

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: April 29, 2022

CASE: 2021-00182N

Citation: Tamo v. Metropolitan Toronto Condominium Corporation No. 744 et al., 2022 ONCAT 40

Order under section 1.44 of the *Condominium Act, 1998*.

Member: Jennifer Webster, Member

The Applicant,

Janet Tamo

Represented by Jonathan Fine, Counsel

The Respondents,

Metropolitan Toronto Condominium Corporation No. 744

Represented by Deborah Howden, Counsel

Teryn Clancy

Represented by Micheal Simaan, Counsel

Hearing: Written Online Hearing – December 12, 2021 to April 4, 2022

REASONS FOR DECISION

A. INTRODUCTION

- [1] This application relates to the enforcement of the provisions of the declaration, by-laws or rules of a condominium corporation that prohibit, restrict or otherwise govern animals in the units and on the common elements of the corporation.
- [2] The Applicant, Dr. Janet Tamo, claims that the Metropolitan Toronto Condominium Corporation No. 744 (MTCC 744) has failed to enforce its pet prohibition by permitting Ms. Teryn Clancy to have a dog (Murphy) in her unit and on the common elements. Moreover, Dr. Tamo states that MTCC 744 has breached her right to occupancy of the condominium free of discrimination by allowing Murphy to live in the building and failing to accommodate her disability of severe allergies and mental distress related to the presence of the dog.
- [3] The Applicant asks the Tribunal to find that MTCC 744 is in breach of its governing documents by approving Ms. Clancy's request for an emotional support animal as an accommodation of her disability. Moreover, the Applicant asks the Tribunal to find that MTCC 744 failed to carry out necessary due diligence prior to approving Ms. Clancy's accommodation request and in failing to enforce the conditions

imposed in relation to the accommodation. The Applicant seeks an order requiring Ms. Clancy to immediately and permanently remove Murphy from the condominium. She also asks for her costs of this application.

- [4] MTCC 744 states that it has enforced the pets prohibition in its governing documents in a consistent, fair and reasonable manner. It submits that it had a duty to accommodate Ms. Clancy's disability and that, in approving an exemption for Ms. Clancy from the pet prohibition, it has not caused undue hardship to the Applicant. It is Ms. Clancy's position that she sought and obtained approval to have Murphy as an accommodation and that she should be able to keep him. Both MTCC 744 and Ms. Clancy ask the Tribunal to order that the Applicant pay their costs.
- [5] For the reasons set out below, I find that MTCC 744 has not breached its governing documents by approving Ms. Clancy's request to have an emotional support animal. In addition, I find that the Applicant has not established that MTCC 744 failed to accommodate her disability or that she has suffered undue hardship as a result of its accommodation of Ms. Clancy's disability. Therefore, I dismiss the application and make no order with respect to costs for any party.

B. BACKGROUND

- [6] The Applicant is the owner of a unit in MTCC 744. She has lived in her unit for over 30 years. She states that one of the reasons she chose to live at MTCC 744 was because she suffers from numerous allergies, including allergies to dogs and cats. MTCC 744 was established as a no-pet building in its declaration, and the Applicant preferred to live in a condominium where she could avoid exposure to dogs and cats.
- [7] Article 3.01(e) of MTCC 744's declaration provides that no animals shall be kept or allowed in any unit, and article 4.05 of the declaration states that no animal shall be kept upon the common elements. The pet prohibition was included in MTCC 744's rules, the current version of which was enacted in 2016. Rule 1.7 identifies that the condominium corporation was established as a "no pet" building. Rule 1.7.1 further describes the pet prohibition as follows:
- No animal, livestock, fowl or pet or any kind shall be kept in or allowed to enter any unit or the common elements, including those parts thereof of which any Owner has the exclusive use. This restriction, of course, does not apply to animals such as guide dogs where required by law.
- [8] Teryn Clancy has been the owner of a unit in MTCC 744 since 2018. She is a person who is diagnosed with mental health disorders. In May 2020, Ms. Clancy submitted a request to MTCC 744's Board (the "Board") for permission to have an emotional support animal as an accommodation related to her disability. The Board approved Ms. Clancy's request in August 2020. Ms. Clancy obtained Murphy, a Bernedoodle, in August 2020 and she brought him to live in MTCC 744 in October 2020.

- [9] On January 8, 2021, the Applicant wrote to the Board, complaining about the presence of Murphy. She identified that she had serious allergies to cats, dogs, dust and dander and stated that she objected to the violation of the pet prohibition in the rules. MTCC 744's counsel responded to the Applicant on February 10, 2021, advising that it had permitted the exemption to the pet prohibition in fulfillment of its legal duty to accommodate individuals with a disability to the point of undue hardship. The Applicant responded to MTCC 744's counsel on February 15, 2021, with a series of questions related to the accommodation, and the counsel responded by letter dated March 1, 2021.
- [10] On April 22, 2021, the Applicant's counsel wrote to MTCC 744's counsel to request the enforcement of the pet prohibition and the removal of Murphy. MTCC 744's counsel responded on May 7, 2021, stating that it would not require that Murphy be removed given its duty to accommodate.
- [11] The Applicant commenced this application with the Tribunal after receiving the May 7, 2021, response on behalf of MTCC 744.

