IN THE MATTER OF: The Nova Scotia *Human Rights Act*, R.S.N.S., 1989, c. 214, Amended 1991 c. 12

- and -

IN THE MATTER OF: A Complaint under the ***Human Rights Act*** by **Wayne Hounsell**, Complainant, against **Drummond Investments Limited** and/or **Blair Humphries**, Respondent

BEFORE: **V. Francine McIntyre**
Board of Inquiry

DATE OF DECISION: February 6, 2004

APPEARANCES BY: **Jennifer Ross** and **Bill Katz,** Counsel for the **Nova Scotia Human Rights Commission**

Wayne Hounsell, on his own behalf

Diana Musgrave, Counsel for the **Respondent, Drummond Investments Limited** and/or **Blair Humphries**

INTRODUCTION

This matter arises out of a complaint filed by Mr. Wayne Hounsell (‘Complainant’) on October 18, 2001 under the Nova Scotia Human Rights Act, R.S.N.S., 1989, c. 214, Amended 1991 c.12 alleging that Drummond Investments Limited and/or Blair Humphries (‘Respondent’) discriminated against him in the matter of accommodation as a result of his physical disability contrary to section 5 (1) (b) (o) of the Act.

The undersigned was appointed on March 5, 2003 to constitute a Board of Inquiry pursuant to section 32 A (1) of the Nova Scotia Human Rights Act, R.S.N.S., 198, c. 214, Amended 1991 c. 12 to inquire into the complaint of Wayne Hounsell and to determine whether the actions complained of constitute a discriminatory practice contrary to Section 5 (1) (b) (o) of the Act.

The complaint was heard on November 13 and 14, 2003 in Halifax, Nova Scotia.

COMPLAINT

The Complainant is a person who is blind and uses a guide dog to assist him in his daily living. At the time the complaint was filed (October 18, 2001), the Complainant was living at 33 Gaston Road in Dartmouth, in an apartment building owned by the Respondent Blair Humphries and operated by Drummond Investments Limited.

According to the Complainant in or around the late summer of 2000 he asked the Respondent if he (the Complainant) could move to another unit within the same building on an upper floor because he would feel more secure. The Respondent refused his request to move upstairs because the Complainant's guide dog might damage the hardwood floors in the apartment. The Complainant then asked about units in other buildings owned by the Respondent. The Respondent indicated that he did not have any vacant apartments available above the ground floor.

The Complainant alleges that this information was not true and that there were above ground floor apartments available for rent during the times he inquired about changing units.

The Complainant alleges that the Respondent discriminated against him on the basis of his disability.

EVIDENCE

The Board heard evidence from the Complainant and the Respondent. The Board noted that, during the Hearing, both Counsel for the Commission and for the Respondent were conscientious in reading documents and describing exhibits to the Complainant to ensure that he was aware of the material being discussed.

Complainant

The Complainant is 46 years old (date of birth June 19, 1957). Throughout the Hearing the Complainant was accompanied by his guide dog, 'Tournesol'. He testified that he has been visually impaired in one eye since 1957 and in the other eye since he was 12 years of age. He is self-employed as an appliance technician and is in receipt of social assistance.

The Complainant moved into apartment #1 at 33 Gaston Road, Dartmouth with his guide dog on or about September 5, 1998. At that time the apartment building was owned by Manafax Ltd.

In November 1999, the apartment building at 33 Gaston Road was purchased by Blair Humphries and/or Drummond Investments Ltd.

The Complainant testified that in addition to a landlord/tenant relationship, he also worked for the Respondent repairing appliances and selling tokens for the laundry machines in the building for a period of time.

The Complainant testified that in the late summer of 2000 he telephoned the Respondent and asked him specifically if he (the Complainant) could move upstairs. He informed the Respondent that he wished to move for safety purposes. According to the Complainant the Respondent stated "no, you are not going upstairs, the dog's nails would scratch the hardwood floors." The Complainant informed the Respondent that he was breaking the law.

On another occasion in 2000 or 2001, the Complainant asked the Respondent if he could move into another building which the Respondent owned on Regency Drive. The Respondent indicated that he could move into the other building but that the only apartment available was on the ground floor. The Complainant maintains that there were upstairs apartments available at the time because he was aware of when people moved in and out of the buildings.

The Complainant acknowledged that he did not ask the Respondent to put him on a waiting list for vacancies or to notify him when apartments became available to rent during either conversation.

According to the Complainant, there were no other individuals with guide dogs living at 33 Gaston Road; however, there was another person with a guide dog in one of the other buildings owned by the Respondent who was also in a ground floor apartment. The Complainant noted that there were other animals (cats) living in his building at the time.

On June 29, 2001 the Complainant gave notice in writing to the Respondent that he wished to terminate his lease effective July 31, 2001. The Complainant testified that he wished to terminate his lease because he could not get an apartment on an upper floor. The basement apartment was always damp and musty and he felt trapped.

As a result of the difficulty in finding another apartment, the Complainant requested to remain in his apartment. He signed a new lease with the Respondent for the same apartment on July 19, 2001 to commence on August 1, 2001 for a term of 1 year.

The Complainant testified that he has difficulty finding accommodations because of his inability to read advertisements in the newspaper. He has to rely on others to inform him of apartments for rent. He noted that landlords often do not understand about guide dogs and say there are no vacancies when he goes to look for apartments.

The Complainant described the restrictions on him as a person who is blind with respect to the location and amenities he requires. Some factors he has to consider include: the rent must be within the guidelines authorized by the Department of Community Services. The proximity to bus routes is important and it must be close to the urban core, his general practitioner, and his bank. The amenities in the apartment building (elevator and snow removal) and safety are other factors which are important to him.

Counsel for the Commission asked the Complainant about the concerns raised by the Respondent in his response to the Nova Scotia Human Rights Commission. These included: concerns about damage to the bathroom in the Complainant's apartment and complaints of noise coming from the Complainant's apartment.

