

Date Issued: October 27, 2011  
File: 9574

Indexed as: Buttner v. Strata Plan VIS 5339, 2011 BCHRT 309

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:

Susan Buttner

**COMPLAINANT**

A N D:

Strata Plan VIS 5339, also known as Parklane Mews Strata Council

**RESPONDENT**

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**REASONS FOR DECISION**  
**APPLICATION TO DISMISS: Sections 27(1)(c), (d) and (e)**

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Chair:	Bernd Walter
On her own behalf:	Susan Buttner
On behalf of the Respondent:	Alan Hurlburt

## INTRODUCTION

[1] Susan Buttner filed a complaint against Strata Plan VIS 5339, also known as Parklane Mews Strata Council (“Parklane”), alleging discrimination in the area of physical disability, contrary to s. 8 of the *Human Rights Code*.

[2] Parklane filed a response as well as an application to dismiss the complaint pursuant to s. 27(1)(c), (d) and (e) of the *Code*.

[3] This decision is restricted to the application to dismiss. In setting out the background allegations, the response and the application to dismiss, I make no findings of fact.

## COMPLAINT

[4] Ms. Buttner’s home is part of a strata complex managed by Parklane. She has occupied the premises since May 2009.

[5] Ms. Buttner says she suffers from a chronic disability and secondary health issues, as well as from multiple allergies and asthma. She says these conditions and their symptoms are exacerbated by cigarette smoke.

[6] Ms. Buttner alleges that she has been affected by smoke entering or infiltrating her home from an adjacent unit. She says this has already exacerbated her symptoms and is of further concern in terms of compromising her recovery following upcoming surgery. She describes her symptoms and says the smoke problem has necessitated increased use of medication. Ms. Buttner says her proposed surgery may have to be postponed if the situation is not resolved.

[7] Ms. Buttner alleges she complained to Parklane on numerous occasions between April 23, 2010 and March 22, 2011, but no resolution has been achieved. Ms. Buttner says Parklane is discriminating by failing to respond to her disability.

[8] Ms. Buttner says that as of May 30, 2011, the offending adjacent unit has been vacated but maintains that her complaint remains essentially unresolved.

## **RESPONSE AND APPLICATION TO DISMISS COMPLAINT**

[9] Parklane denies Ms. Buttner's allegation of discrimination and files an application to dismiss the complaint. Parklane says it is aware of Ms. Buttner's health issues, and does not question her disability.

[10] Parklane says that Ms. Buttner's complaints were investigated and given sympathetic attention. It concluded that modifying airflow, among or within units, is not practicable, available, affordable, effective, or safe, and could compromise insurance coverage and warranties. It says it is impossible to stop smoke infiltration. Parklane submits it duly investigated Ms. Buttner's concerns, as it is obligated to do, and concluded nothing could be done.

[11] Parklane does not have a non-smoking by-law and says Ms. Buttner was aware of this when she purchased her home. It says prohibiting smoking is the responsibility of the individual unit owner. Parklane submits that it cannot be held responsible if Ms. Buttner failed to conduct due diligence prior to purchasing her unit given her pre-existing medical condition.

[12] Parklane says there is no evidence the occupants of the adjacent unit in question were creating a nuisance but that they were smoking lawfully in permissible locations.

[13] Parklane submits it would be unlawful for it to interfere with the rights of other residents to smoke.

## **RESPONSE TO APPLICATION TO DISMISS**

[14] Ms. Buttner submits that Parklane's failure to enforce its nuisance by-law has had an adverse impact on her health and caused a loss of enjoyment of her property. She submits that Parklane's application demonstrates its lack of interest in enforcing its by-law or accommodating her disability.

[15] Ms. Buttner submits that Parklane's application to dismiss lacks the documentation necessary to enable the Tribunal to dismiss her complaint under s. 27(1)(c) and the application should therefore be denied.

## REPLY

[16] Parklane replies that Ms. Buttner's complaint should be dismissed because she has not established or provided scientific documentation of smoke infiltration. It disputes that smoke infiltration has in fact occurred.

## ANALYSIS AND DECISION

[17] Section 27(1)(c), (d) and (e) of the *Code* provides:

- (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

...