C. PROCEDURAL MATTERS

- [12] I addressed three procedural matters during the hearing.
- [13] Firstly, when I asked the parties to disclose the documents they intended to rely on in the hearing, the Applicant and MTCC 744 identified that they wished to submit photos and video surveillance records. I asked the parties to provide submissions about the proposed records and to answer the following questions in their submissions:
- How are the photos / video surveillance records relevant to an issue or issues in this hearing?
 - What is the reliability of this evidence?
 - How will the evidence be identified and / or authenticated?
 - What ability will there be for testimony and cross examination about these records?
 - Are these records the only means to obtain this evidence?
 - How does the probative value outweigh any prejudicial effect?
- [14] Based on my review of the parties' submissions, I accepted the photos and some of the video surveillance records. I was satisfied that the records were reliable and could be authenticated, and I concluded that the records were relevant to issues in the hearing with the exception of one video clip from September 19, 2021. I found that the September 2021 video clip was not relevant because it showed an interaction between Ms. Clancy and the Applicant's spouse when Murphy was not

present and therefore, did not relate to the issues in the hearing. I was also persuaded that the proposed photo and video records did not have a prejudicial effect on the parties or the other people recorded. The photos and video surveillance records were subsequently identified and authenticated by witnesses through testimony in the hearing

- [15] Secondly, I identified to the parties after the disclosure of documents and witnesses that many of the documents included the private medical information of the Applicant and Ms. Clancy. I explained that the Tribunal process is a public process, but that the Tribunal could address the confidentiality of personal information in accordance with rule 21.5 of its Rules of Practice which states:

The CAT may take any steps and make any directions or Orders that are needed to protect the confidentiality of personal information. The CAT may do this after a request or without a request from a Party, in accordance with the CAO's Access and Privacy Policy.

- [16] I held a case management conference (CMC) on February 23, 2022, with the counsel for all three parties to discuss procedural issues related to the hearing, including the question of a confidentiality order. The parties identified at the CMC that they agreed to a confidentiality order with respect to the medical information provided. Later in the proceeding, the parties requested that the confidentiality order be extended to a video recording of the cross-examination of the Applicant and Ms. Clancy. I agreed to this request, and the confidentiality order is issued as a separate order from this decision.
- [17] The third procedural matter involves the Applicant's request made on February 16, 2022, for an interim order requiring that Ms. Clancy immediately remove Murphy from MTCC 744's property or, in the alternative, requiring her to transport Murphy in an enclosed wagon or carrier when travelling through MTCC 744's interior common elements. The Applicant stated that the interim order was required due to deterioration in her health status.
- [18] The Tribunal has the power to make interim orders pursuant to Rule 4.3 which states, "The CAT may make an Order directing a Party to take an action or refrain from taking an action while a Case is ongoing." At the CMC on February 23, 2022, I discussed the applicant's request for an interim order and the process for submissions about the request with the parties. In the context of this discussion, the Applicant advised that she withdrew the request.
- [19] There are numerous factual disputes in the evidence presented in the witness testimony and documents. In this decision, I will only address the evidence that is relevant to the issues before me, as not all of these disputes are relevant or material to the issues.

D. ISSUES & ANALYSIS

- [20] There are four issues to be addressed in this decision:

1. Is MTCC 744 in breach of its governing documents by exempting Ms. Clancy from the pet prohibition?
2. Has MTCC 744 failed to accommodate the Applicant's disability by permitting Ms. Clancy to have a dog in her unit and on the common elements?
3. Has MTCC 744's decision to accommodate Ms. Clancy's disability imposed an undue hardship on the Applicant?
4. Should the Tribunal order costs?

Issue 1: Is MTCC 744 in breach of its governing documents?

The legal framework

- [21] Condominium corporations, such as MTCC 744, are governed by the *Condominium Act, 1998*, S.O. 1998, c.19 (the "Act"), and by their declaration, by-laws, and rules.
- [22] Section 27 (1) of the Act provides that a board of directors shall manage the affairs of a condominium corporation, and section 37 (1) requires that each director and officer of a condominium corporation exercise their powers and duties honestly and in good faith, and with the "care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."
- [23] A condominium corporation is governed by its declaration, by-laws and rules, enacted in accordance with the Act. By-laws and rules must be reasonable and must be consistent with the declaration and the Act. Owners have an obligation to comply with the Act, declaration, by-laws and rules, and the board of directors has a duty to enforce them.
- [24] MTCC 744's declaration and rules include pet prohibitions. The declaration sets out in articles 3.01(e) and 4.05 that no animals shall be kept or allowed in any unit or upon the common elements. MTCC 744's rules set out the restriction on animals and pets in rule 1.7.1 as follows:
- No animal, livestock, fowl or pet or any kind shall be kept in or allowed to enter any unit or the common elements, including those parts thereof of which any Owner has the exclusive use. This restriction, of course, does not apply to animals such as guide dogs where required by law.
- [25] Condominium corporations are also required to comply with the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19 (the "Code").
- [26] Section 47 (2) of the Code states that the Code has primacy over other legislation; this includes the Act and the governing documents of the condominium corporation. In *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, the Supreme Court of Canada (SCC) held that provincially created

statutory tribunals are required to apply human rights legislation when making their decisions.

- [27] Section 2 (1) of the Code provides that every person has a right to equal treatment with regard to the occupancy of accommodation, without discrimination based on a number of different personal attributes or grounds (called “prohibited grounds”), including disability. This includes the occupancy of a condominium. A disability is defined in section 10 of the Code to include a condition of mental impairment or a mental disorder. Sections 11 and 17 of the Code set out an obligation to accommodate a person experiencing discrimination related to a prohibited ground, provided that the needs of the person can be accommodated without undue hardship “considering the cost, outside source of funding, if any, and health and safety requirements.”
- [28] The Applicant argues that MTCC 744 is in breach of its governing documents by allowing Ms. Clancy to have Murphy in her unit and on the common elements. In particular, she argues that MTCC 744 failed to exercise due diligence when it concluded that it had an obligation to accommodate Ms. Clancy. She argues that Ms. Clancy did not establish that she had a disability or that she required the accommodation of an emotional support animal. She also argues that MTCC 744 failed to enforce the conditions it placed on Ms. Clancy’s emotional support animal and that this constitutes a failure on the part of the condominium corporation to exercise its duties in good faith and with care, diligence and skill as required by section 37(1) of the Act.
- [29] MTCC 744 maintains that its decision to exempt Ms. Clancy from the application of the pet prohibition was required as an accommodation of her disability pursuant to the Code. MTCC 744 further argues that the Board’s decisions about the accommodation are owed deference by this Tribunal due to the “business judgment rule”. The scope of such deference is outlined by the Ontario Court of Appeal in *3716724 Canada Inc. v. Carleton Condominium Corporation No. 375*, 2016 ONCA 650, as follows:
- [53]...the first question for a court reviewing a condominium board’s decision is whether the directors acted honestly and in good faith and exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. If they did, then the board’s balancing of the interests of a complainant under s.135 of the Act against competing concerns should be accorded deference. The question in such circumstances is not whether a reviewing court would have reached the same decision as the board. Rather, it is whether the board reached a decision that was within a range of reasonable choices. If it did, then it cannot be said to have unfairly disregarded the interests of a complainant.
- [30] The Tribunal has accepted that the business judgment rule applies such that deference should be given to the decisions of a condominium corporation’s board of directors, provided the decision is neither unfair or unreasonable and the directors have met the standards set out in section 37 of the Act (see *Boodram v.*

