

Indexed as: Weitzel v. Strata Plan NW 2536, 2019 BCHRT 18  
IN THE MATTER OF THE *HUMAN RIGHTS CODE*,  
RSBC 1996, c. 210 (as amended)

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

BETWEEN:

Pamela Weitzel

**COMPLAINANT**

AND:

The Owners, Strata Plan NW 2536 (Willow Park Estates)

**RESPONDENT**

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**REASONS FOR DECISION**  
**APPLICATION TO DISMISS A COMPLAINT**  
Section 27(1)(b) and (c)

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Tribunal Member:

Grace Chen

Counsel for the Complainant

Daniel Sorensen

Counsel for the Respondent

Christopher J. Bakker

## I INTRODUCTION

[1] Pamela Weitzel complains against The Owners, Strata Plan NW 2536 [**Strata**] alleging discrimination in the provision of a service customarily available to the public, based on physical disability, contrary to s. 8 of the *Human Rights Code* [**Code**].

[2] Mrs. Weitzel says noise began emanating from the unit above her suite after new occupants moved in and replaced the carpet with vinyl floors. The Strata approved the flooring change subject to a condition that soundproofing underlay must be installed. It is undisputed that the soundproofing underlay was never installed. Mrs. Weitzel says that the excessive noise from the unit above is exacerbating the effect of her disabilities. Mrs. Weitzel further says that the Strata's failure to enforce its soundproofing underlay requirement and the Strata's failure to appropriately address her noise complaints is discrimination contrary to the *Code*. Mrs. Weitzel's husband, Mr. Weitzel has filed a separate complaint arising from the same events.

[3] The Strata denies discriminating against Mrs. Weitzel and applies to dismiss her complaint on the bases that: it does not allege a possible contravention of the *Code*; and it has nor reasonable prospect of success: *Code*, ss. 27(1)(b) and (c).

[4] While I do not refer to it all in my decision, I have considered all of the information filed by the parties in relation to this application to dismiss. This is not a complete recitation of the parties' submissions, but only those necessary to come to my decision. I make no findings of fact.

## II BACKGROUND

[5] The Strata is a 64-unit residential condominium complex. Residents must be 45 years of age or older to live there. Typically, the residents are 65 years of age or older.

[6] Mr. Weitzel has lived in a ground floor unit in the complex since 2002. Mrs. Weitzel moved into his unit in 2008. Mr. Weitzel has hereditary spastic paraplegia condition, which is a neurological condition. Mrs. Weitzel has relapsing/remitting multiple sclerosis [**MS**].

[7] Mr. and Mrs. Weitzel did not have any noise complaints about previous occupants who lived above them.

[8] On January 23, 2016, two new occupants moved into the unit above the Weitzels. The new occupants asked the Strata for permission to install vinyl flooring. The Strata approved the new occupants' request. Its approval letter included a condition that the highest soundproofing underlay was to be installed under the new flooring. Despite this condition, the new occupants did not have soundproofing underlay installed.

[9] After the new occupants installed the flooring, the Weitzels complained of noise to the Strata on various occasions. The Strata responded in various ways. It told the new occupants about the complaints and asked them to mitigate noise transfer. It addressed the Weitzels' complaints in strata meetings. It permitted the Weitzels to install sound insulation in their unit at their own cost. The Strata performed a non-professional sound test in both units whereby some Strata members made noise in the upper unit while other members listened in the Weitzels' unit. The Strata concluded the noise heard from the upper unit was not excessive.

[10] In April 2017, the Strata asked the new occupants how the flooring was installed. The new occupants provided the Strata with a letter from the company that installed the flooring. The company advised that the new flooring was glued down and that this particular flooring product was quieter than other types of flooring.

[11] On January 15, 2018, the Tribunal received Mrs. Weitzel's complaint.