(c) there is no reasonable prospect that the complaint will succeed;

(d) proceeding with the complaint or that part of the complaint would not

- (i) benefit the person, group or class alleged to have been discriminated against, or  
 (ii) further the purposes of this *Code*;

(e) the complaint or that part of the complaint was filed for improper motives or made in bad faith;

### Section 27(1)(c) Analysis

[18] Under s. 27(1)(c) of the *Code*, the Tribunal has discretion to dismiss a complaint if it determines it has no reasonable prospect of success. The principles which the Tribunal employs in considering applications to dismiss under s. 27(1)(c) are well-established. In *Wickham and Wickham v. Mesa Contemporary Folk Art and others*, 2004 BCHRT 134, the Tribunal determined that the assessment under s. 27(1)(c) is not whether there is a mere chance the complaint will succeed, or whether there is a certainty it will do so. Rather, the Tribunal's role is to assess whether, based on all the material before it, and applying its expertise, there is no reasonable prospect the complaint will succeed: paras. 11 and 12; *Contreras v. YMCA and another*, 2009 BCHRT 433, para. 14.

[19] In *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49, at para. 27 the Court of Appeal described the Tribunal's role under s. 27(1)(c) as follows:

It is useful to describe the nature of an application under s. 27 of the *Code* to provide context for the appellants' arguments. That provision creates a gate-keeping function that permits the Tribunal to conduct preliminary assessments of human rights complaints with a view to removing those that do not warrant the time and expense of a hearing. It is a discretionary exercise that does not require factual findings. Instead, a Tribunal member assesses the evidence presented by the parties with a view to determining if there is no reasonable prospect the complaint will succeed. The threshold is low. The complainant must only show the evidence takes the case out of the realm of conjecture. If the application is dismissed, the complaint proceeds to a full hearing before the Tribunal. If it is granted, the complaint comes to an end, subject to the complainant's right to seek judicial review: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, 223 B.C.A.C. 71 at paras. 22-26, leave to appeal ref'd [2006] S.C.C.A. No. 171; *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCCA 191, 285 B.C.A.C. 276 at para. 31.

[20] The Tribunal has previously held that s. 8 of the *Code* applies to strata corporations: *Konieczna v. The Owners Strata Plan NW 2489*, 2003 BCHRT 38; *Williams v. Strata Council #768*, 2003 BCHRT 1; *Holloway v. Moore and Hamm* 2004 BCHRT 185.

[21] In order to establish a complaint pursuant to s. 8, Ms. Buttner must prove that Parklane discriminated against her with respect to an accommodation, service or facility customarily available to the public because of a disability.

[22] Ms. Buttner bears the onus of proof. She must prove that she has a disability, that Parklane's actions had an adverse impact on her, and that the adverse impact related to, or resulted because of, her disability.

[23] Parklane accepts Ms. Buttner's medical conditions and does not question her disability. For the purposes of this decision, I will accept that Ms. Buttner would be able to establish a disability under the *Code*.

[24] There are essentially two aspects to Parklane's submission.

[25] First, Parklane submits that Ms. Buttner has not established that smoke infiltration has actually occurred. At a hearing, Ms. Buttner would need to adduce evidence that this has occurred and that she has thereby suffered an adverse impact. On the material filed, I am not persuaded that she has no reasonable prospect of doing so.

[26] Second, Parklane submits that it is impractical or impossible to accommodate Ms. Buttner's disability. Again, if Ms. Buttner is able to establish a *prima facie* case, the evidentiary burden would shift to Parklane to establish a *bona fide* justification, including accommodation to the point of undue hardship. As this is a factual inquiry, Parklane, on this application, would have to persuade me that there is no reasonable prospect of success because of the likelihood that it will be able to establish a *bona fide* justification.

[27] Ms. Buttner submits that Parklane has provided no information with respect to any efforts to accommodate her disability such as would enable the Tribunal to dismiss her complaint under s. 27(1)(c).

[28] Considering all of the information before me, including Parklane's acknowledgement of Ms. Buttner's medical issues, I find Parklane's response to Ms. Buttner's concerns, as articulated, somewhat perfunctory, vague or non-specific. It essentially says that it is not possible to accommodate her concerns but, beyond a general statement that "[...] it is not possible to stop smoke infiltration", it provides little in the way of detail with respect to any meaningful efforts or of its willingness to do so. It essentially pleads "caveat emptor".

[29] Under the circumstances, I cannot conclude that Ms. Buttner's complaint has no reasonable prospect of success and I decline to dismiss it under s. 27(1)(c).