The Complainant denied causing the damage in his bathroom and refuted the allegations that there was excessive noise coming from his apartment.

The Complainant testified that even though he received three noise complaints, the last one dated June 7, 2002 he was not given a 15-day eviction notice but was allowed to stay until the end of his lease.

Counsel for the Commission entered into evidence an article from the Mail Star Chronicle Herald dated April 16, 2002 describing the Complainant's dispute with the Respondent over his request to relocate to another apartment. The Complainant testified that two weeks after the article appeared in the newspaper he received his notice to quit.

On April 30, 2002 the Complainant was given a notice from the Respondent indicating that the Respondent would not renew his lease and requiring him to vacate the premises by July 31, 2003.

On July 3, 2002 the Complainant caused a letter to be written to the Respondent informing him that he was paying $185.00 towards his rent (rent $385.00) and requesting the remainder of the rent to be taken from his damage deposit. The Complainant stated that he did not receive any response to this letter.

According to the Complainant he started looking for another apartment on approximately June 30, 2002 and moved into a ground floor apartment at 45B Elmwood Drive on August 1, 2002. According to the Complainant, because he had to 'move fast' his guide dog 'Sundae' failed. She 'quit working'. The Complainant testified a guide dog can go through stress when she has to move. Normally someone from the Mira Foundation, the school which provides the guide dogs does an inspection of the new location to assist the dog in adjusting to the new surroundings. However, because of the suddenness of the move, there was no time for an orientation and assessment to be done of his new apartment. This resulted in the guide dog refusing to work. The Complainant had to retire the dog in June 2003, which left him without a guide dog until September 2003. According to the Complainant retiring the dog was very stressful. It was 'almost like losing a family member' or 'giving up a child'.

The Complainant described the close bond between himself and his guide dog. He stressed that a guide dog is a working dog and not a pet. The dog is with him 24 hours a day, 7 days a week. The dog guides and keeps him from harm's way. The dog helps him to go around barriers. He depends on the dog solely. In essence the dog acts as his eyes. Guide dogs are highly trained and are worth approximately $20,000.00.

The Complainant provided a history of his guide dogs. He had his first guide dog for 4 years, from 1993 to 1997. This dog died of a heart attack.

He had his second guide dog from 1998 to 1999 at which time the dog developed epilepsy. He had this dog when he moved to Gaston Road.

He had his third dog 'Sundae' from September 1999 to June 2003. During that time the Complainant and Sundae moved from Gaston Road to Elmwood Avenue and then to Churchill Drive.

The Complainant received his fourth guide dog 'Tournesol' on September 29, 2003. After a period of training with the dog in Quebec, the Complainant returned to Nova Scotia on October 13, 2003 with Tournesol.

The Complainant acknowledged that there are a number of reasons including health and stress which can affect a guide dog's ability to work. He testified that the school which provides the guide dogs does not state how long the guide dog will perform. In fact he stated that the dog could last for 15 months and then collapse.

On cross-examination, the Complainant testified that he filed the complaint with the Human Rights Commission in October 2001 as a result of the incident which occurred in 2000. The Complainant acknowledged that he is slow at getting around to things. He pointed out that as a person who is blind, he does not work like sighted people do. He does not make notes and so is unable to recall exactly when some events took place.

The Complainant acknowledged that he continued to live in the apartment and renewed the lease for his basement apartment after he had made the request to move upstairs. The Complainant testified that he asked to go on a month-to-month lease so that if he found another apartment, he would be able to move.

In response to questions asked by the Respondent's counsel, the Complainant stated that he asked both the Respondent and his property manager, Mr. Gaetan Beaulieu about moving to an upper floor apartment. However, when it was pointed out to him that on direct testimony he indicated that he had only spoken to the Respondent about the possibility of moving to another apartment, the Complainant stated he could not recall if he had spoken to anyone else about it.

In terms of finding another apartment, the Complainant testified that although he received Social Assistance and has a Case Worker, the Case Worker would not assist him in finding an apartment. Similarly, he stated that it was not the job of the CNIB to help people find apartments or to assist them in moving. He indicated that they only help people who lose their sight not people who are blind from birth. However, he did acknowledge that during the period of time when he was looking for an apartment to move from Gaston Road, he did not approach the CNIB for help, he stated "I do not bother with them." The Complainant agreed that he has sighted friends and that they could have helped him to find another apartment.

The Complainant acknowledged that he knew by the end of April 2002 that the Respondent was not going to renew his lease and that he had to move out of his apartment on Gaston Road by July 31, 2002.

When questioned by counsel for the Respondent as to why he did not look for another place if safety was an issue and why he moved out only when the landlord refused to renew his lease, the Complainant stated that he was "testing the landlord to see how far I could go with him."

The Complainant admitted that when he moved out of Gaston Road, there was an outstanding invoice for repairs to his bathroom ($85.00) and that he did not pay the full month's rent. He paid $185.00 and requested that the landlord take the remainder of the rent from his damage deposit.

The Complainant testified that the apartment he moved into on Elmwood Drive was a much larger ground level apartment. The floors were carpeted and tiled.

On redirect, counsel for the Commission attempted to clarify the timing of the Complainant's request to move to another apartment and the filing of the complaint. Counsel introduced the Telephone Inquiry form dated July 9, 2001 from Mr. Bill Grant, employee of the Human Rights Commission This document refers to conversations between the Complainant and his landlord. One statement makes reference to "about a year ago he asked to move upstairs" and in a subsequent statement "recently he asked to move to another Drummond building at 4 Regency Drive." With this aid to his memory, the Complainant was able to recall that he did speak to the Respondent on two occasions and while he was certain that one occasion was by telephone, he was uncertain about the other one but stated that the other occasion may also have been by telephone.