Peel Standard Condominium Corporation No. 843, 2021 ONCAT 31 at paragraphs 17 and 18; and *Davy v. Toronto Standard Condominium Corporation No. 2121*, 2021 ONCAT 114 at paragraph 21).

- [31] The question then is whether the Board, in providing the exemption to Ms. Clancy from the pet prohibition, acted in good faith, followed a reasonable decision-making process, and made a decision that was within a range of reasonable outcomes.

The Board's decision to accommodate Ms. Clancy

- [32] Martin Starkman testified about the board's decision-making process with respect to Ms. Clancy's request to be permitted to have an emotional support animal. Mr. Starkman was a member of the Board when Ms. Clancy made her accommodation request, and he has been the condominium president since January 2021. Ms. Clancy also described the steps that she undertook in relation to the requested accommodation.

- [33] On May 25, 2020, Ms. Clancy sent an email to MTCC 744's condominium manager, Ervin Meco, to ask about forms and guidelines in relation to support animals. He responded by email on May 28, 2020, in which he confirmed that MTCC 744 was a pet free building. He also advised as follows:

...the board has recently been in the position of balancing the health needs of residents who have animal related phobias or allergies, with the health needs of other residents who may be served by a comfort animal.

In order to answer your inquiry as best as we can, the board is asking whether you are exploring the possibility of applying for an exemption to the pet-free rule. The board has recently dealt with such an application, and managed it as a one-off circumstance. However, due diligence would suggest that we must be prepared for future, if few, other applications. It would be helpful for us to know if this is something that we should do immediately, rather than in the near future.

- [34] Mr. Starkman testified about the information in Mr. Meco's email that referenced a prior application for an exemption to the pet prohibition, and he confirmed that another owner had been permitted to have an emotional support dog prior to the board's consideration of Ms. Clancy's request. The owner of this dog provided a witness statement in which he testified that he had received the board's approval for his emotional support animal, Sophie, in 2018 and that she lived with him at MTCC 744 from July, 2018 to March 1, 2021.
- [35] Ms. Clancy responded to Mr. Meco's email that she would like the board to work on her request for an exemption. In his reply to her, he indicated that the board requested "a written statement from you, stating your need for, and intention to have a comfort animal, as well as a letter from your treating physician, backing up your request."

- [36] On June 19, 2020, Ms. Clancy submitted her formal request for approval of a support animal to the board. She advised in her letter that her family doctor had recommended the support animal for her anxiety, and she provided a letter from her doctor in support of her request. Mr. Meco wrote to Ms. Clancy on July 2, 2020, asking for clarification of her request. Ms. Clancy provided another letter from her doctor dated July 29, 2020, that stated that she required a support animal to assist with her disability.
- [37] Mr. Starkman testified that the board reviewed the information provided by Ms. Clancy and decided to make an exemption to the pet prohibition as an accommodation of her disability pursuant to the Code. The board communicated its decision to Ms. Clancy by letter dated August 28, 2020. In this letter, the board advised that the decision was without prejudice to its right to request further medical information to support the accommodation and its right to revoke its consent to the emotional support dog, if the dog was deemed a threat to residents or other relevant information came to the board's attention. In addition, the board set out a series of conditions, including a restriction on the dog's weight, a requirement to register the dog with property management, and directions on the care and control of the dog in Ms. Clancy's unit and on the common elements.
- [38] Ms. Clancy registered Murphy with MTCC 744 through an email to Mr. Meco on September 25, 2020. She confirmed his name, age and breed, that his weight was 24 pounds, that he would complete his puppy vaccinations on September 26, 2020, and that he would start with a dog walker and trainer at 6 months of age. Murphy started living with Ms. Clancy in MTCC 744 in October 2020.
- [39] The Applicant challenges the board's decision to provide the accommodation to Ms. Clancy on the basis that she questions whether Ms. Clancy is a person with a disability. She argues that Ms. Clancy has not proven her disability in this hearing, and that she is, therefore, not entitled to an accommodation.
- [40] Ms. Clancy is not, however, required to prove her disability to the Tribunal or to the Applicant. Rather, she was required to provide the information to the satisfaction of the board to enable it to make a decision about its obligation under the Code. The Ontario Human Rights Commission (OHRC) publishes policies on its website in relation to the requirements of the Code. According to the OHRC, these policies reflect its interpretation of the Code, and set out standards, guidelines and best practice examples for how individuals, service providers, housing providers, employers and others should act to ensure equality for all Ontarians. In its *Policy on preventing discrimination on the basis of mental health disabilities and addictions* (the Mental Health Policy), it clarifies that the documentation supporting the need for a particular accommodation should only be provided to the people who need to be aware of the information and that this information should be kept confidential. The OHRC further notes that "[m]aintaining confidentiality for people with mental health disabilities or addictions may be especially important because of the strong social stigmas and stereotypes that persist about such disabilities."

[41] I am satisfied that Ms. Clancy provided sufficient medical information to the board to establish that she had a disability and that an emotional support animal was a required accommodation, and that the board took reasonable steps to consider and approve her request for an exemption from the pet prohibition. The board did not automatically approve the exemption in response to Ms. Clancy's first inquiry. Instead, it required a formal request and a doctor's letter, and then requested clarifying information from Ms. Clancy's doctor. Once Ms. Clancy provided further information, the board reviewed her request and supporting documents and then granted approval for the emotional support dog as an accommodation, subject to a series of conditions. I find that this decision was made in good faith and with due diligence within the standards set out in section 37 of the Act.

