parking spot would be provided.

[12] Mrs. Englot and Ms. Brockmeyer were satisfied with the responses they received and they agreed to sign the lease. They asked that the lease be in joint tenancy for tax reasons. This request was approved by the board on August 9, 2010 and the lease was signed on August 11, 2010.

[13] Problems developed soon after the lease was signed. The lease provided for a possession date of October 15, 2011 but the complex was experiencing construction delays. The possession date was pushed back to November, December and finally January of 2011.

[14] During the fall of 2010 there was an increasingly heated exchange of e-mails between Ms. Brockmeyer and various representatives of Cornerstone. The main point of contention was whether Ms. Brockmeyer could get access to the suite to ensure that the various modifications were made before her mother moved into the suite. She explained that her mother required the grab bars and toilevators in place her mother would not be able to use the bathroom safely and could not move into the suite. She asked repeatedly either to be able to bring her contractor in to get the work done or at least to inspect the suite to ensure that it could be done.

[15] The position of the board was that they were unable to grant access until after occupancy.

[16] There seems to have been confusion in the communications as to the meaning of the term “occupancy” as it was used in some of the communications. The witnesses for Cornerstone explained that there was a distinction between the occupancy date and the move in date.

[17] The witnesses for the respondent both explained that under the terms of the construction contract, the general contractor had control of the construction site until the work was complete. Visits to the site by persons not involved in construction required the consent of the contractor.

[18] The occupancy date was the date on which the contractor completed its work and turned the project over to Cornerstone. After this date other contractors would be allowed to work in the suites and there would be a time window when Ms. Brockmeyer could get the necessary modifications done before her mother moved in.

[19] It is not clear how well this distinction was communicated to Ms. Brockmeyer. The main channel of communications between Ms. Brockmeyer and the board was Mr. Vander Kooy who did not have a detailed recollection of his conversations during this time.

[20] There were two opportunities to inspect the suite. On October 23, 2011 Mr. and Ms. Brockmeyer were allowed in the building as part of a group tour. Ms. Englot came along but had to wait in the car because the building was still under construction and it would not have been safe for her. The actual suite was not available but they were able to see the suite immediately above which had the same floor plan.

[21] Ms. Brockmeyer said that the suite the saw was still unfinished. The drywall was up but there were no doors or door frames. The tub had been installed not the toilets. They viewed the parking garage but could not get a good idea of the layout because the contractor's work room was still in place. Mr. and Mrs. Brockmeyer had at least one other opportunity to inspect the property in December of 2011.

[22] Mrs. Englot's move in date was set for January 23. Ms. Brockmeyer arranged for Jorge Requiema, a contractor who had done modifications to Mrs. Englot's house, to install the grab bars, toilevator and sliding shower head. Mr. Requiema was not able to complete the work. He installed the toilevator in the guest bathroom but the toilet in the ensuite bath was a different model and the toilevator did not fit. He also found that the walls were framed with steel studs rather than wood he said that the steel studs would

not support the weight of grab bars. He did install one grab bar in the guest bathroom but he warned that he did not think that it was safe.

[23] Ms. Brockmeyer also found that the bath lift would not work in the bath in the suite. The interior of the tub was too short and too narrow and the suction cups would not adhere to the surface.

[24] When Mrs. Englot moved into her suite she found that she could neither bathe, shower nor use the toilet. The toilet in the ensuite was the wrong height and had no grab bars. The toilet in the guest bath was the right height but it also had no grab bars. She had no way of getting into the bath in the ensuite. She could not shower because one leg is shorter than the other and she cannot stand without shoes on.

[25] What followed were several very difficult months while Ms. Brockmeyer tried to work out a solution. She called occupational therapists, contractors and medical supply houses trying to come up with alternatives.

[26] Eventually she worked out a solution to the toilet problem by placing an aluminum walker that her mother used in restaurants where there chairs without arms around the toilet. This allowed Mrs. Englot to use the toilet unassisted. However, it is a temporary solution. The frame is rickety and it is not recommended by Mrs. Englot's doctor.