### **III ANALYSIS AND DECISION**

#### **A. Section 27(1)(b): No contravention of the *Code***

[12] Under section 27(1)(b) of the *Code*, the Tribunal has discretion to dismiss a complaint where it does not allege any acts, which could, if proven, contravene the *Code*. In determining whether to dismiss a complaint on this basis, the Tribunal only considers the allegations outlined in the complaint, without reference to the respondent's explanation or evidence:

*Francescutti v. Vancouver (City)*, 2017 BCCA 242 at para. 49. The threshold for assessing a possible contravention is low: *Lebovich v. Home Depot and others*, 2011 BCHRT83 at para. 84.

[13] To amount to discrimination, Mrs. Weitzel would have to prove that he has a disability, that he suffered an adverse impact in respect of a service being provided by the Strata, and that it is reasonable to infer that the protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61 [**Moore**] at para. 33.

[14] The Tribunal has held that strata corporations provide various types of services to the owners who make up their membership: *Shannon v. The Owners, Strata Plan KAS 1613 (No. 2)*, 2009 BCHRT 438 at paras. 175-176. In the present case, the specific services provided by the Strata were those of considering, and either approving or rejecting, a request to replace the flooring in the unit above Mrs. Weitzel's suite and applying / enforcing the Strata's noise bylaw.

[15] In her complaint, Mrs. Weitzel says her MS was exacerbated by noise coming from the unit above her suite. She alleges that her health was negatively affected by the Strata's failure to resolve her noise complaints and ensure that the required soundproofing underlay was installed in the unit above.

[16] Based solely on the information set out in Mrs. Weitzel's complaint and without consideration of other evidence, I am satisfied that her complaint contains allegations, that if proven, could contravene the *Code*.

[17] I dismiss the Strata's application to dismiss the complaint under section 27(1)(b).

### **B. Section 27(1)(c): No reasonable prospect of success**

[18] Under s. 27(1)(c) of the *Code*, the Tribunal determines whether there is no reasonable prospect that the complaint will succeed. This provision creates a gate-keeping function that permits the Tribunal to conduct a preliminary assessment of complaints in order to remove those that do not warrant the time and expense of a hearing: *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 [**Hill**]. This is a discretionary exercise by the Tribunal and does not

require factual findings; merely the assessment of evidence submitted by the parties:  
*Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, para. 22; *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCCA 191, leave to appeal ref'd [2010] SCCA No. 217 at paras. 25 and 31.

[19] As stated above, to succeed at a hearing of this complaint, Mrs. Weitzel would have to establish that she has a disability, that she suffered an adverse impact in respect of a service provided by the Strata, and that it is reasonable to infer that the protected characteristic was a factor in the adverse impact: *Moore* at para. 33. If any one of those elements is missing, there is no discrimination. If Mrs. Weitzel proves the three elements, then the burden shifts to the Strata to justify its conduct: *Moore* at para. 33.

[20] On an application to dismiss filed under s. 27(1)(c), the burden is not on Mrs. Weitzel to establish the elements of her case, but rather, it is on the Strata to show that she has no reasonable prospect of success of doing so: *Stonehouse v. Elk Valley Coal (No. 2)*, 2007 BCHRT 305. If the Strata is able to show that Mrs. Weitzel has no reasonable prospect of establishing any one of the three elements, then the dismissal application must succeed and the complaint be dismissed. The threshold for such a review is low: Mrs. Weitzel must only show that her evidence is not mere speculation or conjecture: *Hill* at para. 27.

[21] Alternatively, the Strata may show that there is no reasonable prospect of success in light of its justification for the conduct. In particular, if it is reasonably certain that the Strata would establish a defence at a hearing of a complaint, then there is no reasonable prospect that the complaint will succeed: *Purdy v. Douglas College and others*, 2016 BCHRT 117 at para. 50 [*Purdy*].