[42] For completeness, given the Applicant's challenge to the board's decision and the manner in which they have enforced conditions, I will address each of the Applicant's submissions about the board's decision.

[43] The Applicant challenges Ms. Clancy's requirement for an emotional support animal as an accommodation because Ms. Clancy confirmed in her testimony that Murphy was not with her at all times. According to Ms. Clancy and her doctors, she suffers from a mental health disability. The symptoms of such disabilities may be episodic with periods of relative wellness followed by periods of severe symptoms, meaning that the accommodation is not required 24 hours of each day, every day of the week. The fact that Ms. Clancy does not require Murphy at all times does not negate the requirement for accommodation. In the OHRC's *Mental Health Policy*, it describes mental health disabilities in the following passage:

People with mental health issues and addictions are a diverse group, and experience disability, impairment and societal barriers in many different ways. Disabilities are often "invisible" and episodic, with people sometimes experiencing periods of wellness and periods of disability. All people with disabilities have the same rights to equal opportunities under the *Code*, whether their disabilities are visible or not.

[44] It can, therefore, be a characteristic of mental health disabilities that a person's needs change over time. A person's accommodation needs may vary depending on whether they are experiencing a period of wellness or a period of disability. The board recognized this characteristic in its approval letter when it advised that it reserved the right to ask for updated medical notes. Moreover, the board did request a medical update from Ms. Clancy in July, 2021. She provided a letter from her doctor dated July 26, 2021, which confirmed her diagnosed mental health disability and the recommendation for an emotional support animal.

[45] The Applicant also argues that the board has failed to exercise its due diligence because it did not enforce the conditions in its approval letter of August 28, 2020. She states that Ms. Clancy obtained a dog that weighed greater than ten pounds, contrary to the weight restriction in the letter, and that she failed to comply with the condition that the dog "be crated or securely carried" when on the common elements. In addition, she asserts that Ms. Clancy has permitted Murphy to leave

paw prints and feces in the elevators and lobby, which is contrary to conditions 5 and 6 that prohibited urination and defecation and held Ms. Clancy responsible for any damage or cleaning.

- [46] Ms. Clancy advised the board of Murphy's weight of 26 pounds on September 25, 2020. She also provided Murphy's vaccination records which indicated that he was six weeks of age as of August 20, 2020. The Applicant submits that, based on this information from Ms. Clancy, the board knew or ought to have known that Murphy would exceed ten pounds as of September 25, 2020, and took no steps to enforce the weight requirement.
- [47] With respect to the crating or carrying requirement, Mr. Meco wrote to Ms. Clancy on November 9, 2020, to advise that it had come to his attention that she was not carrying her dog on the common elements. She responded that she had a shoulder injury that made it impossible for her to carry Murphy and she stated that it was discriminatory to require her to carry him. The condominium president, Ms. Julie Foley, replied to Ms. Clancy that it was not reasonable or safe to expect her to carry her dog, and the board took no further steps to enforce this condition.
- [48] With respect to the Applicant's claims about the paw prints and feces in the elevators and lobby, I find that these claims are not proven. The Applicant submitted photos to show the paw prints and feces. The images in the photos are inconclusive as to whether there are actually paw prints or feces or anything related to a dog. It is just as likely that the images in the photos are mud or dirt left by a shoe or boot.
- [49] The Applicant further notes that the board's conditions stipulated that the dog was only allowed on the common elements in order to enter and exit the building. She testified that she observed MTCC 744's concierge, Mr. Peter Evanoff, playing with Murphy on February 28, 2022. In her witness statement, she describes that she saw that Mr. Evanoff was on the floor, facing up to Murphy and playing with him. After viewing MTCC 744's video of this interaction, the Applicant changed her testimony to indicate that she had observed that Mr. Evanoff was crouching over the dog and petting him. She argues that this interaction shows that Ms. Clancy is not restricting Murphy's use of the common elements to entering and exiting but that she is permitting him to play on the common elements.
- [50] I am satisfied that MTCC was aware that Ms. Clancy was not following some of the conditions in its approval letter and made a reasonable decision to not enforce these conditions, based on its evaluation of all the circumstances. Moreover, with respect to the Applicant's claims about Mr. Evanoff's interaction with Murphy, I do not find that this is a breach of the conditions. The Applicant presented an exaggerated description of this interaction until the video surveillance record showed that the incident involved Mr. Evanoff patting Murphy's head from a standing position. There is nothing in this interaction that would demonstrate that either MTCC 744 was not enforcing the restriction with respect to limiting Murphy's use of the common elements to entering or exiting the building. I find that the clip

from the video surveillance shows a short interaction that is consistent with Ms. Clancy and Murphy entering or exiting the building.

[51] It is evident that the Applicant does not like or agree with the board's decision to permit Ms. Clancy to have a dog, and that she has good reasons for her disagreement in that she intentionally chose a pet free building in order to avoid dog and cat allergens. Her disagreement with the board's decision does not, however, make the decision unreasonable or contrary to the board's obligations under section 37 of the Act.

[52] The Applicant first interacted with Murphy on January 6, 2021, and she communicated her objection to his presence to the board by letter on January 8, 2021. She identified to the board that the dog is not a "genuine service dog" and should be removed for being in violation of the rules. She further explained her position as follows:

If they [Ms. Clancy] truly require an animal for emotional support, they should choose a different condominium to live in. There are plenty of other pet friendly buildings nearby! They should not attempt to force us to accommodate them. Our condominium declaration is very clear on this matter and we respectfully suggest that no time be allowed to elapse before **strong legal action** is taken. Our condominium lawyer Warren Kleiner should be immediately directed to take the appropriate steps to remove the dog and owner from 30 Holly Street.

