FILE NO. CI 14-01-88320

THE QUEEN'S BENCH
GENERAL DIVISION
WINNIPEG CENTRE

BETWEEN:

MANITOBA HUMAN RIGHTS COMMISSION and DIANNE BROCKMEYER,
Applicants,

- and -

THE CORNERSTONE HOUSING CORP.,
Respondent.

APPLICATION UNDER: ***The Court of Queen's Bench Act*, C.C.S.M. c. C280, and the Court of Queen's Bench Rules, Man. Reg. 553/88, as amended**

AND UNDER: ***The Human Rights Code*, C.C.S.M. c. H175**

ENDORSEMENT SHEET

SITTING DATE: **January 21, 2016**

JUDGE: **Edmond J.**

COUNSEL:

Isha Khan and Heather Unger	☑ **Applicants**	☐ **Present**
Charles R. Huband	☑ **Respondent**	☑ **Present**

ENDORSEMENT:

INTRODUCTION

On February 13, 2014, an adjudicator appointed pursuant to *The Human Rights Code*, C.C.S.M. c. H175 ("*Code*"), issued reasons for decision in connection with a complaint of discrimination under sections 13 and 16 of the *Code* by Dianne Brockmeyer on behalf of her mother, Dorothy Englot ("the decision"). The Manitoba Human Rights Commission and Ms. Brockmeyer brought an application for judicial review seeking an order quashing the decision, and either substituting this court's decision respecting the allegations in Ms. Brockmeyer's complaint or, in the alternative, returning the complaint back for re-determination by another adjudicator.

The adjudicator was appointed to determine a complaint of discrimination brought against the respondent, The Cornerstone Housing Corp. ("Cornerstone"), for failing to provide

reasonable accommodation for Mrs. Englot's disability-related needs in connection with a life lease unit co-leased by Ms. Brockmeyer and Mrs. Englot from Cornerstone.

The facts of this case were reviewed by the adjudicator at paragraphs 2 to 55 of the decision. In essence, Mrs. Englot, with the assistance of her daughter, Ms. Brockmeyer, decided to enter into an agreement with Cornerstone respecting a life lease at a new complex that was in the process of being constructed by Cornerstone.

There is no dispute that Mrs. Englot and Ms. Brockmeyer brought to the attention of the representatives of Cornerstone that Mrs. Englot was physically disabled and would require certain modifications to the unit to accommodate her disabilities.

Initially, the construction of the complex was to be completed and ready for occupancy by October 15, 2010. However, construction delays extended the closing date by approximately two months, to mid-December 2010.

All the tenants, including Mrs. Englot, were affected by the delays and the move-in date was established for mid-January 2011. Mrs. Englot did in fact move into unit 227A on the second floor of the complex on January 22, 2011.

An agreed statement of facts was submitted to the adjudicator and the relevant paragraphs read as follows:

> "7. In or about mid-July 2010, Englot and Brockmeyer met with Vander Kooy and advised him that Englot had specific disability related needs that would need to be addressed if she were to lease a unit in The Cornerstone. In particular, it was indicated that Englot utilizes specialized equipment due to her disability, including toilevators, grab bars, a hydraulic bath lift, and lift assist chair.
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> 8. Vander Kooy assured Brockmeyer that Englot's disability related needs would be addressed if she were to lease a unit in The Cornerstone. Vander Kooy also assured Brockmeyer that he would try to provide Brockmeyer and Englot with an opportunity to view their unit, if purchased, as soon as September or October 2010, so they could identify if any changes would be required to accommodate Englot's disability related needs, prior to occupancy.
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> 9. On or about August 11, 2010, Englot and Brockmeyer co-signed a lease that would have Englot occupy Unit #227A in The Cornerstone (the 'Unit'). The Unit's specifications included a wheelchair accessible washroom, a heated enclosed sparking [sic] spot in the underground parkade and lever handles and hardware.
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> 10. Between mid-August 2010 and mid-September 2010, Brockmeyer provided Vander Kooy with written confirmation of a number of Englot's

disability related needs, requesting that they be addressed by The Cornerstone:

a. Under-cabinet, task lighting be installed due to visual impairment;

b. Garburator be installed due to mobility challenges that impact carrying garbage;

c. Adjustable, hand-held shower head in ensuite bath be installed due to mobility challenges; and

d. Electrical outlet in open area be installed to enable power to lift assist chair, without electrical cords running along floor to and from existing outlets.