[22] In conducting an assessment of the evidence, I make no findings of fact on the merits of the complaint. However, I nonetheless apply a content-based analysis not unlike that which would be applied by a fact-finder. Among other things, I look for both internal and external consistency, place the evidence in context, consider the overall relationship of the parties and consider all of the circumstances in which the alleged acts of discrimination occurred. On this

basis, I gauge the relative strengths and weaknesses of the evidence and determine what aspects of the complaint do not rise above conjecture and, in light of all of the material before me, have no reasonable prospect of success. When assessing the Strata's defence, as noted, I am considering whether it is reasonably certain to prove the necessary facts.

[23] The Strata submits sworn affidavits from the Strata Manager and a member of the Strata Council. Exhibits include communications between the Weitzels, the Strata, and the new occupants. Other exhibits include the Strata report from its informal sound test, minutes from Strata meetings, and the Strata bylaws.

[24] In response, Mrs. Weitzel submits her sworn affidavit. Exhibits include communications with the Strata and media articles about the Weitzels' physical challenges and their advocacy for persons with disabilities. Some articles refer to Mrs. Weitzel having MS. Some articles refer to a previous complaint the Weitzels' had with the Strata regarding second-hand smoke. She also submitted a sworn affidavit from Mr. Weitzel that simply indicated he read Mrs. Weitzel's affidavit and swore the information in it was true.

#### *Disability*

[25] There is no dispute between the parties that Mrs. Weitzel has a disability as the Strata acknowledges that it knew she had MS. It follows that I am not persuaded there is no reasonable prospect Mrs. Weitzel could succeed in establishing that she has a disability.

#### *Adverse impact*

[26] Mrs. Weitzel's complaint relates to two general matters: the Strata's decision to approve a flooring change in the upper unit; and the Strata's response to Mrs. Weitzel's noise complaints. Mrs. Weitzel alleges that the Strata's actions in respect of these matters resulted in the excessive noise that is negatively affecting her health due to lack of sleep, stress and anxiety. She says that she never had noise issues with the previous neighbours who lived above and that the noise problems started after the flooring was changed in that unit.

[27] The Strata disputes that Mrs. Weitzel experienced an adverse impact because it says there was no excessive noise coming from the unit in question. To support its case, the Strata relies on an informal sound test conducted by several members of the Strata Council where a few members went into the upper unit and replicated normal living movements as well as louder noises while the remaining members remained in the Weitzel's unit to listen. After this investigation, the Strata Council ultimately concluded that there was no excessive noise.

[28] In respect of its decision to approve a flooring change in the upper unit, the Strata acknowledges that the soundproofing underlay it required as a condition of approving the flooring change was never installed. The Strata now provides a letter from the company that installed the flooring which says that soundproofing underlay was not required. However, the Strata does not explain why it initially approved the flooring change on the condition that the highest soundproofing underlay be installed but subsequently changed its position. Further, while the Strata also submits that other upper floor units have installed similar flooring without complaints from lower unit occupants, it has not provided evidence regarding the specific flooring that was installed or whether soundproofing underlay was installed in those units.

[29] Mrs. Weitzel disagrees with the Strata's conclusion that the noise is not excessive. Further, contrary to the Strata's position that no one else has complained, her evidence is that there is another neighbour residing in a lower unit who has also complained about the noise.

[30] Based on the materials before me, I am not persuaded that Mrs. Weitzel has no reasonable prospect of successfully establishing that she experienced an adverse impact. While the Strata says that it conducted a sound test, the evidence before me is simply that the Strata Council members' subjective view of the noise levels differs from that of Mrs. Weitzel. As the Strata did not engage a professional to conduct a sound test that included objective decibel readings, for example, I am left with two conflicting subjective views regarding the noise level that can only be determined by making findings of fact after a hearing.

*Disability a factor in the adverse impact*

[31] The Strata says that there is no nexus between Mrs. Weitzel's disability and any adverse impact. In considering whether there is a nexus between a prohibited ground of discrimination and the negative impact alleged, the facts must be capable of supporting a reasonable inference that the ground is at least a factor in the adverse impact experienced: *Moore*.

