

MANITOBA BOARD OF ADJUDICATION UNDER THE HUMAN RIGHTS CODE

IN THE MATTER OF: The Human Rights Code CCSM Cap H175 and Amendments thereto
and In The Matter of a complaint between Arlene Ursel (Complainant) and LMG Properties Ltd. o/a Bay Hill Inns & Suites, (Respondent).

BETWEEN:

ARLENE URSEL and THE HUMAN RIGHTS COMMISSION,

Complainants,

- and -

LMG PROPERTIES LTD.
O/A BAY HILL INNS & SUITES,

Respondents.

DATE OF DECISION: JUNE 15, 2009

ADJUDICATOR: LYLE M. SMORDIN

APPEARANCES: COMPLAINANT: ARLENE URSEL

COUNSEL: SARAH LUGTIG FOR THE HUMAN RIGHTS COMMISSION

NO ONE APPEARING FOR THE RESPONDENTS

This Hearing arises out of a complaint filed by Arlene Ursel, (the Complainant), on June 15th, 2007 alleging that LMG Properties Ltd. o/a Bay Hill Inns & Suites (the Respondents) of Neepawa, Manitoba, failed to provide a fully accessible hotel room and as a result has discriminated in the provision of services contrary to Section 13 of The

Human Rights Code. There was no reply or response received from the Respondents either to the complaint or at any time afterwards up to and including the date of hearing. As well the Respondents, although they were duly notified of the hearing, did not attend.

I was appointed as the Adjudicator to hear and determine the complaint on December 17th, 2008 by The Minister of Justice and Attorney General. The Hearing took place on May 7, 2009 in Winnipeg, Manitoba. At the hearing, the following exhibits were filed:

EXHIBIT 1A Notice of Hearing signed by myself as Adjudicator

EXHIBIT 1B Complaint letter dated June 15th, 2007 sent by the Registrar of Complaints

EXHIBIT 1C Designation of Board of Adjudication dated December 17th, 2008

EXHIBIT 2 Complaint of discrimination dated June 15th, 2007

EXHIBIT 3A Winnipeg Free Press advertisement May 2nd, 2009

EXHIBIT 3B Manitoba Gazette notice dated April 17th, 2009

EXHIBIT 4 Articles of Incorporation LMG Properties Ltd. dated September 12, 1997

EXHIBIT 5 Annual Return of Information dated November 9, 2005

EXHIBIT 6 Notice of Change of Registered Office dated October 3, 2005

EXHIBIT 7 Notice of Change of Directors dated June 30th, 2006

EXHIBIT 8 Certificate of Dissolution dated January 18th, 2008

EXHIBIT 9 Intake Worksheet dated May 2nd, 2007

EXHIBIT 10 Taped telephone call Louis Nolin and Bay Hill Inn front desk dated May 1st, 2007

- EXHIBIT 11 Transcript of telephone conversation of May 1st, 2007
- EXHIBIT 12 Manitoba Public Insurance Memorandum dated May 5th, 2004
- EXHIBIT 13 Visa Gold statement of account October 23rd, 2004 to January 24th, 2007
- EXHIBIT 14 Visual website information undated
- EXHIBIT 15 Telephone notations MTS April 25th, 2007 and May 1st, 2007
- EXHIBIT 16 Title Search LMG Properties Ltd. Title No. 1643512
- EXHIBIT 17 2009 property search result and Manitoba Assessment

The first witness called on behalf of the Complainant was Pamela Roberts, an investigator with The Manitoba Human Rights Commission whose job was to gather evidence and make a recommendation to the Commission regarding the complaint of April 25th, 2007. The intake worksheet dated May 2nd, 2007 (Exhibit 7) was referred to and after the witness reviewed the recording which was entered and played (Exhibit 10) and the transcript reviewed (Exhibit 11), there was an investigation commenced related to the issues and a report was sent to Ms. Roberts' manager on or about February 29th, 2008. There was a letter dated January 11th, 2008 to a representative of the Respondents asking for a reponse which was followed up by a registered letter on both February 29th, 2008 and March 17th, 2008. Once again there was no response from any representative of the Respondents. A telephone call was also unsuccessfully attempted on February 9th, 2008 and subsequently the recommendation of Ms. Roberts was for this matter to proceed to mediation and if not successful, to adjudication.

The next witness was the Complainant Arlene Ursel who indicated she grew up in the Neepawa area and now lived in Winnipeg for the past twenty years. Her previous occupation was as a hairdresser for over twenty-five years, but she was involved in a serious motor vehicle accident on August 14th, 2003, and was rendered a paraplegic which condition is permanent. Her evidence is that she totally relies on a wheelchair for everything and needs access to a fully equipped washroom. She rented a room at the Respondent's premises on four occasions, evidenced by her Visa Gold statements, namely October 24th, 2004, February 28th, 2006, September 13th, 2006 and December 24th, 2006. She indicated that the room that she occupied was most suitable and accessible and the best she had ever seen. Exhibit 14 is an advertisement for the hotel which shows the amenities and which the Complainant indicated she accessed prior to renting the room. She testified that on April 25th, 2007 she once again tried to rent a room there by calling the hotel and was advised that: "they did not have the room anymore". As evidence of the telephone call, Exhibit 15 shows a telephone call to the hotel on April 25th, 2007 at 7:09 p.m. She apparently called again and was told by a Mr. Sung that they did not have an accessible room anymore. As there were no other accessible rooms in Neepawa and as she was visiting her parents who did not have accessible accommodation, she was forced to drive back and forth from Winnipeg on the same day, a trip of approximately five hours. She indicated that her father at that time was extremely ill so she visited him in that fashion on a number of occasions. Her father passed away in January 2008.