[27] Meanwhile Mrs. Englot had to make do with sponge baths for the next ten months until Ms. Brockmeyer arranged to remove the existing tub and substitute a walk in tub. This work was done by a contractor hired by Ms. Brockmeyer at a cost of $9,450.00. The Cornerstone management approved the work once it was satisfied that the contractor was qualified and had proper insurance. A walk in tub had been available as an option for the suite however Mrs. Englot did not consider it. Her doctor and occupational therapist had never recommended a walk in tub and she had much preferred the bath lift. However, it was the only workable solution she could find.

[28] Ms. Brockmeyer said that she was also arranging for the same contractor to replace the toilet in the ensuite bath with one that could use a toilevator and take out the drywall, reinforce the steel studs and install grab bars.

[29] Ms. Brockmeyer had also wanted to install a moveable shower head in the bath. This was a minor change which the board had agreed to. It became irrelevant when it was discovered that there was no way for Mrs. Englot to get into the tub.

[30] The placement of the outlet for Mrs. Englot's lift assist chair also became a concern. Mrs. Englot uses this chair to eat her meals and spends much of her day in it.

[31] In September 2010, when Mrs. Brockmeyer was considering the layout of the living room she asked the board if it would be possible to place an electrical outlet for the chair in the middle of the room so that it would be possible to plug in the chair without the risk of tripping over the cord.

[32] In October, 2010, Mrs. Brockmeyer submitted a sketch to the board which showed an electrical conduit running across the ceiling to an electrical pole. The board was reluctant to approve this request because it would damage the stipple ceiling. Running the plug across the floor was not an option because the floor was concrete.

[33] Mr. Henry Bakker was asked by the board to suggest various alternatives. The board also decided that it would be better to defer this issue until Mrs. Englot had moved in and had a better idea of who furniture would look in her suite. The board eventually turned down the request to for a relocated outlet.

[34] Mrs. Brockmeyer said that she experimented with various types of extension cords which were suggested by Mr. Bakker. None of them could be run across the floor without putting her mother at risk of tripping.

[35] Eventually she was able to find a floor to ceiling pole which is used in lighting showrooms. This is a product which is normally only available to commercial users but she was able to purchase one. She connected an extension cord to this pole and ran it

overhead to the wall and down to an outlet. The arrangement required a number of picture hook size holes in the wall and does not do any damage to the ceiling.

[36] On the move-in date Ms. Brockmeyer discovered that there were no indoor handicapped parking spots available. The Cornerstone had four outdoor handicapped parking spots as required by the City of Winnipeg by-laws. The indoor parking area had space for one parking spot for each unit in the building. Two of these spots were larger than the rest and of these spots was assigned to Mrs. Englot. After a few weeks, Ms. Brockmeyer noticed that the lines had been repainted and Mrs. Englot's spot had been made smaller.

[37] When this problem was brought to the attention of the Cornerstone management, they suggested that Mrs. Englot could switch her spot with the other tenant in a larger spot. It was suggested that this tenant did not have the same need for a larger spot. Mrs. Englot did not want to do this because she did not want to create a conflict with her neighbours. Someone in the Cornerstone management made the request anyway and the other tenant refused to switch.

[38] In any event, Ms. Brockmeyer said that even the larger parking space would not have been adequate. In order for Mrs. Englot to get in and out of the van it was necessary to have clearance on both sides. While Mrs. Englot was getting herself out on the passenger side with the assistance of her cane, Ms. Brockmeyer would be unloading the scooter on the driver's side. The process could take several minutes.

[39] Mrs. Englot does not drive herself so the parking spot is not used every day. She needs at least twice week when her daughter comes to take her out.

[40] Ms. Brockmeyer found that in order to unload the van she needed to back out of the parking spot. The alternative which the respondent suggested was to load and unload the van beside the entrance of the building and then move to the parking spot. Mrs. Englot and Ms. Brockmeyer said that no matter which option they used, the van was blocking traffic. Some people were patient but others would honk their horns or try to force their way past.

[41] Mr. Allan Brockmeyer, the husband of Mrs. Brockmeyer also testified. He is a retired banker and he said that he has knowledge of construction matters both from years of reviewing construction loans with the bank and extensive experience doing his own home renovations.