11. Brockmeyer subsequently made written requests for the following disability related needs, requesting that they also be addressed by The Cornerstone:

a. Grab bars; and

b. Accessible parking stall.

12. The under-cabinet, task lighting and garburator were characterized as upgrades to the Unit and it was ultimately agreed by The Cornerstone that they would be installed. The Cornerstone advised Brockmeyer that the toilevators, adjustable shower head, grab bars and electrical outlet would best be dealt with [sic] the Unit was complete and ready for occupancy.

13. On or about September 21, 2010, the Board of Directors of The Cornerstone advised all tenants that move in would have to be pushed back a few weeks.

14. Between late September 2010 and mid-October 2010, Brockmeyer requested access to the Unit during construction so that she could identify any challenges that would impact Englot and make arrangements to accommodate Englot's disability related needs, as required. Brockmeyer emphasized to The Cornerstone that any modifications to the Unit would have to be completed prior to Englot moving in.

15. On or about October 23, 2010, Brockmeyer visited a unit in The Cornerstone similar to the one that she and Englot had leased.

16. The Unit was substantially complete in January 2011 and on or about January 18, 2011, Brockmeyer and Englot met with Bakker for a final

deficiency review. In that meeting it was noted that Brockmeyer would arrange for the installation of:

a. a grab bar on one side of the toilet in the ensuite; and

b. toilevators on both toilets.

17. On or about January 22, 2011, Englot moved her personal belongings in to the Unit.

18. Upon moving in to the Unit, Brockmeyer continued to request that The Cornerstone address the issue related to supplying power to Englot's lift assist chair in the open area without electrical wires extending along the floor, and the fact that the toilet installed in the ensuite bathroom was incompatible with a toilevator, and therefore unusable by Englot.

19. On or about June 29, 2011, Brockmeyer became aware that The Cornerstone had narrowed the parking stall assigned to the Unit. Brockmeyer advised The Cornerstone that the allotted space was not sufficient for her to load and unload Englot from her van due to the nature of her disability and equipment.

20. On or about September 29, 2011, Brockmeyer notified The Cornerstone that she was going to arrange for a walk in tub to be installed in the ensuite bathroom, to enable Englot to bathe in her Unit. The tub was installed in late November 2011."

There is no question that the adjudicator recognized that the unit required modification to accommodate Mrs. Englot's disabilities at the time Mrs. Englot and Ms. Brockmeyer co-signed a lease on August 11, 2010.

In the decision, the adjudicator stated:

"[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."

The adjudicator reviewed the applicable provisions of the *Code*, and in the decision he stated:

> "[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*;
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> 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."

The adjudicator stated that the complainant has the onus of proof respecting the first three requirements and the ultimate burden of proof is on Cornerstone respecting the issue as to whether Cornerstone failed to accommodate a disability-related need up to the point of undue hardship. See paragraphs 63-69 of the decision.

After reviewing the applicable law, the adjudicator reviewed each of the specific issues in assessing whether Cornerstone failed in its duty to reasonably accommodate the complainant. After reviewing and considering the facts relating to each of the issues, the adjudicator concluded that Cornerstone had satisfied its obligation to provide reasonable accommodation of Mrs. Englot's disability-related needs up to the point of undue hardship. The complaint was dismissed.

ISSUES

The applicants submit that the court must determine two questions:

(1) What is the appropriate standard of review?

(2) Did the adjudicator err in law?

(1) What is the appropriate standard of review?

The applicants and Cornerstone agreed that the standard of review applicable to a decision made by a specialized administrative tribunal interpreting or applying its home statute, is reasonableness. See *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Winnipeg Airports Authority Inc. v. PSAC*, 2015 MBCA 94, 390 D.L.R. (4th) 633.

The parties also agreed as to the manner in which reasonableness is applied by the reviewing court as set forth in the *Dunsmuir* decision:

> "[47] ... In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

In terms of the deference owed to the decision of the adjudicator, I was also referred to the Supreme Court of Canada decision in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, in which the court dealt with the application of the reasonableness standard as follows:

> "[59] ... Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law'.... There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome."