### **Section 27(1)(d) Analysis**

[30] The purposes of the *Code* are set out in s. 3:

- (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;

- (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
- (c) to prevent discrimination prohibited by this Code;
- (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
- (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

[31] In *Tillis v. Pacific Western Brewing and Komatsu*, 2005 BCHRT 433, the Tribunal determined that, in limited cases, it may be appropriate to dismiss a complaint under s. 27(1)(d)(ii) of the *Code* if the allegations contained in the complaint, viewed in context, would not further the purposes of the *Code*. In particular, the Tribunal said:

... the assessment of whether proceeding with a complaint would further the purposes of the *Code* involves more than an assessment of an individual complaint, but encompasses broader public policy issues, such as the efficiency and responsiveness of the human rights system, and the expense and time involved in processing a complaint to hearing.

In my view, public policy issues such as the efficiency and responsiveness of the human rights system are appropriately taken into account under s. 27(1)(d)(ii) of the *Code*. (paras. 15 and 16; see also *Dar Santos v. University of British Columbia*, 2003 BCHRT 73, para. 57)

[32] The Tribunal has dismissed complaints under s. 27(1)(d)(ii) where the respondent has acted responsibly and responded promptly to the issues raised in the complaint. See, for example, *Horner v. Concord Security Corporation*, 2003 BCHRT 85, paras. 30-32; *Wilkie v. ICBC*, 2005 BCHRT 318, paras. 4-6, *Gueffroy v. Pacific Newspaper Group and another*, 2005 BCHRT 349; *Gueffroy v. Coast Mountain Bus Company*, 2006 BCHRT 258; *Pollock v. TDK Holdings and others*, 2009 BCHRT 103.

[33] On the basis of the material filed, it is not clear that Parklane dealt with Ms. Buttner's complaint in a thorough, responsible, effective, proportionate or timely manner upon being notified of her concerns and considering that it acknowledges her disability. Parklane has essentially indicated it cannot, and does not, intend to take further steps to respond to Ms. Buttner's concerns. Although the offending unit has been vacated, Ms. Buttner fears that she may find herself in a similar position in future.

[34] In this case, if Ms. Buttner proves her allegations at a hearing, she may be in a position to establish a *prime facie* case of discrimination.

[35] If Ms. Buttner's complaint prevails at an evidentiary hearing, s. 37 of the *Code* may provide a remedy which has the potential to offer her some form of relief.

[36] I am unable to conclude that continuing with this complaint would not benefit Ms. Buttner or further the purposes of the *Code*.

[37] I therefore deny Parklane's application to dismiss the complaint under s. 27(1)(d) of the *Code*.

### **Section 27(1)(e) Analysis**

[38] In *Stoppis v. Just Ladies Fitness (Metrotown) and D. (No. 2)* 2005 BCHRT 359, the Tribunal held:

A complainant may be found to have filed a complaint for improper motives or in bad faith where, for example, the complainant is motivated by a purpose not consistent with that of the *Code*, or the complaint was not prompted by an honest belief that a contravention of the *Code* has occurred, but by some ulterior, deceitful, vindictive, or improper motive. The question of bad faith or improper motive must be judged by an objective standard, since it will seldom be possible to know the mind of the complainant. Further, given that the Tribunal does not investigate complaints, the Tribunal must have sufficient information before it to make such a finding. (para. 13)

[39] In *Nieuwkerk v. Cimex Industries*, 2003 BCHRT 126, at para. 13, the Tribunal found that, in order to succeed in an application under s. 27(1)(e), a respondent must show that the complainant's allegations have no foundation in fact or reality, and are made for spurious reasons. Similarly, in *Hartley v. Glenlyon Norfolk School*, 2004 BCHRT 384, at para. 13, the Tribunal held that "[i]n order to dismiss a complaint on the basis of s. 27(1)(e), the Tribunal would need to be satisfied that the complaint was filed on the basis of something other than an honest belief that the allegations in it occurred and amounted to a breach of the *Code*."



[40] In subsequent cases, the Tribunal has noted that the circumstances in which it will be able to find, on a preliminary application, that a complainant has filed a complaint for improper motives or in bad faith, are the exception rather than the rule: *Williams v. UBC Aqua Society*, 2006 BCHRT 193, para. 8; *Hoepfner v. Medicatrix Nature Health and Parmar*, 2008 BCHRT 413, para 61. In applications to dismiss a complaint the onus of proof is on the respondent to establish the grounds alleged.

[41] There is nothing in the materials before me upon which I could conclude that Ms. Buttner's complaint is filed in bad faith or for any improper reason. Parklane's application to dismiss under s. 27(1)(e) is denied.

## **CONCLUSION**

[42] Parklane's application to dismiss Ms. Buttner's complaint is denied. I urge the parties to avail themselves of the Tribunal's assisted settlement services to resolve this complaint.

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Bernd Walter, Chair