[42] He said that he believed that the costs of making the modifications to the bathroom had been increased by the delay in getting the work done. He said that in order to install the grab bars it would be necessary to remove and replace the drywall. If the work had been done before the drywall was up, he estimated that it would have cost around $250 to place wooden studs in the wall.

[43] The Commission asked for permission to call one witness by telephone. This was a Mr. Tetrault who was identified as the contractor who had installed the walk-in bath in the suite. Mr. Tetrault was working in Saskatchewan and was not available to testify in person. Mr. Huband objected to the witness being permitted to testify by telephone as it would impede his ability to conduct a cross examination.

[44] I denied the request to permit the witness testify by telephone. While Subsection 39(2) of the *Code* does give an adjudicator the discretion to admit evidence that would not be admissible in a court, this discretion should be exercised sparingly. In this case I concluded that given the nature of the evidence the witness was likely to present on construction costs and practices, it would be difficult to conduct a full cross examination of the witness unless he were in the room so that he could be referred to photographs and documents. I advised that I would be prepared to grant an adjournment of the hearing so that Ms. Khan could have the witness attend in person as a rebuttal witness. She decided against calling the witness.

[45] The first witness for the respondent was Mr. John Vander Kooy, who was the leasing agent for the Cornerstone. He recalled meeting with Mrs. Englot and Ms. Brockmeyer and discussing the suite but does not recall many details. He does recall that there was a request for some disability related modifications to the suite. He said that it was past the cut-off date for requesting changes to the unit other than certain

standard upgrades, so he would have to refer the request to the board of the respondent.

[46] He says that when he asked the board about the modifications to the bathroom, he was told that the changes could be made but that they would have to wait until the unit was ready for occupancy. He said that he believes that he explained to Mrs. Brockmeyer that changes could be made after occupancy, meaning the date on which the contractor turned over the building, and the move in date. He said that he did not understand why she kept making the same request.

[47] In the late fall of 2010 his role shifted from leasing agent to move-in coordinator and he had to deal with the needs of 52 other tenants whose move-in dates had been postponed.

[48] The second witness for the respondent was Mr. Henry Bakker who was a member of the board of directors of the Cornerstone. Mr. Bakker is a Civil Engineering Technologist who has 25 years of experience in the construction industry. He is currently employed by a major architectural firm as a budget manager. Mr. Bakker's employer was not the architect for the Cornerstone. He was involved with the Cornerstone as a volunteer member of the board.

[49] Mr. Bakker said that the requests of modifications which were communicated to the board appeared to him to be fairly simple matters which could easily be addressed after the occupancy date.

[50] He explained that the contract was a fixed price contract under which the general contractor carried all insurance and was fully responsible the safety of the site. The general contractor therefore had full control of job site until the occupancy date. Any requests for modifications to the building would have to be submitted to the general contractor by way of a Proposed Change Notice. The contractor would then submit a price for the work.

[51] It was his experience that the price a contractor will submit for last minute changes to a job are often excessive. He believed that for something like installation of

the grab bars, it would have been more economical to bring in a contractor to cut through the drywall and install backing than to have the work done by the general contractor through the change order process.

[52] He said that he believed that with the exception of the electrical modifications, all of the requests of the complainants were approved. It had been explained to the Mrs. Brockmeyer that the necessary work could be done after the occupancy date. He said that he did not understand why she kept pushing the issue.

[53] On the question of parking, he said that the building was provided with 4 outdoor handicapped stalls with an 8 foot loading space which is what is required by the City of Winnipeg by-law. There was no requirement to provide handicapped parking stalls in the indoor parkade.

[54] He said that when the parkade was laid out it was found that two stalls were larger than the others and Mrs. Englot was given one of these. The size of her stall was reduced because it was found that the painter had made a mistake and made another stall in the same row too small. When the lines were repainted, the size of each of the stalls in that row, including Mrs. Englot's, was reduced.

[55] On the question of the electrical modifications, he said that he did not see any need to provide a new outlet for the chair. He could not understand why Mrs. Englot could not arrange her furniture so that the chair was close to an existing outlet and she did not have to worry about walking over the cord.