[32] The Strata argues that Mrs. Weitzel never requested accommodation for her MS. It further says that Mrs. Weitzel has not provided any medical evidence to show that her MS is aggravated by noise.

[33] I do not find the Strata's arguments persuasive as Mrs. Weitzel informed the Strata that she has MS and that the excessive noise from the upstairs unit – which she says started after the approved flooring change – negatively affected her health by causing her lack of sleep, stress and anxiety. In the same letter, Mrs. Weitzel proposed two possible solutions to the issue: first, that the Strata pay to have soundproofing underlay installed in the upper unit; or second, that the Strata pay for sound insulation in her unit.

[34] In my view, this letter plainly suggests that Mrs. Weitzel was requesting accommodation because her health was being negatively impacted by the noise emanating from the unit above. At that point, if the Strata had questions or needed more information from Mrs. Weitzel, including medical information from her doctor, it was incumbent on the Strata to ask for any information that it reasonably required to assess and respond to Mrs. Weitzel's request.

[35] On the information provided, I am not persuaded that there is no reasonable prospect that Mrs. Weitzel will be able to prove that her disability was a factor in the alleged adverse impact that she experienced as a result of the Strata's failure to resolve her noise complaints and ensure that soundproofing underlay was installed in the unit above.



*Bona fide and reasonable justification*

[36] The Strata argues, in the alternative, that the complaint has no reasonable prospect of success because its actions were justified and it accommodated Mrs. Weitzel to the point of undue hardship.

[37] The accommodation process described by the Supreme Court of Canada in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 is one in which all those involved are required to work together to find a solution that adequately balances the competing interests. The duty to accommodate requires a respondent to take positive steps to achieve a reasonable solution. The process requires the party best placed to make a proposal to advance one. The other party must then respond with alternative suggestions and refinements as necessary and the exchange should continue until a satisfactory resolution is achieved or it is clear that no such resolution is possible. A spirit of co-operation is obviously necessary to this process. The Tribunal has made it clear that, when determining whether an individual with a disability has been reasonably accommodated, the respondent is not required to provide a “perfect solution” from the complainant’s point of view but, rather, to provide a reasonable accommodation in the circumstances of the case: *Purdy; Allen v. UBC*, 2013 BCHRT 90.

[38] Whether a respondent has met the duty to accommodate is a question of fact. It will depend on the specific circumstances and relevant considerations appropriate to each case. In an application under s. 27(1)(c), the Tribunal’s role is not to determine, as a matter of fact, whether the respondent met its duty. Rather, the Tribunal considers the likelihood that the respondent will be able to establish that defence. The respondent must persuade the Tribunal that it is reasonably certain it will be able to do so. This requires the respondent to provide the Tribunal with evidence showing that it took all reasonable and practical steps, including effort to look at alternative approaches. The Tribunal will be alert to shortfalls in the evidence regarding relevant considerations and situations where the evidence requires testing by way of cross-examination.

[39] The Strata submits that there was a legitimate business-related purpose for how it applied and enforced its bylaws. The Strata says that while it could not unreasonably withhold its approval of the flooring change request, it did require soundproofing underlay to be installed as a condition of that approval. The Strata further submits that requiring the rest of the Strata owners to pay to reinstall the flooring in the unit above or to pay to install sound insulation in Mrs. Weitzel's unit would amount to undue hardship.

[40] In order to establish the defence of undue hardship, the Strata must show that it considered all reasonable alternatives for accommodation and that there were none. The materials before me suggest that the Strata may not appreciate the full extent of what the duty to accommodate requires. The Strata has provided no evidence to support its undue hardship argument. For example, it has not provided any information on how much re-installing the flooring with soundproof underlay or installing sound insulation in Mrs. Weitzel's unit would cost. It has also not provided any information regarding the state of its contingency fund. Further, the Strata has not explained why it has not simply required the new occupants to adhere to the terms of the approval and install the soundproofing underlay.

