

Date Issued: September 21, 2016
File: 12719

Indexed as: Leary v. Strata Plan VR1001, 2016 BCHRT 139

IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Teodora Leary

COMPLAINANT

A N D:

Strata Plan VR1001

RESPONDENT

REASONS FOR DECISION

Tribunal Member:	Catherine McCreary
On her own behalf:	Teodora Leary
Counsel for the Respondent:	Jesse Halperin
Dates of Hearing:	August 8-11, 2016
Location of Hearing:	Vancouver, BC

I INTRODUCTION

[1] Ms. Leary complains that the respondent Strata Plan VR1001 (the “Strata”) has violated s. 8 of the BC *Human Rights Code* and discriminated against her. Ms. Leary claims that she has a disability that makes her react to second-hand smoke and the Strata did not act on her complaints of smoke ingress to her apartment.

[2] Ms. Leary also made an application for costs arising out of actions after a settlement meeting. However, Ms. Leary provided no evidence in support so I dismiss that application.

[3] The Strata takes the position that Ms. Leary has no credibility due to her frequent and strident correspondence with the Strata which shows that she exaggerates the impact of the second-hand smoke about which she complains, in addition to many and various complaints about the behaviour of her neighbours.

II THE EVIDENCE

[4] I heard from a number of witnesses in the hearing. I have not catalogued the evidence of each witness. The following are my findings of fact from the evidence led at the hearing of this matter. I am entitled to accept some, none or all of a witness’ testimony. Where there was a disagreement in the evidence, my findings and reasons therefore are set out. In resolving conflicts in the evidence, and determining whether to accept the evidence of any witness, in whole or in part, I have adopted and applied the tests set out in *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186 (citations excluded):

Credibility involves an assessment of the trustworthiness of a witness’ testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides. The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his [or her] memory, the ability to resist the influence of interest to modify his [or her] recollection, whether the witness’ evidence harmonizes with independent evidence that has been accepted, whether the witness changes his [or her] testimony during direct and cross-examination, whether the witness’ testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the

probabilities affecting the case as a whole and shown to be in existence at the time.

[5] Ms. Leary testified and she called a number of witnesses who were also on the Strata's witness list. Generally the cross-examinations by the Strata were friendly, not adverse. By agreement, Ms. Leary gave reply evidence in relation to both the evidence tendered by the Strata in the presentation of its case plus the evidence adduced by the Strata on cross-examination of Ms. Leary's witnesses.

[6] Generally, I find that Ms. Leary was prone to exaggeration in both her evidence before the Tribunal as well as in her written communications with the Strata. It appears to me that she believes her own evidence and did not deliberately try to mislead me. I note below where I believe her evidence.

A. MILIEU AT THE STRATA

[7] The Strata is governed by a Strata Council (the "Council") made up of volunteers from among the owners. The Council meets about every second month. Day-to-day management of issues at the Strata is done by a property manager, hired by the Strata. Previously, correspondence to the Strata went to the property manager who then assembled it and provided it to the Council to consider in its bi-monthly meetings. At least since 2015, on the urging a member who had joined the Strata Council, there has been a system of triage to identify and deal with correspondence about important matters.

[8] Many residents have lived at the Strata for more than 20 years. The Building is a wood frame structure built over 30 years ago, and includes 27 suites over four levels. The Strata has never had a bylaw that specifically prohibits or restricts smoking.

[9] Ms. Leary's unit is on the second floor. The person resident directly below Ms. Leary was a smoker until 2014. She testified that she has "cheated" occasionally since then. I characterize the relationship between Ms. Leary and her downstairs neighbour as akin to a feud. While they may have initially gotten along, they have not done so for many years and their relationship is very acrimonious. Many of Ms. Leary's complaints are about her downstairs neighbour.

[10] Ms. Leary's upstairs neighbour moved out about seven weeks before the hearing. She testified that she moved out because of the acrimony in the building. In 2014, that upstairs neighbour moved in and immediately undertook a renovation that lasted four to six weeks. The renovation was noisy. The upstairs neighbour is a smoker. She smoked two to three cigarettes a day in her apartment. She testified that she has recently often used e-cigarettes that do not generate smoke, but it was not during a period covered by the initial complaint.