The Complainant agreed that prior to moving out of Gaston Road, the relationship between himself and the Respondent was strained and less than cordial.

Respondent

The Respondent confirmed that he and/or his company, Drummond Investments Limited, own the apartment building at 33 Gaston Road, Dartmouth along with some other apartment buildings.

He acquired the building in October 1999. At that time he did not do a formal inspection but rather a general walk-through. He did not make notes about the state of each unit.

At the time the Respondent bought the building the Complainant was a tenant in it. In addition to being a tenant the Complainant repaired appliances in the building. The Respondent testified that he did not have any concerns about the Complainant as a tenant or about the repair work that he did for him at that time.

The Respondent's recollections about the events surrounding the Complainant's request to move to another apartment are significantly different in a number of areas

from those of the Complainant. The Respondent testified that in May or June 2000, he and the Complainant ran into each other in the lobby of the building and the Complainant approached him about moving to one of the upstairs apartments. The Respondent informed him that there were no vacancies in the building at the time. According to the Respondent, it was the Complainant who raised the issue about the dog's claws and stated 'you are not going to allow me to move up there because I have a dog'. The Respondent acknowledged that he would be concerned about the damage the dog's nails might do but repeated 'I don't have any vacancies at this time'.

The Respondent testified that his statement about no vacancies was accurate. He already had a new tenant waiting to move into the apartment on the upper floor when the old tenant moved out. The Respondent maintains that the only vacancy he had was in a basement apartment on Regency Drive. He told the Complainant that if he wanted that apartment, he could have it. According to the Respondent the Complainant clearly did not believe him and thought that he was lying. The reason the conversation took 15 to 20 minutes was because the Complainant was very upset and indicated that he was going to take it further.

The Respondent recollects only one conversation with the Complainant about moving. The Respondent stated in August 2000 he hired a property manager and from then on the day-to-day concerns in the apartment building were looked after by the property manager. The Respondent testified that he did not know that the Complainant was still seeking to move to another apartment after the discussion in 2000.

The Respondent stated that he did not think about putting the Complainant on a waiting list for the next available apartment because he doesn't keep waiting lists. He has never needed to use them and still does not use them. He stated that it was uncommon for tenants to request to move to another unit but if they did want to move they would have been expected to put something in writing.

When questioned by counsel for the Commission, about the difficulty that writing a letter would pose for the Complainant, the Respondent stated that the Complainant had no difficulty corresponding with them at other times. He repeated that they did not treat the Complainant any differently than other people.

In 2001 the Complainant requested to renew his lease on his existing apartment two weeks before he was to move out. The Respondent acknowledged that he was surprised that the Complainant wanted to renew his lease given the tone of the conversation in 2000. The Respondent stated that at the time the lease was renewed, the Complainant was no more of a problem than any other tenant. All tenants receive verbal complaints about noise once in a while.

According to the Respondent even though the Complainant had 'threatened' him with going to the Human Rights Commission, it did not prevent him (the Respondent) from renewing the Complainant's lease. When the Complainant requested to stay on

there was no indication to the Respondent or to anyone who worked for him that the Complainant wanted to move to another apartment.

The Respondent's testimony confirmed that there were problems with the Complainant in terms of damage to his apartment and complaints about noise from other tenants.

According to the Respondent such things as notices about noise, repairs for damages and security deposit claims were handled by the property manager. While he was told about these things, he did not personally witness or discuss these matters with the Complainant.

The Respondent testified that he received correspondence from Halifax Regional Municipality, Development Services Eastern Region dated December 12, 2001 that an inspection had been done of the Complainant's apartment by the Building Inspector. The inspection revealed that the floor was not level. The Respondent was given 90 days to correct the problem.

According to the Respondent, he was unaware that the Complainant had brought a building inspector into the apartment until he received this letter. He testified that there were three apartments with similar problems. The agreement reached with the Building Inspector was that the floors would be fixed in each apartment after the tenant moved out. They could not be repaired if a tenant was living there. These repairs were made to the satisfaction of the Building Inspector.

The Respondent testified that since receiving the notice from the Building Inspector in December 2001, he has not had any contact with the Complainant.

The Respondent testified that he was not aware that the Complainant had gone 'public' or involved the media until he was contacted by the newspaper. The Respondent was forthright in acknowledging that the tenant involving the media 'added fuel to the fire' but it was the complaints about noise that led him to decide not to renew the Complainant's lease.

The Respondent's position is that the noise concerns and damages to the property are the reasons the landlord/tenant relationship was terminated. Otherwise he did not have a problem renting to the Complainant.

The Respondent testified that the Complainant put a stop-payment on his rent cheque for July 2002 and reissued a cheque in the amount of $185.00. The Respondent testified that he did not pursue the remainder of the rent through the Residential Tenancies Board.

The Respondent denied that the Complainant being blind or using a guide dog to assist him was ever an issue for him as a landlord. In fact he stated that for the first few years, the Complainant was a good tenant. The Respondent acknowledged that if the Complainant had wanted to move to another apartment and there had been no problems with noise and he had agreed to be responsible for any potential damage, he would have rented to the Complainant. The hardwood floors were not a factor

taken into consideration in not allowing the Complainant to move. He was not allowed to move because there were no vacancies; there was no place for him to go.

According to the Respondent he has never told the Complainant that he did not want him as a tenant because he was blind or because he used a guide dog. Nor is he aware of anyone in his (the Respondent's) employ ever stating this to him.

In response to questions from counsel for the Commission, the Respondent stated that he did not refuse the Complainant an apartment with a hardwood floor because of his guide dog but because there were no apartments available at the time.

On cross-examination the Respondent acknowledged that there was a steep 'learning curve' associated with managing the buildings.