Positions of the Parties

[56] The Commission argues that the respondent did not take adequate steps to determine the nature of Mrs. Englot's disability related needs or to accommodate them to the point of undue hardship. The commission argues that the *Code* requires active engagement on the part of the respondent. It must make inquiries as to the nature of the complainants disabilities and the steps which are required to accommodate them.

[57] The commission argues that the respondent simply waited for Mrs. Brockmeyer to supply them with information as to Mrs. Englot's needs. If the respondent had been actively involved in the accommodation process, it could have arranged to have all the modifications to the suite completed before Mrs. Englot moved in. By insisting that the modifications wait until after possession, it made the changes much more difficult and costly and caused Mrs. Englot serious discomfort and inconvenience.

The respondent takes the position that it has provided reasonable accommodation to the complainants. With the exception of the request for relocation of an electrical outlet in the main living area, all of the requests which the complainants made for modifications were approved. The only point of disagreement was over when the complainant would be allowed access to the suite to make the changes. The respondent maintains that the changes were minor and could easily have been made after construction was completed.

Applicable Law

[58] The complaint was originally filed under Section 13 of the *Code* which reads:

> 13(1) No person shall discriminate with respect to any service, accommodation, facility, good, right, licence, benefit, program or privilege available or accessible to the public or to a section of the public, unless bona fide and reasonable cause exists for the discrimination.

[59] At the outset of the hearing counsel for the Commission made a motion to amend the complaint to add a reference to Section 16 of the code which reads:

> 16(1) No person shall discriminate with respect to
>
> (a) the leasing or other lawful occupancy of, or the opportunity to lease or otherwise lawfully occupy, any residence or commercial premises or any part thereof; or
>
> (b) any term or condition of the leasing or other lawful occupancy of any residence or commercial premises or any part thereof;

> unless bona fide and reasonable cause exists for the discrimination.

[60] I allowed the amendment as it was my view that it was simply a minor procedural matter which did not change the factual scope of the inquiry or prejudice the respondent in any way. In any event the complaint form states that the complaint is brought under Section 13 “or any other applicable section” of the *Code* so I would be entitled to rely on Section 16 even without an explicit amendment.

[61] The basis of the allegations of discrimination is section 9(c) of the *Code* which provides that discrimination includes:

> (d) Failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

[62] Disability is one of the characteristics listed in subsection 9(2) and is described as:

> (l) physical or mental disability or related characteristics or circumstances, including reliance on a service animal, a wheelchair, or any other remedial appliance or device…

[63] The case law establishes that four elements are required in order to make out a case of discrimination under subsection 9(2):

1. The complainant must be a person with a disability within the meaning of the *Code;*

2. There must be a relationship between the complainant and the respondent in which the *Code* puts the respondent under a duty not to discriminate against the complainant;

3. The complainant must have a disability related need which is made known to the respondent; and

4. The respondent must have failed to accommodate this need to the point of undue hardship.

[64] The complainant has the onus of proof that the first three requirements have been met.

[65] The *Code* does not provide a comprehensive definition of disability and it is not necessary to formulate one for this case. There was evidence that Mrs. Englot has a physical condition that requires her to use various remedial devices for daily living. The respondent did not dispute that she was disabled within the meaning of the *Code*.

[66] Mrs. Englot had disability related needs to use various remedial devices in her living space and these needs were made known to the respondent. I will discuss the specifics of these needs later in this decision.

[67] The respondent was engaged in leasing premises and was therefore subject to Section 16 of the *Code* and by virtue of Section 9(c) had a duty to make reasonable accommodation for the disability related needs of persons seeking to lease premises. This would include a duty to consent, on reasonable terms, to modifications to private living space to meet the special needs of a tenant.

[68] The question of whether the respondent provided reasonable accommodation or could not do so because it would impose undue hardship is really a single question. In the case of *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 (CanLII), [2007] 1 SCR 650 at par. 133, Abella, J. said:

> It bears repeating that "[i]t is important to remember that the duty to accommodate is limited by the words 'reasonable' and 'short of undue hardship'. Those words do not constitute independent criteria. Rather, they are alternate methods of expressing the same concept"

[69] The ultimate burden of proof is on the respondent but the evidentiary burden of proof may change. The respondent must prove that it took steps to provide reasonable accommodation to the complainant to the point of undue hardship.