B. PHYSICAL DISABILITY

[11] The parties have agreed that Ms. Leary has complained of smoke ingress into her suite since 1997. Ms. Leary testified that in 2011 she provided the Strata with a letter from her physician that said:

Tuesday June 28th, 2011

To Whom It May Concern:

RE: Teodora Leary

This woman appears to be suffering from physical symptoms which could be caused by second hand smoke.

[12] Witnesses for the Strata deny receiving the letter and the current president said that he did not find it in his review of records. There was no evidence by the Strata on the entity that was the property manager in 2011 nor was there evidence about the procedures in place at the time for receipt of such information. The current Strata president was not a member of the Council at the time this letter was written.

[13] Ms. Leary submitted another note from a second doctor in February 2014. This note said:

February 13, 2014

To Whom It May Concern:

This is to certify that Teodora Leary has been under my professional care. She appears to be suffering from physical symptoms which could be caused by second hand smoke.

[14] A more descriptive letter was sent from the second doctor December 17, 2014:

To Whom It May Concern:

Re: Teodora Leary (DOB: *redacted*)

This is to certify that Teodora Leary has been under my professional care. She suffers from allergic and asthmatic bronchitis with shortness of breath. This disability is negatively impacted by second hand smoke which would cause further irritation to her airways.

[15] The current property manager was in place at the time this note was submitted. The Council did not consider the contents of the note until May 2014 along with other correspondence that had accumulated since the previous meeting. Ms. Leary's complaints were discussed. It was determined that at the next Annual General Meeting a "no smoking" bylaw would be put to the owners. In addition, following the meeting, a strata council member offered to make herself available to Ms. Leary to assess her claims of smoke ingress into her unit.

[16] The Strata argues that there was no medical evidence that explains allergic and asthmatic bronchitis with shortness of breath, and the Tribunal is not in a position to determine whether it amounts to a physical disability under the *Code*. Further, the Respondent submits that these notes do not qualify as "a report stating an expert opinion" under Rule 21(2) of the Tribunal's *Rules of Practice and Procedure*.

[17] However, Ms. Leary testified that she has ongoing difficulties with her breathing exacerbated by second-hand smoke and my personal observations of Ms. Leary are that she has trouble breathing; she uses an inhaler, her speech is rasping and she seems often short of breath. I am sure that she presented this way to members of the Council and her neighbours. It is also clear that she has presented these concerns to the Strata for many years, showing that her condition is not transient.

C. COMPLAINTS ABOUT SMOKE

[18] I focus on Ms. Leary's complaints about smoke in her suite. Ms. Leary made frequent complaints about other issues contemporaneous with her complaints about

smoke. I will refer to them below, particularly the impact of these complaints on the reactions of the Strata to Ms. Leary's concerns about second-hand smoke.

[19] The parties agree that Ms. Leary often identified that the source of the smoke was her downstairs neighbour or upstairs neighbour. In particular, in the fall of 2014, Ms. Leary began to complain that the alleged smoke ingress was also coming from the suite above hers from May 2014 until the summer of 2016. In 2007, Ms. Leary had previously identified that the smoke was coming from the unit above hers.

[20] There were dozens of complaints thereafter, until now. In many of these complaints Ms. Leary identified where she thought the smoke was coming from; as noted, she claimed that it was coming from both her downstairs neighbour and her upstairs neighbour. She was dismissive of suggestions that the origin of the smoke is from the building across the laneway where many of that building's occupants go to smoke both cigarettes and marijuana as it is a rental building that does not allow smoking.

[21] There was evidence that other occupants of the Strata smoke. Other non-smoking Strata occupants testified, each claiming that they had no problem with smoke in their suites.

[22] Ms. Leary identifies areas where the smoke enters her suite: near the entranceway to her suite, in a closet in which houses her washer and dryer, near the fireplace (gas) and in her bedroom. She also complains of the smell of marijuana smoke. She says she has many fans running in her suite and often keeps the windows open to dissipate the smell.

D. OTHER COMPLAINTS

[23] I easily conclude that Ms. Leary is a demanding and difficult member of the Strata. This has clearly impacted the way her concerns were treated by the Strata. I conclude that, due to the volume of other complaints, the Strata concluded that her concerns about smoking lack credibility.