The Respondent stated that dogs are not allowed in his buildings and that the only dogs which have been allowed in the building are the guide dogs belonging to the Complainant and another tenant. The Respondent described the damage done by a dog walking on hardwood floors as 'not ordinary wear and tear'.

Counsel for the Commission referred the Respondent to a list of tenants which had been updated as of July 5, 2002. She noted that according to the list new tenants had moved into 33 Gaston Road on the second and third floors in October 2000 and throughout 2001 (In January, August, September and December 2001). Other apartments at Regency Drive became available in June and September 2001. Counsel asked the Respondent if he had considered moving the Complainant into any of these apartments.

The Respondent stated that he had not considered the Complainant for any other apartment except at the time of the initial request. He did not take it any further nor did he make a note that the Complainant was unhappy where he was.

The Respondent acknowledged that he never considered any other options to accommodate the Complainant's request such as laying inexpensive carpeting over hardwood floors or asking the Complainant if he was going to have area rugs to protect the floors or deaden the noise.

ARGUMENT

The Board was reminded by counsel for the Commission that the issue before it is that of discrimination. She argued that there may in fact be valid landlord/tenant issues but that these are irrelevant to the case before the Board. Anything subsequent to the request by the Complainant to move to an upper floor and the denial of this request should not be taken into consideration.

The nub of the complaint according to the Commission is that there was the request to relocate to an upper floor apartment and the denial of the request was based in

part on the presence of the guide dog. It was pointed out that the disability and reliance on the guide dog (the prohibited ground) doesn't have to be the only factor in the denial it has to be an operative factor. Counsel maintains that the Respondent conceded at least three times that it was an operative factor.

Counsel for the Commission argued that the Respondent's actions were a clear violation of the Human Rights Act, Section 4, insofar as he made a distinction based on immutable characteristics. The refusal to allow the Complainant to move to another unit because he uses a guide dog had the effect of imposing a burden or disadvantage on him not imposed upon others and which withheld or limited his access to opportunities available to others.

Furthermore, counsel argued that the Respondent made no effort to accommodate the Complainant's disability which he is required at common law to do to the point of undue hardship. She stated that he did not put the Complainant on a waiting list for an upper floor apartment; he did not attempt to meet his needs by providing carpeting or asking the Complainant about the possibility of using area rugs to protect the floors. Nor did the Respondent attempt to relocate the Complainant when he became aware that the unit the Complainant was living in was not up to building code standards.

She urged the Board to disregard the information about the noise complaints and damage to the Complainant's apartment as these are matters to be decided under the Residential Tenancies Act.

Counsel for the Respondent agreed that the only issue before the Board was the question of whether discrimination took place or not. She argued that the present case is not a denial of rental property but rather a situation where the Complainant was less than satisfied with his accommodations. In her argument, counsel stressed that both the Complainant and Respondent testified that there was a discussion in 2000. Both of them agreed that the evidence given by the Respondent is that the apartment was rented. The Complainant's opinion at that time was that the apartment was not rented and that he was being discriminated against by the Respondent. With respect to the Respondent's other buildings on Regency Drive, both the Complainant and Respondent recall that the Respondent indicated that the only apartment available was a basement apartment.

Counsel for the Respondent argued that the response to the Complainant's request to move to an upper floor was 'the apartment is already rented' cannot be viewed as discrimination. Counsel characterized the subsequent discussion with the Complainant and later on in August 2002 with Mr. Desmond, Human Rights officer about the dog as hypothetical, i.e., if you had an apartment available what would you do in the way of accommodation for the Complainant, The Respondent replied that he might want more in the way of a damage deposit was not a discussion which occurred with the Complainant and therefore should not be considered evidence of discrimination.

Counsel for the Respondent pointed out that after the discussion with the Respondent, the Complainant entered into another lease with the Respondent for

the same apartment. He did not ask to be moved to another apartment at that time. Therefore, there was no indication that the request to move to another apartment was an ongoing concern.

Counsel for the Respondent acknowledged that the relationship between the landlord and tenant deteriorated. However, both Complainant and Respondent testified that after the property managers were hired, they did not interact with each other. Counsel stressed that the Complainant testified that he did not approach the property manager with his request to move to another apartment building.

In terms of reasonable accommodation, counsel for the Respondent stated that the Respondent was willing to move the Complainant to another building, but the only apartment available was in the basement. He was willing to accommodate the Complainant when the Complainant was unable to find another apartment by giving him a new lease on a year-to-year basis after the Complainant gave his notice to quit. Counsel argues that the Respondent could have said you've given your notice to quit, therefore you will have to leave. The actions of the Respondent are not those of someone who was ignoring the fact that the Complainant may require some additional accommodations. She maintains that the Respondent would have been well within his rights and within the law to say sorry, you've given your notice to quit, therefore you must leave.

The Respondent's lawyer characterized the situation as follows: there was a request to move; there was a discussion and the Complainant believed or became angry over the fact that he was not given an apartment that was let to someone else. This is not discrimination and therefore should not lead to a finding of discrimination.

The Complainant, Mr. Hounsell, made some closing statements to the Board. He stated that anybody who wishes to refuse a guide dog states that the apartment is not available. He argued that there is discrimination in a number of areas and that people who are sighted do not know how people without sight work. He argued that people without sight work slower.

The Complainant provided the Board and counsel with an opportunity to review a card outlining the rights of the blind under the Blind Person's Act.

Damages

With respect to damages counsel for the Commission pointed out that under the Act, the Board has broad powers to fashion a remedy. According to Section 34 (8)

"A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefore."

Counsel for the Commission suggested that there needs to be a remedy for the individual Complainant as well as a remedy which will satisfy the broader institutional interests and will uphold the educational and rehabilitation components of the Act.

Special Damages

Counsel for the Commission suggested that the Board should consider granting the Complainant the difference between the rent that the Complainant was paying at Gaston Road and the rent that he had to pay when he moved to another apartment. Counsel reported that this amounts to $140.00 per month. The appropriate length of time to compensate the Complainant for could be anywhere from six months up to the time of the Hearing.