[53] She maintains the position outlined in her January 8, 2021, letter in this hearing, arguing that Ms. Clancy is not entitled to an accommodation because Murphy is not a service dog within the meaning of the Code or the *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c.11 (the AODA). She relies on the definition of service animal in section 4(9) of O. Reg. 429/07 under the AODA. According to section 4(9) of this regulation, an animal is a service animal for a person with a disability:

(a) if it is readily apparent that the animal is used by the person for reasons relating to his or her disability; or

(b) if the person provides a letter from a physician or nurse confirming that the person requires the animal for reasons relating to the disability.

However, I note that this regulation, including the definition of service animal, was revoked on July 1, 2016, and the current regulations under the AODA do not include a definition of service animal. The Code's definition of disability in section 10(1)(a) does specifically reference physical reliance on a guide dog or other animal as a form of disability, but this does not preclude an accommodation for a mental health disability through an emotional support animal. I also note that the OHRC provides the following information about the use of service animals in its *Mental Health Policy*:

People with mental health or addiction issues who use service animals to assist with them with disability-related needs (such as anxiety) are also protected under

the definition of “disability” in section 10 of the *Code*. Service animals for people with psychiatric disabilities or addictions do not have to be trained or certified by a recognized disability-related organization. However, where it is not immediately obvious that the animal is performing this service, a person must be able to show evidence (such as medical evidence, or from a similar service provider) that they have a disability and that the animal assists with their disability-related needs. Service providers and others who receive such documentation should not use their own assumptions and observations to second-guess this verification. See *Allarie v. Rouble*, 2010 HRTO 61 (CANLII).

- [54] I am not persuaded by the Applicant’s argument that the Board has failed to exercise its due diligence because Murphy is not a service dog. It is immaterial to the issue of accommodation whether Murphy is a service animal within the meaning of the revoked AODA regulations or a guide dog within the meaning of section 10(1)(a) of the *Code*. Ms. Clancy has provided documentation to support the requirement for an emotional support animal as an accommodation of her disability that was sufficient for the board to conclude that it had a duty to accommodate.
- [55] Taking into consideration all of the Applicant’s submissions about the board’s decision to grant Ms. Clancy’s accommodation, I have concluded that MTCC 744 engaged in a reasonable decision-making process and acted in good faith when it decided to exempt her from the pet prohibition.

Issue 2: Has MTCC 744 failed to accommodate the applicant’s disability?

- [56] The Applicant argues that, even if MTCC 744 was required to permit Murphy as an accommodation for Ms. Clancy, it has failed to accommodate her disability of severe allergies to dogs. She submits that, due to her allergies, she is required to avoid dogs and that MTCC 744 has failed to meet its procedural and substantive duties of accommodation of her disability by allowing Murphy in the condominium corporation.
- [57] I am satisfied that the Applicant has a disability within the meaning of section 10 of the *Code*, based on her testimony and the supporting reports from her doctors of allergies to a range of substances, including dogs. However, I am unable to conclude that MTCC 744 failed in its duty to accommodate the Applicant, because she did not participate in the accommodation process despite repeated requests from MTCC 744 to do so.
- [58] In *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970 (*Renaud*), the SCC described that the process for achieving accommodation involves a multi-party inquiry. The SCC explained that an employer, union and complainant must work together to assist in securing the appropriate accommodation. The SCC described the obligation on the complainant employee as follows:

To facilitate the search for an accommodation, the complainant must do his or

her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered. (at page 995)

[59] Although the context in *Renaud* was a workplace accommodation, the reasoning applies to accommodation generally such that, in the search for reasonable accommodation, all parties have an obligation to engage and cooperate. This means that the Applicant has a duty to participate in the process by, for example, responding to reasonable requests for information to show their accommodation needs and taking part in developing accommodation solutions.

[60] MTCC 744 made numerous requests related to the Applicant's concerns about the impact of Murphy on her allergies. MTCC 744's counsel, Warren Kleiner, responded to the Applicant's January 8, 2021, letter on February 10, 2021. In addition to his advice that the Board had allowed Murphy as an accommodation pursuant to the Code, he inquired about the Applicant's allergies in the following paragraph:

We acknowledge that you had indicated that you both [the Applicant and her spouse] suffer from serious allergies to cats, dogs, dust and dander. If you suffer from a disability condition and require accommodation with respect to the dog on the property, please advise so that the Corporation can consider what, if any obligations it may have in relation to your request.

[61] The Applicant responded to Mr. Kleiner on February 15, 2021, with a series of questions about the Code and the board's decision-making process. She asked that "proper consideration be given to our serious medical situation" without providing specific information about her disability or required accommodation.

[62] Mr. Kleiner replied to the Applicant on March 1, 2021. He provided answers to each of her nine questions. With respect to her request for consideration of "our serious medical situation," he responded as follows:

The Corporation has no evidence on which to rely that the mere presence of the ESA [emotional support animal] is detrimental to others. The Corporation is not permitted to presume that, because its declaration prohibits pets, bringing an ESA onto the property would harm others. As advised in our letter of February 10, 2021, if you suffer from a disability condition and require accommodation with respect to the dog on the property, please advise so that the Corporation can consider what, if any, obligation it may have in relation to your request.

[63] The Applicant did not respond to Mr. Kleiner or to the board with information about her accommodation requirements. There was further correspondence between the applicant's counsel and MTCC 744's counsel in relation to these issues prior to the commencement of the CAT case. The Applicant's counsel demanded that MTCC 744 enforce its rules and remove the dog and advised that, in the absence of such action, a case would be filed with the Tribunal. MTCC 744's counsel responded that the dog was permitted as an accommodation and again requested information

about the Applicant's disability and accommodation requirements, noting that the Applicant had not responded to MTCC 744's previous requests for such information.

[64] Although the Applicant argues that she requires accommodation of her disability from MTCC 744, she has not participated in the accommodation process. I am satisfied that MTCC 744 met its duty to accommodate by repeatedly requesting information from the applicant about her needs. The Applicant, unfortunately, did not respond to these requests and her failure to participate in the process has effectively prevented MTCC 744 from considering and meeting her accommodation needs.

Issue 3: Has MTCC 744's decision to accommodate Ms. Clancy's disability imposed an undue hardship on the Applicant?