[24] For example, in her extensive complaints to the Strata, Ms. Leary also complains about her downstairs neighbour's dogs. The downstairs neighbour has had two dogs. The first one died six years ago and was replaced with another. Ms. Leary claims that each of

the dogs barked all the time and that they defecate in the yard outside the downstairs neighbour's suite. Ms. Leary provided photos to me purporting to be of the dogs doing so. Ms. Leary also claims that her downstairs neighbour, who works for a local hotel, inappropriately gave hotel rooms to at least one of their neighbours. The downstairs neighbour denies doing so and explained that she arranged a "friends and family" rate for a neighbour who was having repairs done in their suite. I believe that the downstairs neighbour was truthful in this testimony. Ms. Leary said that the neighbour in receipt of the benefit described it as a gift and I believe she misinterpreted what was meant.

[25] Concerning her upstairs neighbour, Ms. Leary says she wears high heels inside and makes lots of noise. The upstairs neighbour testified, and I accept, that she wears rubber-soled flip flops at home and does not make noise on her floors. In another complaint letter to the Strata, Ms. Leary claimed that the upstairs neighbour was having sexual liaisons with workers at the Strata. I believe the upstairs neighbour's testimony that no such behaviour occurred.

E. RESPONSE OF THE STRATA

[26] Often when Ms. Leary would complain about smoke and other matters, the Strata would acknowledge the complaint and make suggestions. Even more often, they would ignore the complaint.

[27] In October 2012, the strata's management company sent a letter to the downstairs neighbour advising her of complaints of smoke emanating from her unit and requesting she refrain from smoking on her patio and to instead smoke inside her unit with the doors and windows closed or, alternatively, far enough away from the Building such that the smoke would not enter units above hers. Ms. Leary was not provided with a copy of this letter at the time.

[28] In response to further complaints, in April 2013, the Council had its management company send a letter to Ms. Leary indicating they believed an upcoming dryer vent cleaning would assist in alleviating the problem.

[29] In May 2013, the Council had its management company to again send a letter to the downstairs neighbour advising that smoke was bothering other owners and requesting she take steps to prevent this.

[30] Later that year, the Council discussed putting forth a bylaw to restrict smoking on common and limited common property.

[31] The Council directed the management company to send Ms. Leary a letter advising that third party verification was necessary in order for any further steps to be taken and asking Ms. Leary to contact a member of strata council during a time the smoke was infiltrating her unit. The management company also advised of the plan to put forward a bylaw to restrict smoking on common and limited common property.

[32] The next February, the Council again directed its management company to send a letter reminding Ms. Leary that third party verification was necessary in order for any further steps to be taken and, in particular, levy a fine against an owner.

[33] In May 2014, the Council secured a volunteer who would come to Ms. Leary's apartment to see if they could smell the smoke she claimed was impacting her. Sometime between May 29, 2014 and September 16, 2014, a letter was sent to Ms. Leary asking her to contact the volunteer to observe the smoke ingress into the Complainant's suite. Ms. Leary was given the name and cellphone number of a member of the volunteer Council member. Ms. Leary was not told what were the consequences of either phoning or not phoning to have this lay person volunteer "witness" the smoke.

[34] In September and November 2014, the Council had letters sent to Ms. Leary advising that no action could be taken because she had not assisted in allowing the Council to obtain third party verification.

[35] Ms. Leary says that the volunteer worked shifts and was not available, which was confirmed by the volunteer. I have doubt whether Ms. Leary tried to call the volunteer. Ms. Leary did, however, continue to send frequent complaint letters to the Strata, describing almost daily incidents of smoke ingress.

[36] Thus, the Council was aware that Ms. Leary was continuing to complain but the Council did not follow up with her on its request to have someone “witness” the smoke, nor did they check with the volunteer to see if she had been available for “witnessing.”

[37] In January 2015, the volunteer attended Ms. Leary’s unit. She wrote to the Strata as follows:

So I have just returned from a visit with Teodora. She called me just before 10 pm and when I arrived the smell of smoke in her unit was obvious. The strongest smell was in the entryway, which might explain the possibility of smoke coming from the washer/dryer area. She then explained that sometimes the smoke came from her fireplace and she had a few strategically placed fans to help dissipate the smoke throughout the unit. I could not smell any smoke coming from outside the unit through the windows and doors. She kept her bedroom door closed and when I asked if there was ever a problem in that room she said that when the person below her smokes in her bedroom the smoke comes through a crack in the corner of her room. I asked to see it and she pointed to a corner covered by carpet so it was difficult to assess if there was really a crack present. She showed me all the bedding she keeps for severe cases where she has to sleep in the bathroom. Finally, she claims if the person above her smokes on their deck, the smell comes in through her bathroom exhaust fan, and this is when she is forced to sleep in her car. I explained we would deal with the problem of smoke coming from the unit below her first, as this seems to be causing the greatest nuisance.

