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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:

Paul Kabatoff and Rose Kabatoff

COMPLAINANTS

A N D:

Strata Corporation Plan NW 2767

RESPONDENT

REASONS FOR DECISION
APPLICATION TO DISMISS: Section 27(1)(b)

Tribunal Member:

Marlene Tyshynski

On their own behalf :

Paul and Rose Kabatoff

On behalf of the respondent:

Agnes Janzen

I INTRODUCTION

[1] Paul Kabatoff and Rose Kabatoff filed a complaint alleging that Strata Corporation Plan NW 2767 (the “Strata Corp.”) discriminated against them in the area of services on the ground of physical disability, contrary to s. 8 of the *Human Rights Code* because it failed to provide them with a housing environment free of second-hand smoke.

[2] The Kabatoffs own and reside in a suite in the Strata Corp. They both have a number of health problems including respiratory illnesses and allergies that are negatively impacted by second-hand smoke. In or about August 2008, persons who smoke moved into the suite below the Kabatoff’s. The Kabatoffs state that the second-hand smoke emanating from the new residents’ suite exacerbates their health problems. They appealed to the Strata Corp. to assist them with the second-hand smoke issue and provided a letter from their physician in support of their request. Ideally, the Kabatoffs want the Strata Corp. to adopt a no smoking by-law.

[3] The Kabatoffs allege that the Strata Corp. has refused to do anything about the second-hand smoke issue and that they were generally told that if they had a problem with people smoking they should move.

[4] The Strata Corp. denies that it has discriminated against the Kabatoffs. Agnes Janzen, the president of the Strata Corp. council (“Council”) states that the Strata Corp. does not have a “no-smoking by-law”, therefore; it has no authority or ability to respond to the Kabatoff’s complaint. The Strata Corp. says that the Kabatoffs can try to have a no smoking by-law passed by Council in accordance with the normal process for the adoption of by-laws. Ms. Janzen states the Kabatoffs have brought their complaints to Council and have been treated fairly throughout. Ms. Janzen denies that the Kabatoffs were told that if smoking was injurious to their health they should move.

[5] The Strata Corp. applied to have the complaint dismissed. In their application they referred to s. 27 of the *Code*. I believe the Strata Corp. meant s. 27(1) which provides the Tribunal with authority to dismiss a complaint on a preliminary basis. However, the Strata Corp. did not refer to any of the seven subsections in s. 27 nor did it provide any related submissions.

[6] The Strata Corp.'s sole submission is that the Kabatoff's allegation is not a violation of their by-laws. There is no prohibition of smoking in an owner's private suite or balcony in the Strata Corp. Therefore, there is no basis for the complaint.

[7] The Kabatoffs have filed a complaint under the *Code*. The Strata Corp.'s submission is not relevant to the issue raised and does not provide a basis on which to dismiss the complaint.

[8] If I considered the Strata Corp.'s submission under s. 27(1)(b), as this section seems to be the essence of their position, I would arrive at the same result. Section 27(1)(b) allows the Tribunal to dismiss a complaint when, even if the allegation in it were proven, it would not amount to a breach of the *Code*. Section 27(1)(b) reads as follows:

- (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:

...

- (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;

[9] If the Kabatoffs are able to establish that they have disabilities that are exacerbated by second-hand smoke, their complaint that Strata Corp. failed to accommodate their disabilities could amount to discrimination under the *Code*. The Strata Corp.'s application would be denied.

[10] In any event, the Strata Corp. made no submissions that were related to the *Code* and have provided no basis for dismissing the complaint against them.

II CONCLUSION

[11] The application of the Strata Corp. to dismiss the complaint against it is denied.

Marlene Tyshynski, Tribunal Member