It was suggested that consideration should be given to the different factors affecting the Complainant's relocation to another apartment compared to the factors that a sighted person would take into consideration.

Counsel for the Respondent argued that special damages must be damages actually incurred. She pointed out that the Complainant testified that he was looking for alternate and larger accommodations. He attempted to find them in 2001 and eventually found them in 2002. The increase in rent paid by the Complainant is the result of moving to bigger accommodations. She reminded the Board that the Complainant testified that the apartment he moved to on Elmwood Avenue was bigger than the one on Gaston Road and the apartment he is currently in on Churchill Drive is larger still and includes two bedrooms. Therefore the increase in rent is not the result of discrimination rather it reflects the cost for the larger accommodations which he obtained.

General Damages

General damages are intended to compensate for damage done to a person's dignity, self-esteem, confidence, pride, independence, emotional pain and suffering as a result of discrimination. In Nova Scotia, general damages have been in the range of $2,000.00 to $6,000.00.

It was pointed out that whatever damage award is given must not be so low that it amounts to a mere 'license to discriminate.' It must be significant enough to compensate the Complainant and large enough for the Respondent who is asked to pay the damages to understand the importance of them, what they represent and why the damages are being paid.

The Complainant testified that when he was told he couldn't move, he was very hurt. He felt discriminated against. He reported that it was like someone saying to him, you can't do something because of your disability.

In addition to the request for general damages as a result of the Complainant's hurt feelings and damage to his pride and his dignity, counsel for the Commission suggested that the loss of the guide dog should be taken into consideration in granting general damages.

The Complainant attributes his guide dog's deterioration and failure to continue working to the Complainant's need to move quickly from the Gaston Road

apartment. The need to relocate quickly meant that there was not an opportunity to get the dog acquainted to his new surroundings.

It was stressed that the guide dog plays a critical role in the Complainant's daily living, that a strong bond is formed between the Complainant and his dog and the loss of the dog was tantamount to 'losing a child'.

The other factor to be taken into consideration is the fact that the Complainant was without a guide dog for 3½ months which meant he had to rely on a white cane which he was not as familiar with and which was not as effective in allowing the Complainant to go about his daily living.

Counsel for the Respondent argued that the circumstances in the present case should not give rise to general damages. She summarized the situation as follows. There was a conversation between the parties about an apartment. The Respondent indicated that "no I am sorry the accommodations are already rented." Both parties acknowledged that the discussion was heated. The fact that the Respondent did not have an apartment to rent should not lead to a finding of discrimination giving rise to general damages.

She argued that in order to determine 'how deep the wounds are' it is necessary to look at the circumstances following the conversation when the request to move was made and denied. After that conversation, the Complainant continued to live in the apartment. He re-leased the apartment in 2001 and then asked to re-lease it again in April of 2002. He did not indicate that the circumstances were so intolerable that he would not continue to rent from the Respondent. Therefore there is no evidence to support that there was an ongoing impact on the Complainant's life and lifestyle.

With respect to the guide dog, counsel for the Respondent argued that there is no foundation to tie the failure of the guide dog to the move. According to counsel, the guide dog failed in January 2003 and was retired in June 2003. This was after the Complainant had moved two times from the Respondent's apartment building. She stressed that the guide dog is an animal and there is no guarantee how long the animal will work or what health or other concerns will impact on the animal to shorten its working life.

Counsel for the Respondent pointed out that the Complainant has had four guide dogs in ten years. The guide dog Sundae was 7 years old when she stopped working which could have been for a number of reasons. Counsel argued that you cannot attribute the problems the dog was having in January 2003 onwards to the move from the Respondent's apartment building in July 2002.

She maintained that the Complainant knew as of the end of April 2002 that he would have to move by the end of July 2002 (based on the notice from the Respondent). She pointed out that the Complainant had given notice the previous year that he intended to move out of his apartment on Gaston Road. This notice would have allowed him only 1 month in which to find an apartment. Therefore to say that the

notice terminating his lease by the Respondent did not give him sufficient time to organize himself is inaccurate.

Institutional Remedies

Counsel for the Commission suggested that the Board should consider institutional remedies in addition to the special and general damages. The Board was reminded that the purpose of the Human Rights Act is not to punish but to rehabilitate and educate people with respect to their obligations under the law. Counsel stated that as a landlord the Respondent must be aware of his obligations as well as people's right to equal treatment. The landlord is in the business of providing accommodation which is a basic need of everyone in society. She stated that refusing someone accommodation based on an immutable characteristic is unacceptable, illegal, and morally inappropriate. Counsel stated "everyone is entitled to equal treatment but sometimes equal treatment means treating people unequally."

In this case, equal treatment for the Complainant would have meant allowing him to move to a different unit at his request and possibly putting down different flooring to satisfy his different needs. The landlord should have taken into consideration the Complainant's concerns about security and the failure of his apartment to meet the building code standards in order to put him on an equal footing with other people in the building.

Counsel suggested that the Respondent, individually and/or through his company should be required to take sensitivity and awareness training. It would be appropriate to have the Respondent's property managers involved in this training as well. She argued that it is important for people who are supplying basic needs such as shelter to be aware that different people have different needs and different characteristics and it is not appropriate to make distinctions based on those characteristics.

It was suggested that it would be appropriate to request the Respondent to post on the premises of his apartment buildings a written commitment affirming the rights espoused under the Human Rights Act so other tenants would know their basic rights.

In terms of institutional damages, counsel for the Respondent directed the Board to the Respondent's testimony that when he bought the apartment building at 33 Gaston Road, Dartmouth he was new to the business. He has had a steep learning curve and an education in Human Rights because of this process. His level of awareness has been increased.