[65] Sections 11 (2) and 17 (2) of the Code require accommodation of a person experiencing discrimination, provided that the accommodation can be achieved without undue hardship. The Applicant argues that MTCC 744's decision to accommodate Ms. Clancy has imposed undue hardship on her and that therefore, the Tribunal should conclude that the board's decision was unreasonable and order that Ms. Clancy's accommodation be rescinded.

[66] The Applicant testified that she had a severe life threatening allergy to dogs and that she was at risk of anaphylaxis related to her dog allergy. She stated that she carried an EpiPen (epinephrine autoinjector) for treatment of anaphylaxis and uses a corticosteroid inhaler to manage her allergy symptoms.

[67] Although I accept that the medical reports from the Applicant's doctors establish that she has allergy symptoms related to exposure to dog dander, I do not find that the Applicant has proven that the presence of the dog is causing the allergic reactions that she identifies as life threatening and severe.

[68] MTCC 744 and Ms. Clancy challenged the credibility of the Applicant's description of the nature and severity of her allergy symptoms. In considering these arguments and assessing the Applicant's credibility, I have been guided by the principles set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) and particularly the following comments at pages 356-357:

Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility...

The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject this story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the rest test of the truth of the story of the 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...Again a witness may testify to what he sincerely believes to be true but he may be quite honestly mistaken.

- [69] In addition to the principles outlined above, I am also guided by the factors considered by the Human Rights Tribunal of Ontario in *Cugliari v. Telefficiency Corporation*, 2006 HRTO 7, at paragraph 26. These factors include the motives of the witnesses, their relationship to the parties, the internal consistency of their evidence, inconsistencies and contradictions in relation to other witnesses' evidence, and observations of the manner in which the witnesses gave their evidence.
- [70] The Applicant testified about her allergic reactions and provided reports and testimony from her doctors. I find that her statements that she has severe and life-threatening allergies to dogs are not consistent with her doctors' reports, the report of Dr. Vadas submitted by MTCC 744, and other statements in her testimony and her correspondence with MTCC 744.
- [71] When the Applicant wrote to MTCC 744 in January and February 2021 about the presence of Murphy, she identified "serious allergies to cats, dogs, dust and dander" and a "serious medical condition". As outlined above, she did not provide further information about her allergies or accommodation needs to MTCC 744 when they requested this information. Her characterization of her allergies in these letters is significantly different from her statements in this hearing that her allergies are severe and life-threatening with a risk of anaphylaxis. Although it may not be inconsistent for the Applicant to at first describe her allergies as "serious" and then describe them as "severe and life threatening", I am concerned that she has inflated her description of the nature of her symptoms over the course of this proceeding.
- [72] The Applicant provided medical reports from three doctors, Dr. Wendy Gould, Dr. Deborah Leibow, and Dr. Marla Munk.
- [73] Dr. Wendy Gould is a specialist in allergies and clinical immunology who has treated the Applicant for a number of years. She wrote a letter on March 12, 2021, in which she advised that the Applicant had a history of allergic rhinitis and symptoms of "headaches nasal congestion, runny nose and sneezing with dog exposure". She attached the results of an allergy skin test from July 10, 1996, that showed that the Applicant had many allergies and that the Applicant's most severe reactions were to grass and mould. She wrote a second report on August 26, 2021, in which she confirmed the Applicant's allergic rhinitis as a reaction to exposure to dog allergens and that her symptoms "are quite disabling, especially with an allergic trigger present."
- [74] Dr. Marla Munk is the Applicant's family physician. She provided a report dated May 16, 2021, in which she identifies that the Applicant has a severe allergy to dogs and cats and that she suffers from nasal congestion, sneezing, headaches,

watery eyes and chest tightness when she is exposed to dogs or cats. Dr. Munk stated in her witness statement that the Applicant must carry an epi-pen with her at all times to prevent the sudden onset of anaphylactic shock which can occur if she is exposed to dogs or their allergens.

- [75] Dr. Munk provided a further report dated February 9, 2022. She stated in this report that she had observed a worsening of the Applicant's allergy symptoms and that, therefore, she had prescribed a corticosteroid inhaler and referred her to a respirologist.
- [76] Both Dr. Munk and Dr. Gould recommended that the Applicant avoid exposure to dogs.
- [77] Dr. Leibow is a psychiatrist who has been treating the Applicant for over 25 years. She testified that the Applicant had suffered a deterioration in her mental health with debilitating stress and anxiety due to the presence of a dog in her building.
- [78] MTCC 744 provided a witness statement from Dr. Peter Vadas. Dr. Vadas is the Head of the Division of Allergy and Clinical Immunology at St. Michael's Hospital, Toronto, Medical Director of the Regional Anaphylaxis Clinic, and Associate Professor of Medicine at the University of Toronto. In his statement, Dr. Vadas indicated that he had the opportunity to review the witness statements of the Applicant and her doctors as well as the letters prepared by her doctors. He recognized Dr. Gould as an established and experienced allergist. He noted that Dr. Gould did not indicate that the applicant had a severe allergy or that she was at risk for anaphylaxis on exposure to dogs. He also reported that he conducted a comprehensive search of the published medical literature and that he was unable to find one publication that reported anaphylaxis due to exposure to dog allergens. He testified that, in his over 30 years of practice, he had never treated a patient with an allergy to dogs that required the use of an epinephrine autoinjector because of the potential risk of anaphylaxis due to dog allergy.
- [79] Dr. Vadas further noted that he had been provided with no objective evidence of the Applicant's symptoms, and he stated that, based on his review of the information provided, the Applicant's claims that her symptoms are caused by dog allergy were unproven. He also did not doubt that the Applicant was experiencing mental health symptoms as reported by Dr. Leibow but he did not see definitive evidence that these symptoms were caused by the dog allergy.
- [80] The Applicant provided a witness statement in reply to Dr. Vadas' statement. She testified that she discussed the contents of his witness statement with Dr. Gould and that Dr. Gould advised that she performed allergy testing on March 12, 2021, that confirmed her serious allergies to dogs and cats. Although it may be true that Dr. Gould performed allergy testing in March 2021, the only allergy test submitted for the purpose of this hearing was from 1996, and this test showed allergies to many allergens, in addition to cats and dogs.