She herself said we should have had three council members present at yesterday’s meeting and seemed quite concerned that I would be discussing the visit with the rest of council. I explained that the entire council had to vote on the various decisions we make and that I could not limit confidentiality to myself, greg and one other council member. I assured that the information regarding yesterday’s meeting would remain within the current 5 council members and our property manager.

At this point I feel comfortable moving forward with the proposed solutions and am crossing my fingers and toes that someone can solve this problem once and for all!

[38] Also, in early 2015, the strata council asked all owners to limit cigarette smoke egress from their units. In the fall of 2015, the strata council issued a news bulletin to owners which encouraged residents “to eliminate any possibility of cigarette smoke escaping from their units into hallways or other suites”. It also reminded owners that the

City of Vancouver bylaws prohibit smoking within six meters of any windows, doors or air intakes, which would include smoking on patios and balconies.

[39] Unbeknownst to Ms. Leary, the Council consulted the property manager about testing for the smoke. The current president said that the property manager advised that he checked several HVAC experts but that they did not provide the service he was looking for. No further investigation of securing an expert to address the problem with smoke ingress seems to have been undertaken. The property manager did not testify. There was no evidence that any inquiries were made from professional air quality testers. Nor was there evidence of any effort by the Strata to secure an expert to determine from where the smoke ingress originated.

[40] The Strata put forth a suggested bylaw to address the issue of smoking at and around the Building. The Council also put forward bylaws that would restrict smoking at the 2014 and 2016 Annual General Meetings. These bylaws were not ratified by the requisite number of owners.

[41] It appears to me that Ms. Leary's concerns about smoke were dealt with in a manner best described as haphazard. Her complaints were not addressed as a real problem.

[42] The Strata points to Ms. Leary's exaggerations and other complaints seemingly as justification. I am sympathetic that many of Ms. Leary's complaints appear exaggerated and not worthy of a response from the Strata. However, I find that there is a consistent and pervasive theme to her complaints that she had smoke from her neighbours in her suite. I also find that the Strata did not engage expert help to determine whether the concerns had merit nor how they could be ameliorated, if so.

F. PRIVILEGE ASSERTED

[43] The Strata takes the position that all of its efforts to accommodate Ms. Leary were undertaken with a view to settle the complaint and are thus privileged. That privilege has not been waived by either party. Thus, there is no evidence before me that, since the Strata was given notice of the complaint, it has tried to determine whether Ms. Leary's

complaints were substantiated, nor is there evidence of any attempts at accommodation of her disability described in her doctor's letter of February 2014.

III ANALYSIS AND DECISION

[44] To establish a *prima facie* case of discrimination, Ms. Leary must show that she has a disability, that she has suffered an adverse impact in relation to provision of services by the Strata, and that her disability was a factor in the adverse impact. See *Moore v. British Columbia (Education)*, 2012 SCC 61, para. 33.

A. PHYSICAL DISABILITY

[45] The Strata claims that because Ms. Leary's other evidence has no credibility, I should not accept her evidence concerning the extent of her claim of disability.

[46] Ms. Leary provided the letter from her doctor. I note the Strata's concerns with respect to using the doctor's letter as evidence of the disability. However, in addition to the letter, I accept Ms. Leary's evidence that when the smoke invaded her apartment, she had difficulty breathing, it woke her up some nights and caused her to take refuge in her bathroom or in her car. She used fans to dissipate the smell. As well, as noted above, I observed her difficulty breathing and rasping when she speaks.

[47] While the Strata argues that Ms. Leary has not proven her disability because she did not tender the doctor's letters under Rule 21, I note that when Ms. Leary tendered her doctor's letters to the Strata, it did not question them, nor did it claim that the letters were deficient or seek further clarification. During the events where Ms. Leary sought accommodation the Strata did not claim to Ms. Leary that it believed she had no disability. Its efforts, such as they were, were focussed on whether there was smoke ingress.