[70] The respondent may satisfy this onus either by providing evidence either that it has offered reasonable accommodation or that it could not do so without undue hardship. If the respondent shows that it made a proposal which, on its face, provides reasonable accommodation, the evidentiary burden shifts to the complainant to show that the respondent's proposal was not reasonable and additional measures are required. The respondent may then offer evidence that the additional measures proposed by the complainant would impose undue hardship.

[71] The leading cases on the duty to accommodate in Canada are *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1, 1999 CanLII 652 (S.C.C.) (hereafter "*Meiorin*"), and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC), [1999] 3 S.C.R. 868, 36 C.H.R.R. D/129, at paras. 22 and 42–45. In these cases the Supreme Court has defined the duty to accommodate as having both procedural and substantive aspects.

[72] The procedural aspect of the duty to accommodate involves making inquiries to determine the nature of the complainant's disability related needs and to devise a solution to accommodate those needs. The substantive aspect of the duty requires the respondent to implement a solution if it is possible to do so without undue hardship.

[73] The obligations of the parties under both the procedural and substantive aspects of reasonable accommodation are mutual. The party seeking accommodation and the party with a duty to accommodate must work together cooperatively to arrive at a mutually acceptable solution. In *Central Okanagan School District No. 23 v. Renaud,* 1992 CanLII 81 (SCC), [1992] 2 SCR 970, Sopinka, J. stated:

> The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. …
>
> To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in

> determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.

[74] The party who should play the larger role in the accommodation process will depend on the circumstances of the case. In cases where the accommodation will involve changes to an employers' rules and procedures or modifications to the public areas of a business premises, the primary responsibility for coming up with a solution should rest with the person with the duty to accommodate. That is the party who will have access to most of the information necessary to consider alternatives and assess costs.

[75] In this case it is reasonable that the primary responsibility for proposing accommodation measures should rest with the complainant. The accommodation requested here was for modifications to private living space to meet private and personal needs. Mrs. Brockmeyer had extensive information as to Mrs. Englot's unique needs. She was in contact with her mother's doctors and occupational therapists and had prior experience in modifying her mother's house. She was in the better position to determine what changes were needed to the bathroom and other areas of the apartment. All the respondent had to do was to assess the requests for modification and determine whether these requests could be accommodated without undue hardship.

[76] The substantive aspect of the duty to accommodate is to provide *reasonable* accommodation. The *Code* does not require the person with a duty to accommodate to comply with the exact request of the person seeking accommodation. In *Morriseau v. Paisley Park* (2000), Manitoba Human Rights Commission Decisions, Adjudicator Suche stated:

> It must be remembered, of course, that accommodation does not have to be absolute or "perfect" accommodation. Rather, by definition, it must be reasonable. It may be that there is more than one alternative available, and in that instance, the employer or service provider, as the case may be, has the right to choose which accommodation it shall offer.

[77] In *Council of Canadians with Disabilities v. VIA Rail Canada Inc., supra* at par. 134 to 140 the Supreme Court states that undue hardship is a relative concept. While the rights of persons with disabilities must not be undervalued, considerations of costs, safety and quality of service to the public must also be given due weight and "flexibility and common sense will not be disregarded."

Costs of Accommodation

[78] The commission has argued that the duty to accommodate includes the duty to pay the cost of providing the accommodation. It has submitted a claim for special damages consisting of the full cost of all of the modifications which were required to the bathroom including the cost of the walk-in tub.

[79] In support of this position, the commission cites the decision of the Ontario Human Rights Tribunal in *Dixon v. 930187 Ontario Ltd.,* [2010] O.H.R.T.D. No. 225, HRTO 256 in which landlord was order to install a ramp and electronic door opening device at its own expense. A British Columbia Human Rights Tribunal made a similar order in *Mahoney obo Holowaychuk v. The Owners, Strata Plan #NW332 and others*, 2008 BCHRT 274 (CanLII). However, in these cases the modifications were changes to common areas which would provide a long term benefit to all occupants of the building. It was therefore equitable to require that the costs be shared by all.