Furthermore, to order the property management company, who was not involved with this complaint, to engage in sensitivity training would presume that they had done something wrong.

Counsel argued that this is not a situation where there is an institutional attitude of discrimination. The Respondent was new at owning and renting apartments and has now hired a professional property management company to ensure that his

properties are dealt with in a professional manner. Therefore remedial training would be overly remedial in light of the present circumstances.

DECISION

The issue before the Board is whether or not the Complainant was discriminated against in the matter of accommodation as a result of his physical disability.

Legislation

The Nova Scotia Human Rights Act, as amended defines discrimination in Section 4.

> "For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society."

Section 5 sets out the prohibited grounds of discrimination.

> 5 (1) No person shall in respect of
>
> *
>
> (b) accommodation;
>
> *
>
> discriminate against an individual or class of individuals on account of
>
> *

(o) physical disability or mental disability;

*

Physical disability is defined in Section 3 of the Act as follows:

(l) “physical disability or mental disability” means an actual or perceived

(i) loss or abnormality of psychological, physiological or anatomical structure or function,

(ii) restriction or lack of ability to perform an activity,

(iii) physical disability, infirmity, malformation or disfigurement, including, but not limited to, epilepsy and any degree of paralysis, amputation, lack of physical coordination, deafness, hardness of hearing or hearing impediment, blindness or visual impairment, speech impairment or impediment or reliance on a hearing-ear dog, a guide dog, a wheelchair or a remedial appliance or device,

*

The burden of proof is on the Complainant to establish on a balance of probabilities that his request to relocate to another apartment was denied by the respondent because of his disability. According to the Supreme Court of Canada in ***O’Malley v. Simpsons-Sears Ltd.*** (1985), 7 C.H.R.R. D/3102 at D/3108

“A *prima facie* case of discrimination……is one which covers the allegations made and which, if believed is complete and sufficient to justify a verdict in the complainant’s favour in the absence of an answer from the respondent.…”.

In order to establish a *prima facie* case the Complainant must show that: he has a disability, he was treated adversely by the Respondent, and there is evidence from

which it is reasonable to infer that the disability was a factor in the adverse treatment.

If the Complainant is able to establish a *prima facie* case, then the burden shifts to the Respondent to show that the denial of accommodation was not discriminatory.

Disability

There is no dispute that the Complainant has a disability as defined in section 3 (I) (iii) of the Act. He is a person who is blind and relies on a guide dog.

Adverse Treatment

The Board assessed the information presented to it to determine if there is evidence that the Complainant was treated adversely by the Respondent.

There is no question that the Complainant's request to move to another apartment on an upper floor was denied by the Respondent. The Commission has characterized this as a denial of accommodation. The Respondent's position is that there was no denial of accommodation in so far as the accommodation the Complainant wanted was not available (i.e. there was no apartment available on an upper floor).

The Complainant and Respondent have different recollections with respect to a number of events related to this case. They differ with respect to when the request to move to another apartment was made (the Complainant stated it was in July 2000 whereas the Respondent stated it was in May/June 2000). They disagree as to how many discussions occurred with respect to the request to relocate (the Complainant maintains that he spoke to the Respondent on two occasions whereas the Respondent recalls only one incident). They disagree about the manner in which the discussion(s) occurred (the Complainant stated he made the request in a telephone call whereas the Respondent recalls it as a face-to-face discussion in the lobby of the building). They also disagree as to who raised the issue about the dog's claws on the hardwood floor.

Counsel directed the Board's attention to the British Columbia Court of Appeal case ***Faryna v. Chorny*** (1952), 2 D. L. R. 354 with respect to the assessment of credibility. In this case. O'Halloran J. A.states:

> "On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgement and memory, ability to describe clearly what he has seen and heard, as well as other factors, combined to produce what is called credibility, …"

and continuing on,

> “The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour or the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again, a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken.” (P357).

The Board in this case does not believe that either of the parties attempted to exaggerate or suppress the truth. Rather, the Board saw them as struggling to recall events which occurred over three years ago and which carried different degrees of significance for them at the time.

Throughout this Hearing, both the Complainant and Respondent made reference to the dates on which events occurred. There appeared to be some confusion with respect to the dates they were referring to. The Board found it helpful to establish the events in chronological order.

Based on the testimony and exhibits, the following chronology was developed:

September 5, 1998	The Complainant moved into Apartment #1, 33 Gaston Road, Dartmouth. The apartment building was owned by Manafax Limited.
October 1999	The Respondent bought the apartment building at 33 Gaston Road, Dartmouth.
May/June 2000	The Respondent recalls the Complainant requesting to move to another apartment (in a face-to-face discussion).
July 2000	The Complainant recalls requesting to move to another apartment (during a telephone call).
June 29, 2001	Letter from the Complainant to the Respondent indicating that he wished to terminate his lease effective July 31, 2001.
July 9, 2001	Telephone inquiry from Complainant to the Nova Scotia Human Rights Commission.
July 19, 2001	Complainant renewed lease for apartment #1, 33 Gaston Road, Dartmouth. The term of the lease was to take effect on August 1, 2001 and to run from year-to-year.