[48] Given the medical evidence she tendered to the Strata and her description of what she experiences because of smoke in her suite, even accounting for exaggeration, I find that Ms. Leary has a disability related to exposure to second-hand smoke. I find that Ms. Leary's disability is an allergy and that makes her asthmatic with shortness of breath for which she uses medication.

B. ADVERSE IMPACT

[49] I accept Ms. Leary's evidence that, at least since 2009, there was smoke in her apartment. Since 2015, Ms. Leary complained that the smoke wakes her up at night, makes it difficult for her to breathe and causes her to seek refuge in her bathroom or go sleep in her car.

[50] I find that these claims have been exaggerated. Although I do not doubt that Ms. Leary was subjected to smoke that woke her up at night, I cannot accept that moving to the bathroom or her car was a proportionate response. I note though that Ms. Leary told her neighbours that this was how she responded to the smoke and were contained in the complaint letters to the Strata.

[51] Ms. Leary had other adverse impacts. She bought fans; she frequently dry-cleaned her clothes and her drapes and she also cleaned her carpets to remove the smell of smoke. I easily find that Ms. Leary was focussed on this problem and it took much of her time and effort and met with little success.

[52] These are adverse impacts.

C. NEXUS

[53] In February 2014, Ms. Leary provided a doctor's note that tied the second-hand smoke she claimed was in her suite, with her physical symptoms. I have no difficulty concluding that there is a nexus between the exposure to second-hand smoke and the adverse impacts experienced by Ms. Leary. Hence, I conclude that Ms. Leary has established a *prima facie* case of discrimination.

D. DUTY TO ACCOMMODATE

[54] Once a *prima facie* case of discrimination is established, the onus shifts to the respondent to justify its actions, including by showing that it has accommodated the complainant up to the point of undue hardship. See *Moore*, para. 49.

[55] As noted above, by at least February of 2014, when she provided the second doctor's note, the Stata was made aware that Ms. Leary was asking it to take steps to

address second-hand smoke in her suite due to a disability. In evaluating its response, it is helpful to look at what the Strata did not know:

- They did not know the extent of Ms. Leary's physical disability and how it was affected by second-hand smoke.
- They did not know how much smoke was getting into Ms. Leary's suite.
- They did not know the source of the smoke. They had the claims of Ms. Leary that the smoke came from both downstairs and upstairs but they doubted that themselves.
- They did not know what accommodation might be necessary to solve the problem of second-hand smoke.
- They did not know whether undertaking that accommodation would amount to an undue hardship on the Strata.
- They did not know whether it was possible to negotiate a resolution with Ms. Leary, although I am sure that they did not believe it was likely.

[56] The Strata's steps to address the concerns and to obtain relevant information were minimal. The Strata put forward a bylaw change to making the building non-smoking but while this gave the Strata members the choice to make the building non-smoking, it did not accommodate Ms. Leary's disability, once the amendment was unsuccessful.

[57] In addition to failed attempts to change the bylaws so the Strata would become non-smoking, and asking residents not to smoke on their balconies, the Strata chose to notify Ms. Leary that she could call a Strata member who would come and see if she could smell the smoke. They did not tell her the reasons why she should follow this suggestion. They did say that it was the policy of the Strata to verify that problems were real before engaging expert assistance to solve a problem.

[58] They took no further steps when Ms. Leary had not contacted the suggested volunteer, even though Ms. Leary continued to frequently make complaints of second-hand smoke.

[59] The Strata submits that once the volunteer attended Ms. Leary's suite in January 2015, efforts were made by the Strata to move forward with the investigation and to attempt to address Ms. Leary's complaints. The Strata claims that it relied on their professional strata property management company who, attempted, but failed, to locate a suitable professional. The volunteer conducted her own independent searches but similarly was unable to come to any conclusions on the appropriate type of professional that could address the issue. Hence the Strata submits that trying and failing to find someone who could determine the extent of the problem and propose a possible solution should be good enough to fulfill the Strata's duty to accommodate. I am not persuaded. The hearsay evidence tendered was that the management company was looking for an HVAC professional and seemingly did not attempt to find an expert in air quality. I conclude that the Strata's search for solutions lacked diligence.