- [81] The Applicant also testified in her reply witness statement that Dr. Gould stated that, although she has serious allergic reactions to dogs, it was unlikely that the EpiPen was needed for the dog allergy. The Applicant stated that she had been hospitalized due to anaphylaxis on two occasions but did not report that these events were related to exposure to dogs.
- [82] I find that the reports of Dr. Vadas and Dr. Gould are consistent in recognizing that the Applicant has allergies to dogs and experiences symptoms of allergic rhinitis when exposed to dog dander. It is, however, only the Applicant who reports that her allergy to dogs is life-threatening and that she risks anaphylaxis. Although Dr. Munk stated that the Applicant must carry an EpiPen in relation to the dog allergy, Dr. Gould, her allergist, did not identify that the EpiPen was required due to dog allergens. Once the Applicant was aware of Dr. Vadas' statement about the use of an EpiPen, she reframed her statements and clarified that the EpiPen was not related to the dog allergy.
- [83] I prefer Dr. Gould's description of the nature of the Applicant's allergy symptoms to those provided by the Applicant herself. Dr. Gould's description is based on her assessment of the Applicant as well as the Applicant's self-reporting to Dr. Gould. The Applicant has allergic rhinitis with nasal congestion, runny nose, and sneezing. Dr. Gould has not described these symptoms as severe or life-threatening and I do not accept the Applicant's claim that they are of such a nature. In addition, Dr. Munk has not described the symptoms as life-threatening or provided any evidence of the worsening symptoms she noted in her February 9, 2022 letter.
- [84] I find that the Applicant has not established that her allergy symptoms are severe and life-threatening or that she is at risk of anaphylaxis related to exposure to dog allergens. Based on my review of her doctors' reports as well as the statement from Dr. Vadas, I conclude that the Applicant suffers from many allergies, some of which are more severe than her allergy to dogs, and that she has symptoms of congestion, runny nose, sneezing, and headache as a result of exposure to a range of allergens. In addition, although Dr. Leibow clearly writes that the Applicant has experienced debilitating stress and anxiety, I have insufficient evidence both from Dr. Leibow and the Applicant to find that these symptoms are caused by the presence of Murphy.
- [85] The Applicant testified about a particular incident in January 2022 when she experienced severe symptoms of shortness of breath at the concierge desk. She stated that she sensed that her symptoms were caused by dog allergens. I do not doubt the reliability of her report of these symptoms. However, her description of this experience is not evidence that these symptoms were caused, as she asserted, by allergens from Murphy, and it is just as possible that her shortness of breath was caused by dust and other construction debris present in the area due to the ongoing renovation of the lobby.
- [86] The Applicant also testified that, during the entire length of Murphy's residence in

MTCC 744, she has been wearing two level 3 masks at all times on the common elements due to the board's directions related to the COVID-19 pandemic. Dr. Vadas testified that an N95 mask would prevent all dog allergens from entering the respiratory tract, and the Applicant stated that the level 3 masks she was using were one step down in their level of protection from N95. She offered no explanation, however, for how dog allergens were entering her respiratory tract when she was wearing these masks on the common elements. In addition, Ms. Clancy testified that she chose a Bernedoodle because she understood that this breed was hypoallergenic and she believed this was important in bringing a dog into a condominium with a pet prohibition. The Applicant submitted an article from the Mayo Clinic that described that there were no dog breeds that were hypoallergenic. Ms. Clancy provided witness statements from the veterinarian and groomer who care for Murphy. These witnesses confirmed that Murphy was a low shedding dog and that he was well groomed by Ms. Clancy. Whether or not there are hypoallergenic breeds, I accept that Murphy is a low shedding dog, and that Ms. Clancy has taken the necessary steps to reduce the risk of dog allergens being left by him. Nonetheless, I also accept that it is still possible for Murphy to shed allergens, but that it would be unlikely for such allergens to be able to enter the respiratory tract when the Applicant, or anyone else, is wearing two level 3 masks.

[87] The Applicant provided photos of the elevator interior and lobby and stated that these photos showed that there were paw prints and feces left by Murphy on the common elements. As outlined above, I find these photos inconclusive in establishing that the marks were left by a dog. Also, the MTCC 744's cleaner testified that, when she cleaned the elevator after the Applicant complained, the remains in the elevator were mud not feces. The Applicant also commented on the photos during her cross-examination and highlighted that the photo also showed a large amount of dust and debris in the elevator related to the construction underway in the lobby area. According to the Applicant's medical reports, she has a serious allergy to dust, and it is a logical conclusion that some of her allergy symptoms are related to the dust caused by this construction.

[88] I also note that the Applicant did not report allergic reactions related to the presence of Sophie, a terrier who lived in MTCC 744 as an emotional support animal from July 2018 to March 2021. For at least five months in 2020 and 2021, Sophie and Murphy were both residents of MTCC 744. Sophie's owner testified that either he or his husband carried her whenever they were in the common elements. Ms. Clancy stopped carrying Murphy due to his size, and this is a difference in the dogs' interaction with the common elements. However, there is no evidence that the carrying of a dog prevents the distribution of the dog allergens that are found in skin and saliva, and I cannot conclude that dog allergens were not left by Sophie in the elevator and lobby.

[89] I find that the Applicant has over-stated the nature of her allergy symptoms by claiming them to be life-threatening and requiring an EpiPen when this description of the symptoms is not supported by the reports from Dr. Gould or her own prior

statements and actions. A party does not strengthen their case when they make overstatements; rather, they tend to undermine their credibility.