October 2001	Invoice from the Respondent to the Complainant for repairs to the apartment.
October 18, 2001	Complaint filed with the Nova Scotia Human Rights Commission by the Complainant.
November 21, 2001	Letter from the Respondent to Herbert Desmond, Nova Scotia Human Rights Officer in response to Mr. Desmond's letter dated October 24, 2001 regarding a complaint.
December 12, 2001	Letter to the Respondent from Halifax Regional Municipality referencing an inspection by the building inspector of the Complainant's apartment noting deficiencies in the level of the floor.
Undated	Notice to tenant re apartment #1, 33 Gaston Road, Dartmouth about noise complaints.
February 20, 2002	Application under the Residential Tenancies Act from the Complainant against the Respondent regarding security deposit and repairs to apartment 1, 33 Gaston Road, Dartmouth.
February 28, 2002	Handwritten letter of complaint about noise coming from apartment #1 signed by two people with reference to an incident on February 23, 2002.
March 4, 2002	Complaint form indicating second official noise complaint regarding apartment 1, 33 Gaston Road, Dartmouth.
April 16, 2002	Newspaper article of an interview with the Complainant in the Mail Star/Chronicle Herald.
April 29, 2002	Letter from the Complainant to the Respondent requesting to go on a month-to-month lease commencing July 31, 2002.
April 30, 2002	Notice to the Complainant from the Respondent indicating that the Respondent would not be renewing the lease on August 1, 2002 and requiring the Complainant to vacate the premises by July 31, 2002.
June 7, 2002	Notice re noise complaint regarding apartment #1, 33 Gaston Road, Dartmouth advising that this is the last official noise complaint.

June 30, 2002	Complainant testified that he started looking for an apartment.
July 3, 2002	Letter from Complainant to Respondent indicating that he was paying partial rent and requesting the remainder to be taken out of his damage deposit.
July 26, 2002	Complainant moved to 14 Elmwood Drive, Dartmouth.
August 7, 2002	Security Deposit Claim under the Residential Tenancy's Act filled out.
August 27, 2002	Interview of the Respondent by Herbert Desmond, Human Rights Officer (notes from interview signed on November 22, 2002).
June 1, 2003	Complainant moved to Churchill Drive, Dartmouth.
June 12, 2003	Complainant retired his guide dog Sundae.
October 13, 2003	Complainant returned to Halifax with guide dog Tournesol.

In weighing the evidence, counsel for the Commission argued that the Board may have to take into consideration circumstantial evidence to rebut the Respondent's justification or explanation of discriminatory conduct. The cases of ***Fortune v. Annapolis District School Board*** (1992), 20 C.H.R.R. D/100(N.S. Bd. Inq.) and ***Basi v. Canadian National Railway Co.* (No. 1)** (1988), 9 C.H.R.R. D/5029(Can. Trib.) were cited as authority to allow the Board to draw an inference of discrimination from circumstantial evidence.

In both cases, B. Vizkelety (Proving Discrimination in Canada, Toronto: Carswell, 1987) was cited as providing the appropriate test to be used in matters involving circumstantial evidence.

> "An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses."

Counsel for the Respondent argued that *Fortune* and *Basi* are not applicable in this case because there is direct evidence available to support the Respondent's position, that there were no apartments available at the time the Complainant made his request. Therefore the Board should not rely on circumstantial evidence to infer that apartments were available.

The Board notes that although the counsel for the Respondent stated in her submission that there was direct evidence to show that the apartments were rented at the time of the request, this evidence was not presented during the Hearing. Neither counsel for the Commission nor Respondent presented evidence regarding the status of apartments at that time.

Counsel for the Commission provided a record obtained from the Respondent of the occupants for #33 Gaston Road, 4 Regency Drive and 6 Regency Drive updated as of July 5, 2002. The Respondent testified that between May/June/July 2000 when the Complainant made his request and July 5, 2002 when the list was updated, there would have been many changes in the tenants occupying the apartments. While the record shows that a tenant moved into an apartment in July 2000 and another one in October 2000. The report was of little help to the Board in determining whether or not there were vacant apartments on upper floors at the time the Complainant made his request.

The Board noted that in the *Fortune* and *Basi* cases the positions put forth by the respondents to justify their actions reflected conflicting explanations and inconsistencies between their stated policies and practises and their actual behaviour. In the present case, the evidence offered by the Respondent is consistent throughout. The Respondent testified that his response to the Complainant's request to move to another apartment on an upper floor at 33 Gaston Road was to inform him that there were no apartments available. The apartment that the Complainant thought was available had already been rented.

During the telephone inquiry with Bill Grant from the Human Rights Commission (July 9, 2001), the Respondent "denied that there were upstairs units available."

In the interview with Herbert Desmond (August 27, 2002), the Respondent stated "at the time of his request, there were no units available." In the Respondent's written response dated November 21, 2001, the Respondent stated that he told the Complainant "there was nothing available at that time, as we had just filled our vacant apartment on the top floor."

The information provided throughout by the Respondent is that there was no apartment vacant for the Complainant to move into at the time he requested to move.

The Complainant maintains that there were apartments available. He testified that he was aware that someone was moving out of an apartment at the time he made his request. However, the Board is of the opinion that knowing when someone is moving out of an apartment and knowing that an apartment is actually available to be rented are two different things.

The Respondent testified that there is a high turnover of tenants in the apartment building at 33 Gaston Road. He stated that he has never had a need to maintain a waiting list. Furthermore, the Complainant testified that he has become aware of

apartments for rent through word of mouth. Therefore, it is not only conceivable but highly likely that an apartment may have been rented prior to a tenant moving out. The Board accepts that although the Complainant may have believed that an apartment was available at the time, there was no evidence to support this belief.

Given the lack of direct evidence and the nature of the circumstantial evidence presented to it, the Board is not prepared to infer that an apartment was available at the time the Complainant made his request.

The Commission asserts that the Complainant was adversely affected by the Respondent's decision and that his actions constituted discrimination.

According to section 4 of the Act

> "a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to clauses (h) to (v) of subsection (1) of section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society."

The Commission argued that the Respondent made a distinction based on the Complainant's visual impairment and his need for a guide dog which had an adverse effect on him. His decision limited the Complainant's access to the opportunity to rent an apartment on an upper floor.