[60] The Strata also noted the obligations on a complainant set out in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970. *Renaud* provides that the search for accommodation is a multi-party inquiry. A complainant has a duty to assist. They must facilitate implementation of a proposal that would, if implemented, fulfil the duty to accommodate. Similarly, a complainant must accept reasonable accommodation. *Renaud*, pp. 994-95.

[61] The Strata argues that Ms. Leary's dismissiveness of possible alternative sources of the smoke ingress and her expression of distrust for contractors retained by the Strata put it in a situation where it felt as though no satisfactory resolution could be achieved between the parties. The Strata submits that its duty to accommodate has been discharged.

[62] I find that once the "witness" confirmed that there was the smell of smoke in Ms. Leary's apartment, there was no further investigation to determine the extent of the problem and thereafter determine if the Strata could solve any problem by accommodating Ms. Leary's disability up to the point of undue hardship. The Strata claims that Ms. Leary's conclusions are not credible about the source of the smoke, yet it undertook no investigation as to its source. Without this information, there was no attempt by the Strata to accommodate Ms. Leary's disability.

E. SUMMARY

[63] Ms. Leary experienced an adverse impact related to her disability due to second-hand smoke in her suite. This impact was long-standing and supported by medical evidence since at least 2014. The Strata did not properly inquire into the extent and impact nor did it determine what was required to accommodate Ms. Leary's disability and whether it would amount to undue hardship. I find that Ms. Leary's complaint is sustained and that the Strata violated s. 8 of the *Code*.

F. REMEDY

[64] I make the following orders pursuant to s. 37(2) of the *Code*:

- a) I declare that the conduct complained of which is the ongoing failure to accommodate Ms. Leary's disability, or similar conduct, is discrimination contrary to this *Code*,
- b) The Strata is ordered to cease the contravention and to refrain from committing the same or a similar contravention,
- c) In order to return the parties to the position in which they would have been had there been no violation of the *Code*, I order that the Strata:
 - (i) Within 30 days of the date of this decision, engage an air quality specialist to determine the source of the smoke that is coming into Ms. Leary's suite and that the Strata determine whether Strata members or their guests are responsible for the smoke ingress and, if so, how that smoke ingress could be prevented;
 - (ii) Once this has occurred, the Strata must work together with Ms. Leary to determine whether preventing smoke ingress is a tenable solution that can be accomplished without undue hardship on the Strata. It may be necessary to have Ms. Leary provide further medical information in furtherance of arriving at a solution. I hesitate to make other comments in this regard in order to ensure that there is a comprehensive resolution. However, I will

retain jurisdiction for six months from the date of this decision to provide further direction, if either of the parties requests that I do so.

- (iii) I order the Strata to pay Ms. Leary the sum of \$7,500 which is an amount that I consider appropriate to compensate her for injury to dignity, feelings and self-respect. Due to the longstanding and pervasive nature of the effect that the smoke had on Ms. Leary and recognizing that she often exaggerated her symptoms, it is an impact that was allowed to continue. I also take into account that Ms. Leary appears to have been impacted by concerns that she often raised but that are not protected by the *Code* and the award does not compensate her for that.
- (iv) I order the Strata to pay post-judgment interest on the award based on the rates set out in the *Court Order Interest Act*, R.S.C.B. 1996, c. 79 (the “*Act*”). Interest is to be calculated at the bankers’ prime rate as published by the British Columbia Supreme Court Registry, in accordance with the *Act*, calculated at six-month intervals.

G. HOW SHOULD A STRATA ADDRESS A REQUEST FOR ACCOMMODATION RELATED TO SECOND-HAND SMOKE?

[65] Since *Williams v. Strata Council No. 768*, 2003 BCHRT 17; *Konieczna v. The Owners Strata Plan NW 2489*, 2003 BCHRT 38 and other cases, complaints of member owners against a strata corporation are encompassed by s. 8 of the *Code*. The Tribunal has recognized that a strata has a duty to accommodate owners who have a disability that is adversely affected by second-hand smoke. Similar issues of accommodation have occasionally arisen in complaints at the Tribunal.

[66] I acknowledge that it can be challenging for strata councils to address requests for accommodation. Strata council members are volunteers in what is often a thankless task. However, as service providers, stratas have an important role to play in removing barriers that may affect their owners with disabilities. This includes taking a serious and rigorous approach to complaints related to smoking.