[80] Custom modifications to private living space fall in a different category. These modifications are for the exclusive benefit of the tenant of a unit. They are adapted to the specific disability needs of that tenant and may be of limited or no value to future tenants. The landlord would therefore have to pay both the cost of the modifications and the cost of removing the modifications when the tenant vacates the suite. In the case of a life lease property like the Cornerstone, these costs would be passed on to the other tenants by way of increased operating costs.

[81] Requiring a tenant of a life-lease property to pay the costs of disability related modifications to their private living space simply puts them in the same position as persons with disability in other types of housing. People who live in a private home or a

condominium have to pay the costs of disability related modifications to their residence themselves. They do not have right to require their neighbours to contribute to these costs. *The Human Rights Code* does not give such a right to persons who have identical needs but happen to live in a life lease property.

[82] I have therefore concluded that the respondent does not have an obligation to pay for any of the modifications to Mrs. Englot's suite except to the extent it can be shown that the failure of the respondent to provide reasonable accommodation materially increased the costs of this work.

[83] I should indicate that the suggestion that the respondent was required to pay modifications to the suite appears to have originated with the Commission. In her evidence Mrs. Brockmeyer stated that it was her understanding that she was required to pay for all of the necessary changes to the suite.

Location of Plug for Power Lift Chair

[84] The first question to consider is whether the request by the complainant for an electrical outlet in the middle of the main room for Mrs. Englot's power lift chair was a disability related need. The use of the chair itself was clearly a disability related need. However, the complainant has not satisfied me that there was a disability related need for the chair to be in a particular position in the room.

[85] The response of the respondent's board, when this request was made, was that the complainants should wait until the furniture was moved in to see if they could find a way to place the chair where it could be plugged into an existing wall socket without requiring Mrs. Englot to step over the cord.

[86] The position of the respondent was not unreasonable. Photographs were filed showing that the current position of the chair in the room is only about three feet from the wall. I do not see any reason why the chair could not be moved a slightly closer to the wall. This may not have been Mrs. Englot's preferred arrangement of furniture, but a simple preference for a certain furniture layout is not enough to give rise to a disability related need.

Access for Modifications to the Bathroom

[87] The request for access to the suite to modify the bathroom clearly related to a disability related need. The modifications consisted of the installation of two toilet lifts and a number of grab bars. There was never any dispute that the modifications could be made. The only dispute is over timing. The Cornerstone board said that Mrs. Brockmeyer could bring in her own contractor to do the work once the unit was released for occupancy. Mrs. Brockmeyer pressed to be allowed in at an earlier date so that the bathroom would be ready for use when her mother moved in.

[88] The respondent was not prepared to allow Mrs. Brockmeyer access to the unit to made changes prior to the occupancy date because the general contractor had control of the site until the occupancy date because the contractor had control of the site until the occupancy date. Any request to permit a third party contractor to work on the site would have required the consent of the general contractor.

[89] Restrictions placed by a third party contract do not automatically give rise to undue hardship. However, the costs of dealing with a third party are a factor which must be taken into account in assessing undue hardship. See *Central Okanagan School District No. 23 v. Renaud,* 1992 CanLII 81 (SCC), [1992] 2 SCR 970.

[90] In this case the project was seriously behind schedule. The move in date had been postponed at least three times. In these circumstances it would have been undue hardship to risk any further delay in the project by making a request for access to the contractor.

[91] I am not satisfied that the delay in access to the suite imposed any additional costs to the complainant or created any difficulties which do not have simple solutions.

[92] The problem with the toilevator not fitting the toilet in the ensuite bath could have been easily solved by replacing the toilet with one that matched the one in the guest bathroom. There was correspondence which said that the board was prepared to consent to this change as long as Mrs. Englot and Mrs. Brockmeyer paid to have the toilet replaced and turned the existing toilet in the ensuite over to the respondent.

[93] The problem of installing grab bars in a building with steel studs also had a number of simple solutions. Mr. Bakker produced a product specification sheet for an anchor system which could be used to install grab bars directly on a wall without needing to secure them to a stud. The anchors were rated as secure for persons up to 300 pounds and met the applicable standards of the American Disability Association and the Canadian Standards Association. He said that he had found these anchors in 2013 and that they had been used by a number of tenants in the Cornerstone to install grab bars in their suites.