In this case the Complainant was not requesting any "accommodation," he was requesting specific accommodation i.e., (an upper floor apartment). The Board is of the view that the Respondent did not deny him accommodation or 'withhold or limit access to an opportunity available to other individuals' At the time the request was made, the Complainant was already renting an apartment from the Respondent. He was not denied access to an opportunity for an upper floor apartment because there were no apartments available. If an opportunity does not exist, it cannot be denied. The Board accepts that if anyone else approached the Respondent seeking an apartment at the time the Complainant did, that person would have received the same response as the Complainant did.

The counsel for the Commission argued that one of the operative factors in the Respondent's decision not to allow the Complainant to move was a concern that the guide dog might damage the hardwood floors.

As was pointed out in ***Sylvester v. British Columbia Society of Male Survivors of Sexual Abuse*** (2002), C.H.R.R. Doc. 02-073 (B.C.H.R.T.) in order for a Complainant to succeed in establishing discrimination, he need only show that the ground alleged was a factor in the Respondent's conduct he does not need to show that it was the sole or overriding factor.

There was considerable discussion and conflicting testimony with respect to the issue of the guide dog and the possibility of his nails inflicting damage on the hardwood floors. The Complainant maintains that it was the Respondent who raised this as a concern when the Complainant initially requested a move to an upper floor apartment.

The Respondent testified that it was the Complainant who raised this issue with him during the initial discussion. According to the Respondent, the Complainant refused to accept that there was no apartment available and stated that the Respondent did not want him to move up there because of the dog's claws.

The Respondent acknowledges that once the Complainant voiced this possibility, the Respondent agreed that it would be a concern for him. However, given that there was no apartment available, the issue of the dog's claws was irrelevant. The Respondent maintains that there were no further requests to move to another apartment and therefore the issue of the dog did not come up again.

Counsel for the Commission argued that the Respondent's statements about the potential damage to the hardwood floors by the dog's nails was a factor in the discriminatory conduct and therefore constitutes discrimination. The Commission referred the Board to several cases where the denial of rental accommodation to individuals who were blind and accompanied by guide dogs was found to be discriminatory. However, the cases of ***Holt v. Cokato Apartments Ltd**.* (1987), 9 C.H.R.R. D/4681 (B.C.C.H.R.), ***Holt v. Quattrin Square Leasing Ltd.*** (1987), 9 C.H.R.R. D/4683 (B.C.C.H.R.), ***Yale v. Metropoulos*** (1992), 20 C.H.R.R. D/45 (Ont. Bd. Inq.) and ***Crepault v. Woo*** (1994), 21 C.H.R.R. D/487 (Man. Bd. Adj.) differ from the present case insofar as in all of these cases the accommodation in question was either advertised as available for rent or acknowledged by the apartment manager as available for rent.

The Board considered whether the Respondent had a duty to accommodate the Complainant by placing him on a waiting list or offering him the next available apartment on an upper floor. The testimony from the Complainant was that he made the request to move on two separate occasions although he was uncertain as to when the requests were made. He emphasized that people who are blind do not work the same way as sighted people and it is difficult to write things down and to remember dates. However, the Complainant did acknowledge that he did not make a request to the Respondent at the time he signed his lease in June 2001 or again when he requested to go to a month-to-month lease in April 2002. Nor did he approach the superintendent of the building or the property manager with a request to move to another building. The Board accepts that it would have been difficult for the Complainant to put in writing a request for a different apartment. However, there is no evidence that he made his desire known to those who were responsible for the day-to-day running of the apartment building.

During the Hearing, there was considerable information provided by both the Complainant and Respondent with respect to the relationship between the

Complainant tenant and the Respondent landlord after the Complainant signed his lease in June 2001. These events clearly reflect a deterioration in the relationship between the landlord and tenant. On the Complainant's part, he testified to a growing dissatisfaction with his accommodations, concerns over safety security and the structural conditions in his apartment. The Respondent testified that there were complaints from other tenants about the noise generated by the Complainant in his apartment and within the building. He also voiced concern about some damage done to the Complainant's apartment.

Both counsel for the Complainant and Respondent cautioned the Board to disregard these matters asserting that they are/were issues to be dealt with under the Residential Tenancy's Act, 1989, R.S.N.S., c. 401 but not under the Human Rights Act.

The Board agrees that it is not within its jurisdiction to inquire into the landlord/tenant issues. However, the Board did take into consideration the continuing landlord/tenant arrangements after the request was made to move and the request was denied.

The evidence before the Board is that although the Complainant wished to move to another location, and signified his intention to do so in writing on June 29, 2001.he was unable to find another apartment and therefore requested to remain in his apartment. He entered into a lease for another year commencing August 1, 2001. The Board accepts that if the Respondent did not wish to rent to the Complainant anymore, he would have been within his right to follow through with the termination of the Complainant's lease and refuse to give him another lease. Furthermore, the Board accepts that the Complainant could have indicated his desire to be considered for another apartment on an upper floor in the Respondent's buildings at the time he indicated he wished to terminate his lease, when he entered into the new lease in 2001 or when he requested to change to a month-to-month lease in April 2002. According to the testimony of the Complainant and the Respondent, there was no indication of such a request at these times..

Therefore the Board concludes that it is not reasonable to expect the Respondent to assume that the Complainant continued to want an upper floor apartment in light of the fact that there was never any mention of it to the Respondent, or the employees of the Respondent whose job it was to deal with the tenants. Given these circumstances it is unrealistic to expect the Respondent-landlord to advise the Complainant of available apartments or to put him on a waiting list when there was no indication from him that he continued to want to move.

Based on all of the evidence provided to the Board, the Board is not satisfied that the Complainant has met the burden placed on him of proving on a balance of probabilities that the Respondent treated him adversely, or that his disability was a factor in the Respondent's treatment of him The behaviour of the Respondent does not constitute discrimination with respect to accommodation.

Therefore, the complaint is dismissed and no damages are awarded.

Dated February 6, 2004-02-09

____
V. Francine McIntyre
Board of Inquiry