[67] Above all, the accommodation process is a shared responsibility where both the person seeking accommodation and the strata council have obligations. I offer the following points of advice for participants in such an accommodation process.

The person seeking accommodation

[68] The person seeking accommodation must:

- Advise the strata council of their disability. The person must provide enough information for the strata council to understand that the person has a disability that is negatively affected by second-hand smoke in the strata.
- Co-operate with the strata to provide sufficient medical information to meet these goals. This may include a medical report. A brief doctor's note on a prescription pad will probably not be comprehensive enough to establish the need for accommodation and allow the parties to understand what options are appropriate.
- Co-operate with the strata to discuss possible solutions. The person seeking the accommodation is not entitled to a *perfect* accommodation, but to one that reasonably addresses their needs and upholds their dignity in their housing.
- Co-operate with professionals or other parties who may have to be involved to explore accommodation solutions. A person may have to facilitate access to their unit and ongoing requests for information.

The strata council

[69] The strata council must:

- Address requests for accommodation promptly, and take them seriously. A strata should consider how it will process accommodation requests on a timely basis, including between council meetings. For example, the strata council should ensure that someone is responsible for receiving such requests and promptly beginning the accommodation process.
- Gather enough information to understand the nature and extent of the need for accommodation. The strata is entitled to request medical information that is related to the request for accommodation. It is not entitled to any more

information than is strictly necessary for this purpose. If the strata requests further medical reports, it should be at the strata's expense.

- Restrict access to a person's medical information to only those individuals who are involved in the accommodation process and who need to understand the underlying medical condition. The strata council should keep medical information confidential from the general membership of the strata.
- Obtain expert opinions or advice where needed. For second-hand smoke, a "sniff test" undertaken by another strata member will rarely be sufficient to evaluate the extent of a problem with smoke in a suite. The strata may have to retain air quality experts. The strata should pay for any tests or expert reports.
- Take the lead role in investigating possible solutions. Co-operate with the person seeking accommodation to constructively explore those solutions.
- Rigorously assess whether the strata can implement an appropriate accommodation solution. In doing so, the strata may have to consider the financial cost and competing needs of other strata members with disabilities. In some circumstances, a solution may not be possible without the strata suffering an undue hardship. In that case, the strata council should document the hardship and test its conclusion to ensure there is no other possible solution.
- Recognize that the strata cannot, through its membership, contract out of the *Human Rights Code*. This means that a strata cannot rely on a vote of its membership to deny an accommodation.
- Ensure that the strata representatives working on the accommodation are able to approach the issue with an attitude of respect. Members of a strata council whose behaviour risks undermining genuine efforts at co-operation and conciliation may need to be removed from the process.

[70] Accommodation may be a challenging exercise for those involved. In cases before the Tribunal, we observe that emotions can run high and participants can become entrenched in positions that undermine the mutual respect and co-operation needed to make the process work. However, when done well, accommodation can be an enriching

experience where participants can take satisfaction in removing the barriers that may be preventing a person from feeling healthy and safe in their home. It is an exercise that is at the core of the *Code*'s goal of achieving equality.

IV CONCLUSION


[71] I find that the Strata violated s. 8 of the *Code* with respect to smoke in Ms. Leary's suite.

[72] To return the parties to the position in which they would have been had there been no violation of the *Code*, I order that the Strata:

- (i) engage an air quality specialist to determine the source of the smoke that is coming into Ms. Leary's suite and that the Strata also determine whether Strata members or their guests are responsible for the smoke ingress and, if so, how that smoke ingress could be prevented;
- (ii) once this has occurred, the Strata and Ms. Leary must work together to determine whether preventing smoke ingress is a tenable solution that can be accomplished without undue hardship on the Strata. It may be necessary to have Ms. Leary provide further medical information in furtherance of arriving at a solution. I hesitate to make other comments in this regard in order to ensure that there is a comprehensive negotiation of a solution. However, I will retain jurisdiction for six months from the date of this decision to provide further direction, if either of the parties requests that I do so.

[73] I order the Strata to pay Ms. Leary the sum of \$7,500 which is an amount that I consider appropriate to compensate her for injury to dignity, feelings and self-respect.

[74] I order the Strata to pay post-judgment interest.


Catherine McCreary, Tribunal Member