[94] There was no evidence as to whether these mounting brackets were available in February of 2011. However, even if they were not, it would have been possible to secure grab bars by removing the drywall and placing plywood between the studs to support the bars. The drywall in the suite had been installed in sometime August or September 2010, so this additional work would have been necessary even if Mrs. Brockmeyer had to bring her contractor at an earlier time.

[95] The problem here was simply one of scheduling which was made worse by construction delays that were beyond the respondent's control. I am aware that Ms. Brockmeyer was under considerable stress in trying to sell her mother's house, arrange a move and arrange for a contractor when the move-in date kept moving. However, I am also mindful of the fact that the Cornerstone management was trying to deal with between 40 and 50 other tenants who were having similar problems. In the circumstances, I find that the respondent did provide reasonable accommodation to the complainant.

Need to Replace the Bath Tub

[96] The most costly problem which the complainants encountered was the inability to use the bath lift in the bath provided in the suite.

[97] However, this problem was not one which can be attributed to a failure to accommodate on the part of the respondent. There was never any request for accommodation for the simple reason that no one thought any form of accommodation

was necessary. The bath lift was a free standing piece of equipment which did not require any installation or modifications to the bathroom. There was no need for Mrs. Brockmeyer or Mrs. Englot to obtain any permission from the landlord to set up the lift in the suite.

[98] It appears that the only time that the bath lift was ever discussed prior to the move in date was at the initial meeting between Mr. Vander Kooy and Mrs. Englot and Mr. and Ms. Brockmeyer. It was explained that Mrs. Englot needed a bath lift and that the lift fit a standard size tub. Mr. Vander Kooy assured them that the units had a standard sized tub and that was the end of the discussion. When Mr. and Mrs. Brockmeyer inspected the building in October and again in November, they saw the type of tub that was installed in the unit and did not notice anything out of the ordinary.

[99] The problem appears to be in the definition of a standard tub. Mr. and Mrs. Brockmeyer testified that they thought that a standard tub means a tub that is 30 inches by 60 inches. Mr. Bakker explained that this means a tub which fits an enclosure 30 or 32 inches deep and 60 inches wide. The size of the tub may vary slightly. He produced a shop drawing of the actual tub unit which showed that it was 59 ¾ inches wide and 32 ½ inches deep. Mr. Bakker did point out that while the exterior dimensions of a standard tub are fixed, the interior dimensions may vary. He speculated that the older type of steel tub that Mrs. Englot likely had in her previous home might have been slightly larger inside than a modern tub.

[100] With the benefit of hindsight, one can see that the problems might have been avoided if the Brockmeyers had been given a shop drawing of the tub in the suite so they could compare the dimensions with the tub in Mrs. Englot's house. However the standard in a human rights complaint is not perfect foresight or hindsight, but reasonableness. It is not reasonable to expect the representatives of Cornerstone to anticipate a potential problem which Mrs. Englot and Mr. and Mrs. Brockmeyer, who had much more knowledge of the situation, did not anticipate.

[101] The respondent was not under a duty to make reasonable accommodation with respect to the bath lift prior to the move in date because no one was aware of the need

for any form of accommodation. Once the problem became evident, the respondent fulfilled its duty of reasonable accommodation by allowing Mrs. Englot and Ms. Brockmeyer to install a walk-in tub at their own expense.

Failure to Provide Adequate Handicapped Parking

[102] The indoor parking area of the Cornerstone was designed to allow one parking space for each unit. Two parking spaces were made larger than the others and Mrs. Englot was allocated one of these spaces.

[103] There was nothing further that the respondent could do to increase the parking space available to Mrs. Englot without taking away parking space from another tenant.

[104] The respondent has therefore demonstrated that it could not accommodate Mrs. Englot's need for a larger indoor parking space without undue hardship.

Conclusion

[105] The respondent has satisfied its obligations to provide reasonable accommodation of the disability related needs of the complainant up to the point of undue hardship. The complaint is therefore dismissed.

February 13, 2014

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Peter Sim
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