The applicants submit that the adjudicator's analysis as to whether Cornerstone contravened the *Code* by failing to provide accommodation for Mrs. Englot's disability-related needs was premised on the following "unreasonable conclusions":

> "a. Certain of Englot's needs were not disability-related needs requiring accommodation under *The Code*;
>
> b. Cornerstone's duty to accommodate was not triggered upon being advised of Englot's disability-related needs;
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> c. Brockmeyer had the primary responsibility for proposing accommodation measures;
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> d. Cornerstone had no obligation to dialogue with Brockmeyer about Englot's disability-related needs;
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> e. Cornerstone's duty to accommodate was limited to approving of or consenting to modifications to the Unit;

f. It would have been an undue hardship for Cornerstone to arrange for Brockmeyer and Englot to modify the Unit during construction; and

g. It would have been an undue hardship for Cornerstone to arrange for and/or cover the costs of the modifications to the Unit."

Overall, I am satisfied on my review of the decision that the outcome on each of the issues raised falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law". In my view, the adjudicator accepted that Mrs. Englot was a person with a disability within the meaning of the *Code* and that she had disability-related needs, which were clearly made known to Cornerstone. He found that Cornerstone was under a duty not to discriminate against Mrs. Englot and had a duty to make reasonable accommodation for the disability-related needs of persons seeking to lease premises. See paragraphs 65-67 of the decision.

Ultimately, the adjudicator found that the steps taken by Cornerstone to accommodate Mrs. Englot's disability-related needs were reasonable and met the duty to accommodate, which is limited by the words "reasonable" and "short of undue hardship". See *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 at para. 133.

While I am satisfied that the decision the adjudicator made regarding accommodation falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law", I agree that there may be more than one acceptable outcome.

For example, the decision on the failure to provide adequate indoor handicapped parking was that Cornerstone demonstrated that it could not accommodate Mrs. Englot's need for a larger indoor parking space without undue hardship. The adjudicator referred to the fact that she was given one of two larger spots in the underground parking garage and Cornerstone could not increase Mrs. Englot's parking space "without taking away parking space from another tenant". See paragraphs 102-104 of the decision. The evidence was that there were four outdoor handicapped parking stalls that could be used by Ms. Brockmeyer to pick up and drop off Mrs. Englot as Mrs. Englot did not drive. The adjudicator could have found that the failure to provide an indoor handicapped parking stall did not amount to reasonable accommodation in the circumstances and that, too, would have been an acceptable outcome.

However, the adjudicator reviewed the facts and the law and the outcome does "fit comfortably with the principles of justification, transparency and intelligibility". Accordingly, on the basis of my review of the authorities, it is not open to me to substitute my own view of a preferable outcome.

(2) <u>Did the adjudicator err in law?</u>

Dealing with the specific submissions made on behalf of the applicants regarding what the applicants stated were "unreasonable conclusions" of the adjudicator:

(a) The applicants submit that the adjudicator erred by determining that certain of Mrs. Englot's needs were not disability-related needs requiring accommodation. I am not satisfied that he erred in his determination, as Ms. Brockmeyer brought the disability-related needs to the attention of Cornerstone and Cornerstone took steps to deal with the issues, albeit the timing of dealing with the issues is disputed.

Specifically with respect to the modified kitchen cabinets, under-cabinet lighting, and garburator, those appear to have been acknowledged by Cornerstone and completed.

As well, with respect to the location of the electrical outlet, the adjudicator considered that as a disability-related need but ultimately determined that the location was more a matter of preference as opposed to a disability-related need or an issue of accommodation.

The need to replace the bathtub was recognized by the adjudicator as a disability-related need. The finding of the adjudicator, however, was that Cornerstone fulfilled its duty of reasonable accommodation by allowing Mrs. Englot and Ms. Brockmeyer to install a walk-in tub at their expense.

(b) The applicants submit that the adjudicator fell into error when he found that Cornerstone's duty to accommodate was not triggered until the construction of the building was substantially complete; in other words, once all tenants could obtain occupancy and commence any additional work required by their hired contractors.

I am not satisfied that the adjudicator erred in his findings or in his interpretation of the test of discrimination set forth in the decision. The adjudicator was in the best position to assess the evidence and the facts that were presented to him and to make the findings he did regarding reasonable accommodation and the timing for work to proceed in all of the units.

(c) The applicants submit that the adjudicator erred by concluding that Ms. Brockmeyer had the onus of coming up with solutions to address Mrs. Englot's disability-related needs. They submit that the adjudicator's findings amount to a misapplication of section 52(1) of the *Code*.