[41] The Strata has also not provided any evidence regarding the extent to which it inquired into or understood how noise affects Mrs. Weitzel's condition by requesting further information from Mrs. Weitzel or her physician, for example. If the Strata had questions in this regard or required further information in order to assess Mrs. Weitzel's request, it was incumbent on the Strata to seek out that information.

[42] As discussed above, this complaint also concerns the Strata's response to Mrs. Weitzel's noise complaints after the floor installation was completed. The materials before me suggest that despite Mrs. Weitzel's complaints, the Strata did not ask the new occupants about the installation or discover that the soundproofing underlay had not been installed for over a year. The Strata has not explained whether it took any steps to confirm that the soundproofing underlay was installed in the first place or why it did not question the new occupants about this matter much sooner.

[43] In sum, on the materials before me, I am not persuaded that it is reasonably certain the Strata will be able to establish that it accommodated Mrs. Weitzel's disability to the point of undue hardship.

[44] I dismiss the Strata's application to dismiss the complaint under section 27(1)(c).

#### **IV CONCLUSION**

[45] For the reasons set out above, I deny the Strata's application to dismiss in its entirety. The complaint will proceed.

[46] I encourage the parties to take advantage of the Tribunal's mediation services to try to resolve this matter by mutual agreement.



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Grace Chen, Tribunal Member

Indexed as: Weitzel v. Strata Plan NW 2536, 2019 BCHRT 17

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**COMPLAINANT**

AND:

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**RESPONDENT**

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**REASONS FOR DECISION**  
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Tribunal Member:

Grace Chen

Counsel for the Complainant

Daniel Sorensen

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Christopher J. Bakker

## I INTRODUCTION

[1] Gord Weitzel complains against The Owners, Strata Plan NW 2536 [**Strata**] alleging discrimination in the provision of a service customarily available to the public, based on physical and mental disability, contrary to s. 8 of the *Human Rights Code* [**Code**].

[2] Mr. Weitzel says noise began emanating from the unit above his suite after new occupants moved in and replaced the carpet with vinyl floors. The Strata approved the flooring change subject to a condition that soundproofing underlay must be installed. It is undisputed that the soundproofing underlay was never installed. Mr. Weitzel says that the excessive noise from the unit above is exacerbating the effect of his disabilities. Mr. Weitzel further says that the Strata's failure to enforce its soundproofing underlay requirement and the Strata's failure to appropriately address his noise complaints is discrimination contrary to the *Code*. Mr. Weitzel's wife, Mrs. Weitzel has filed a separate complaint arising from the same events.

[3] The Strata denies discriminating against Mr. Weitzel and applies to dismiss his complaint on the bases that: it does not allege a possible contravention of the *Code*; and it has nor reasonable prospect of success: *Code*, ss. 27(1)(b) and (c).

[4] While I do not refer to it all in my decision, I have considered all of the information filed by the parties in relation to this application to dismiss. This is not a complete recitation of the parties' submissions, but only those necessary to come to my decision. I make no findings of fact.

## II BACKGROUND

[5] The Strata is a 64-unit residential condominium complex. Residents must be 45 years of age or older to live there. Typically, the residents are 65 years of age or older.

[6] Mr. Weitzel has lived in a ground floor unit in the complex since 2002. Mrs. Weitzel moved into his unit in 2008. Mr. Weitzel has hereditary spastic paraplegia condition, which is a neurological condition. Mrs. Weitzel has relapsing/remitting multiple sclerosis.

[7] Mr. and Mrs. Weitzel did not have any noise complaints about previous occupants who lived above them.

[8] On January 23, 2016, two new occupants moved into the unit above the Weitzels. The new occupants asked the Strata for permission to install vinyl flooring. The Strata approved the new occupants' request. Its approval letter included a condition that the highest soundproofing underlay was to be installed under the new flooring. Despite this condition, the new occupants did not have soundproofing underlay installed.