The next witness was Louis Nolin, a friend of the Complainant, who indicated that the Complainant advised him that she was upset that the accessible hotel room was

not available. He was asked by the Complainant to telephone the hotel and did so on May 1st, 2007 at 10:22 a.m.. That phone call lasted five minutes and Mr. Nolin identified the recording, (Exhibit 10) and the transcript (Exhibit 11) as being his voice and the words that were used by him. That concluded the evidence presented on behalf of the Complainant. As the Respondents were not present, there was no evidence given on their behalf.

Firstly I would address the issue of the recording. In the case of *Tanzos v. AZ Bus Tours Inc.*, a Decision of Michel Doucet, an adjudicator appointed as a result of a complaint to The Canadian Human Rights Commission the same issue was considered. There was a tape introduced and the transcript of the conversations were attempted to be introduced as evidence. It was argued that these conversations were taped without the knowledge and consent of one of the parties. The Respondent in that case argued that the action of the Complainant constituted a recording of private conversations between individuals done without their consent. The adjudicator reviewed a decision of The Ontario Court of Appeal in *R. v. Pleich* (1980) 55 C.C.C. (2d) 13, which held that taped conversations should be treated much like testimony from a witness who had overheard a conversation and made accurate notes. As Mr. Nolin testified that the tape and the transcript were both accurate, I am admitting the tape as part of the evidence.

In argument, counsel for the Manitoba Human Rights Commission argued that the Respondents failed to accommodate the Complainant contrary to Section 9(1)(d) of the Code as they failed 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 Section 9(2). One of the characteristics in Section 9(2) refers in subparagraph (1) to any physical or mental disability or related characteristics or circumstance. Section 13(1) says: “No person shall discriminate with respect to any service, accommodation, facility, good, right, license, 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.” In this case since the accessible room had been available and was no longer available, I would hold that there is no bona fide or reasonable cause existing for the discrimination.

Counsel also argued that the discrimination occurred at a critical time in the life of the Complainant, as her father was extremely ill and this added additional stress to her. Section 9(2)(1) of the Code would encompass the need for a wheelchair by the Complainant and as well the fact that the hotel had initially offered a service which was later withdrawn. The Complainant, by her disability, faced barriers and her disability was indeed a factor. The issue that the room with proper accommodation for her was previously accessible but was then withdrawn is also an important factor.

The case of *Council of Canadians with Disabilities vs. Via Rail Canada Inc.*, (2007) S.C.J. 15 a case heard in the Supreme Court of Canada was referred to. In that case the following quote appears at paragraph 162: “The accommodation of personal wheelchairs enables persons with disabilities to access public services and facilities as independently and seamlessly as possible. Independent access to the same comfort,

dignity, safety and security as those without physical limitations, is a fundamental human right for persons who use wheelchairs. This is the goal of the duty to accommodate: to render those services and facilities to which the public has access equally accessible to people with and without physical limitations.” Counsel in this case argues that the failure to provide the accommodation requested was a violation of the Complainant’s fundamental rights. The case of *Turnbull v. Famous Players Inc.*, a case heard by M.D. Garfield, Board of Inquiry on September 10th, 2001 (2001) O.H.R.B.I.D. No. 20, at page 41, Paragraph 201 asks the following question:

- 1) “DID FAMOUS PLAYERS VIOLATE THE CODE BY FAILING TO PROVIDE WHEELCHAIR-ACCESSIBLE THEATRES TO THE COMPLAINANTS?” The board in this case found that the failure to provide access to a facility or service constituted a prima facie violation of Section 1 of the Code. By having a facility that would not allow a person what other patrons not in wheelchairs could do, that is use the washroom, among other things, would be a violation.

Section 10 of The Manitoba Human Rights Code establishes a vicarious liability upon an officer, employee, director or agent contravening the Code while acting in the course of employment or the scope of actual or apparent authority unless they did not consent to the contravention and took all reasonable steps to prevent it and subsequently took all reasonable steps to mitigate or avoid the effect of the contravention. There is no evidence of any of that in this case.

Counsel argues that the Complainant has established a prima facie case of discrimination and the onus would then shift to the Respondents who of course were not present. Clearly a prima facie case was established.

As far as remedies are concerned, counsel argued that the impact on the Complainant was severe and asked for general damages in the sum of \$5,000.00 as well as an order to make available the former hotel suite and a monitoring order for a period of two years allowing the Human Rights Commission to monitor the establishment. In the *Turnbull v. Famous Players Inc.* case earlier referred to, Famous Players Inc. was ordered to make their theatres wheelchair accessible on a phased in basis for several of their establishments. In this case the order would apply only to the room in the Respondent's premises that was previously available and I would therefore order that within 60 days from the date of this decision an implementation plan should be filed by the Respondents providing a copy to the Complainant and The Manitoba Human Rights Commission dealing with the availability of the wheelchair accessible suite and that The Manitoba Human Rights Commission continue monitoring the situation for a period of two years.

I note that the Respondent corporation has been dissolved by the Province of Manitoba and there is no evidence that the corporate registration has been revived. On that basis the last two directors of the corporation as of June 30th, 2006 are Kyu Taek Sung and Myung Sook Song whose addresses are listed as 45 – 20th Street West, Portage la Prairie, Manitoba, R1N 2Y8. They would be vicariously liable.

As far as general damages are concerned while I would agree with counsel that earlier awards in this province have been inadequate, I believe in this case that general damages of \$5,000.00 are excessive. I would however award damages in the amount of \$3,000.00 payable to the Complainant within 60 days of the date of this Decision.

I will retain jurisdiction for the purpose of resolving any further issues which may arise out of the implementation or interpretation of this Decision.

Dated at the City of Winnipeg of Winnipeg, in Manitoba this 15th day of June, 2009.

LYLE M. SMORDIN
Adjudicator