I agree with the submission of the applicants that section 52(1) of the *Code* codifies the principle, long established by case law, that Cornerstone has the onus of proving that the accommodation measures it offered were reasonable, or that accommodation was not possible in the circumstances. In my view, the adjudicator recognized that Cornerstone had the onus. I am not satisfied that his statement of the applicable law is incorrect. The adjudicator pointed out the following in the decision:

"[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."

The adjudicator also acknowledged that the obligations of the parties under both procedural and substantive aspects of reasonable accommodation are mutual. See *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 (at paragraph 73 of the decision).

Having set out the proper test in the decision, the adjudicator stated:

"[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."

The applicants submit that this statement by the adjudicator was an error which applied the fundamental principles of accommodation in such a way as to effectively lessen the obligation of the landlord pursuant to section 16 of the *Code* requiring a landlord to provide reasonable accommodation for a tenant's disability-related needs.

I disagree that the adjudicator erred in his application of the fundamental principles of reasonable accommodation. My interpretation of the decision is that the adjudicator was simply stating what was obvious based on the facts that were presented at the hearing; that is, Ms. Brockmeyer had extensive information regarding her mother's unique needs and requirements for the unit. In my view, the adjudicator did not change the law or the onus. In essence, he found that Cornerstone met the onus. In my view, that was a conclusion he was entitled to reach on the facts of the case in determining whether reasonable accommodation had been provided.

(d) The applicants submit that the adjudicator erred in finding that Cornerstone had no obligation to dialogue with Ms. Brockmeyer about Mrs. Englot's disability-related needs.

My review of the decision leads me to conclude that the adjudicator did find that Cornerstone had an obligation to provide reasonable accommodation and to dialogue with Ms. Brockmeyer. In fact, the evidence shows that there was dialogue and meetings with Ms. Brockmeyer. That does not mean that Cornerstone was required to do everything that was requested, including provide Ms. Brockmeyer and Mrs. Englot's contractor with access to the unit before construction by the main

contractor was complete. The test to be applied is whether or not Cornerstone offered reasonable accommodation or could not do so without undue hardship. That duty and onus were recognized by the adjudicator.

In hindsight, measurements of the toilets and the bathtub should have been exchanged to ensure that the toilevators could be installed and the bathtub would fit the bath lift that Mrs. Englot required. The adjudicator was in the best position to assess the evidence that was presented and to make his findings regarding the toilevator and the bath lift. Ultimately, he found that Cornerstone 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. Further, he found that once the problem became evident, Cornerstone met its duty of reasonable accommodation by allowing Ms. Brockmeyer and Mrs. Englot to install a walk-in tub at their expense. In my view, those findings fall within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

(e) The applicants submit that the adjudicator erred in his interpretation of section 9(1)(c) of the *Code* by narrowing the duty to provide reasonable accommodation for a person's disability-related needs in the context of housing, to merely approving of, or consenting to, modifications made by the person to their private living space.

On my review of the decision, the reference to section 9(1)(c) or 9(c) in the decision was wrong. Even though the adjudicator referenced section 9(c), I believe he meant section 9(1)(d) of the *Code*. In fact, he quoted section 9(1)(d) in paragraph 61 of the decision. In any event, I am not satisfied that the adjudicator narrowed his analysis regarding the duty of reasonable accommodation. To a large extent, the issue became one of timing for Ms. Brockmeyer and Mrs. Englot to have access to the unit. Ms. Brockmeyer provided Cornerstone with a number of Mrs. Englot's disability-related needs between August and September 2010. On the facts of this case, the Board of Cornerstone granted permission to make the modifications to the unit that were sufficient according to the adjudicator to meet its duty of reasonable accommodation. I am not satisfied that the adjudicator's conclusion amounts to a change in the law respecting protection against discrimination in housing versus protection against discrimination in employment as submitted by the applicants.

(f) The applicants submit that the adjudicator erred in determining that it would have been an undue hardship for Cornerstone to have arranged for, enabled or allowed Ms. Brockmeyer to make modifications to the unit during construction by the main contractor, Boretta Construction. The finding of the adjudicator was ultimately that providing access to the unit once the main contractor was completed was sufficient to meet the test of reasonable accommodation. I do agree with the applicants that it does appear to make some sense to have permitted Ms. Brockmeyer to have their contractor contact Boretta Construction to seek permission to gain access to the site. However, on a busy construction site that is behind schedule with a move-in date that had been postponed at least three times according to the adjudicator, any further risk of delay in the project would have amounted to undue hardship to Cornerstone. The essence of the adjudicator's finding was that it was not reasonable

or practicable to have other contractors on site when the main contractor was still in control of the site and that the modifications could have been done in a short period of time following occupancy of the premises.