- [90] The Applicant's overstatements of her allergy symptoms are consistent with the manner in which she exaggerated other concerns in relation to Murphy. She had her first interaction with Murphy on January 6, 2021, and she reported to Mr. Evanoff that the dog tried to jump on her. On January 8, 2021, she wrote to the board about the incident and she described that she was "almost bowled over by a very large dog bounding out of the building." MTCC 744's video surveillance record of this interaction was entered into evidence. The video clip shows Ms. Clancy and her mother exiting the building with Murphy held tightly next to Ms. Clancy on a leash. Ms. Clancy and her mother exit the building from the left door, and the Applicant enters from the right. There is no interaction between the Applicant and Murphy, or between the Applicant and Ms. Clancy, and no jumping or bounding by Murphy. After viewing the video surveillance record of her interaction with Murphy on that date, the Applicant clarified that she felt bowled over emotionally but had not really been bowled over.
- [91] The inquiry into undue hardship is generally focused on whether the party responsible for providing the accommodation can do so without undue hardship, taking into account the cost, outside sources of funding, and health and safety requirements. The question of undue hardship, therefore, is focused on whether the accommodation provider is subject to undue hardship. However, in some circumstances, an accommodation can impact individuals other than the accommodation provider and the person requiring the accommodation. There may be an impact on individual employees, tenants, or condominium owners and occupiers, depending on the nature of the accommodation. Such an impact should be considered in the assessment of whether the accommodation can be provided without undue hardship.
- [92] In this case, the Applicant submits that MTCC 744 has failed to consider her health and safety requirements in making its decision to accommodate Ms. Clancy and that, as a consequence, she is experiencing undue hardship. As outlined above, MTCC 744 sought information from the Applicant about her disability and accommodation needs, and she did not provide a response beyond her general statement that MTCC 744 should remove the dog. Her failure to provide this information effectively prevented the board from considering any health and safety requirements related to her individual situation.
- [93] However, if the undue hardship analysis extends to a consideration of whether the accommodation of Ms. Clancy's disability creates undue hardship of the Applicant, I note that the assessment of undue hardship is necessarily contextual and depends on the factors relevant to the circumstances of the particular accommodation. In *Renaud*, the SCC explained that the use of the term "undue" means that some hardship is accepted and that it is only "undue hardship" that satisfies the test to limit accommodation (*Renaud*, at page 984). The onus to prove undue hardship is on the party that claims undue hardship, and this must be

proven with concrete evidence and not simply through general assertions (see *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, 2007 SCC 15, at paragraphs 225-228).

- [94] The medical reports from the Applicant's doctors establish that she experiences allergy symptoms related to dogs. The evidence has not, however, proven in a clear and convincing way that the Applicant is experiencing allergy symptoms related to the presence of Murphy or that she is experiencing severe and life-threatening symptoms related to his presence. Consequently, I do not find that the accommodation of Ms. Clancy's disability by MTCC 744 has caused undue hardship to the Applicant.
- [95] Despite my findings in this matter, I am, nonetheless, mindful of the context of this dispute, being that the Applicant and Ms. Clancy continue to live in MTCC 744 and that this decision will not resolve the ongoing conflict relating to their competing human rights. The Preamble to the Human Rights Code reflects the following key principles: to recognize the dignity and worth of every person; to provide for equal rights and opportunities without discrimination that is contrary to the law; and to create a climate of understanding and mutual respect. Bearing in mind these principles, I encourage all parties, the board, the Applicant and Ms. Clancy, to work together to engage in a dialogue about reasonable accommodation approaches that would reconcile their competing rights and obligations. In particular, I draw their attention to the OHRC's *Policy on competing human rights* and the following excerpt from the policy with a view to guiding them in their ongoing relationship:

Case law dealing with competing human rights claims has been developing slowly in Canada. The courts have said we must go through a process on a case-by-case basis to search for solutions to reconcile competing rights and accommodate individual and groups, to the greatest extent possible. This search can be challenging, controversial, and sometimes dissatisfying to one side or the other. But it is a shared responsibility and will be made easier when we better understand the nature of one another's rights and obligations and show mutual respect for the dignity and worth of everyone involved. Finding the best solution for maximizing enjoyment of rights takes dialogue and even debate.

Issue 4: Should the Tribunal order costs?

- [96] Each party seeks its costs of this case. The relevant sections of the Tribunal's Rules of Practice are:

48.1 If a Case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful Party will be required to pay the successful Party's CAT fees unless the CAT member decides otherwise.

48.2 The CAT generally will not order one Party to reimburse another Party for legal fees or disbursements ("costs") incurred in the course of the proceeding. However, where appropriate, the CAT may order a Party to pay to another Party all or part of their costs, including costs that were directly related to a Party's

behaviour that was unreasonable, undertaken for an improper purpose, or that cause a delay or additional expense.

- [97] I find that the Applicant is not entitled to recover her filing fees because she was not successful in this case.
- [98] With respect to costs claimed in accordance with Rule 48.2, the Tribunal developed a Practice Direction about its approach to ordering costs effective January 1, 2022. The purpose of the Practice Direction was to provide clarity on the criteria the Tribunal might consider when deciding whether to order costs and the amount of costs to be ordered. These criteria included: whether a party or representative's conduct was unreasonable, for an improper purpose, or causes a delay or expense; whether the case was filed in bad faith or for an improper purpose; the conduct of all parties and representatives; the potential impact an order for costs would have on the parties; whether the parties attempt to resolve the issue in dispute before the CAT case was filed; and whether a party had failed to follow or comply with a previous order or direction of the CAT.
- [99] Rule 48.2 is clear that the Tribunal will generally not order costs of a proceeding. I find no circumstances in this proceeding that would support a cost order in favour of any party. Each party conducted itself reasonably throughout the hearing and the issues that were involved were pursued by each party for a proper purpose of ensuring that the competing human rights considerations were addressed. For these reasons, I award no costs to any party in this proceeding.

E. CONCLUSION

- [100] I conclude that MTCC 744 has not breached its governing documents by exempting Ms. Clancy from the pet prohibition as an accommodation of her disability. I further find that MTCC 744 has not failed to accommodate the Applicant's disability or imposed undue hardship on her in relation to the accommodation of Ms. Clancy.
- [101] I dismiss the application without costs.

Jennifer Webster
Member, Condominium Authority Tribunal

Released on: April 29, 2022