There was evidence at the hearing on behalf of Cornerstone regarding the delays and Boretta Construction having control over the site. In addition, there was evidence that part of the work requested by Ms. Brockmeyer to address the disability-related needs was undertaken and performed by Boretta Construction, including custom changes to the kitchen cabinets, among other changes. As well, the under-cabinet lighting and the garburator were installed prior to the move-in date. I am not satisfied that the adjudicator's acceptance of the oral evidence given by Cornerstone was unreasonable in the circumstances. Nor am I satisfied that it is open to me as the reviewing court to substitute my view of a preferable outcome in the circumstances.

(g) Finally, the applicants submit that the adjudicator unreasonably concluded that it would have been an undue hardship for Cornerstone to arrange for or cover the costs of the requested modifications to the unit.

On my review of the decision, the adjudicator stated:

> "[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."

The adjudicator also found that the costs of dealing with a third party are a factor that must be taken into account in assessing reasonable accommodation and undue hardship. He did not find that the costs of the modifications to the unit amounted to undue hardship. He found that reasonable accommodation was provided by Cornerstone by the general contractor completing some of the required modifications and by permitting Ms. Brockmeyer and Mrs. Englot to complete the balance of the modifications upon occupancy.

I am not satisfied, on reviewing the decision, that the adjudicator erred in making the findings that he did. In this case, Ms. Brockmeyer and Mrs. Englot were not singled out or treated differently than other tenants. They were given access to the premises for inspection purposes before the date of possession, and upon taking possession of the unit, they were permitted to complete the disability-related modifications required. Overall, I am not satisfied that the decision is unreasonable in the circumstances.

CONCLUSION

The decision of the adjudicator falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law". Other steps perhaps could have been taken by Cornerstone to better accommodate Ms. Brockmeyer to satisfy Mrs. Englot's disability-

related needs, but the test is not one of perfection. The duty to accommodate is limited by the words "reasonable" and "short of undue hardship". See *Council of Canadians with Disabilities*, and *Morriseau v. Wall (c.o.b. Paisley Park)*, [2000] M.H.R.B.A.D. No. 1, 2000 CarswellMan 691. The adjudicator reviewed all of the facts and considered that there was reasonable accommodation. The applicants have not satisfied the onus that the decision is unreasonable in the circumstances. Accordingly, the application is dismissed.

Counsel for the applicants advised the court that they were not seeking costs in this application. Counsel for Cornerstone, however, advised the court that his client was seeking solicitor and client costs against the Manitoba Human Rights Commission and/or Ms. Brockmeyer. Counsel for Cornerstone submits that this process has been a costly one for a not-for-profit entity.

I disagree that this is an appropriate case for an award of solicitor and client costs. The applicants strongly believe that the conduct of Cornerstone amounted to discrimination and their counsel made a strong submission that the adjudicator erred in law in the decision. In my view, there was nothing extraordinary or unusual that would justify an award of solicitor and client costs in this case. Costs are always in the discretion of the court (*The Court of Queen's Bench Act*, section 96(1); Queen's Bench Rule 57) and orders of solicitor and client costs are the exception rather than the rule and should only be granted in the most extreme cases. See *Young v. Young*, [1993] 4 S.C.R. 3; *Fouillard v. Ellice (Rural Municipality)*, 2007 MBCA 108, [2007] M.J. No. 444 (QL), leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 555 (QL); *McMurachy v. Red River Valley Mutual Insurance Co.* (1994), 115 D.L.R. (4th) 220 (Man. C.A.); and *Kelly v. Canada (A.G.)*, 2015 MBCA 41, [2015] M.J. No. 119 (QL).

Costs are granted to Cornerstone respecting this application on the basis of a Class 2 proceeding under the Court of Queen's Bench tariff. If the parties cannot agree on those costs, they may be spoken to.

DATE: **February 9, 2016** **JUDGE:** _____ **J.**

Copies of this Endorsement Sheet have been sent to counsel on the 9th day of February, 2016.