[9] After the new occupants installed the flooring, the Weitzels complained of noise to the Strata on various occasions. The Strata responded in various ways. It told the new occupants about the complaints and asked them to mitigate noise transfer. It addressed the Weitzels' complaints in strata meetings. It permitted the Weitzels to install sound insulation in their unit at their own cost. The Strata performed a non-professional sound test in both units whereby some Strata members made noise in the upper unit while other members listened in the Weitzels' unit. The Strata concluded the noise heard from the upper unit was not excessive.

[10] On June 29, 2016, the Tribunal received Mr. Weitzel's complaint.

[11] In April 2017, the Strata asked the new occupants how the flooring was installed. The new occupants provided the Strata with a letter from the company that installed the flooring. The company advised that the new flooring was glued down and that this particular flooring product was quieter than other types of flooring.

### III ANALYSIS AND DECISION

#### A. Section 27(1)(b): No contravention of the *Code*

[12] Under section 27(1)(b) of the *Code*, the Tribunal has discretion to dismiss a complaint where it does not allege any acts, which could, if proven, contravene the *Code*. In determining whether to dismiss a complaint on this basis, the Tribunal only considers the allegations outlined in the complaint, without reference to the respondent's explanation or evidence:

*Francescutti v. Vancouver (City)*, 2017 BCCA 242 at para. 49. The threshold for assessing a possible contravention is low: *Lebovich v. Home Depot and others*, 2011 BCHRT83 at para. 84.

[13] To amount to discrimination, Mr. Weitzel would have to prove that he has a disability, that he suffered an adverse impact in respect of a service being provided by the Strata, and that it is reasonable to infer that the protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61 [**Moore**] at para. 33.

[14] The Tribunal has held that strata corporations provide various types of services to the owners who make up their membership: *Shannon v. The Owners, Strata Plan KAS 1613 (No. 2)*, 2009 BCHRT 438 at paras. 175-176. In the present case, the specific services provided by the Strata were those of considering, and either approving or rejecting, a request to replace the flooring in the unit above Mr. Weitzel's suite and applying / enforcing the Strata's noise bylaw.

[15] In his complaint, Mr. Weitzel says that he has hereditary spastic paraplegia - a neurological disorder - with related depression and dementia which was exacerbated by noise coming from the unit above his suite. He alleges that his health was negatively affected by the Strata's failure to resolve his noise complaints and ensure that the required soundproofing underlay was installed in the unit above.

[16] Based solely on the information set out in Mr. Weitzel's complaint and without consideration of other evidence, I am satisfied that his complaint contains allegations, that if proven, could contravene the *Code*.

[17] I dismiss the Strata's application to dismiss the complaint under section 27(1)(b).

### **B. Section 27(1)(c): No reasonable prospect of success**

[18] Under s. 27(1)(c) of the *Code*, the Tribunal determines whether there is no reasonable prospect that the complaint will succeed. This provision creates a gate-keeping function that permits the Tribunal to conduct a preliminary assessment of complaints in order to remove those that do not warrant the time and expense of a hearing: *Workers' Compensation Appeal*

*Tribunal v. Hill*, 2011 BCCA 49 [**Hill**]. This is a discretionary exercise by the Tribunal and does not require factual findings; merely the assessment of evidence submitted by the parties:

*Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, para. 22; *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCCA 191, leave to appeal ref'd [2010] SCCA No. 217 at paras. 25 and 31.

[19] As stated above, to succeed at a hearing of this complaint, Mr. Weitzel would have to establish that he has a disability, that he suffered an adverse impact in respect of a service provided by the Strata, and that it is reasonable to infer that the protected characteristic was a factor in the adverse impact: *Moore* at para. 33. If any one of those elements is missing, there is no discrimination. If Mr. Weitzel proves the three elements, then the burden shifts to the Strata to justify its conduct: *Moore* at para. 33.

[20] On an application to dismiss filed under s. 27(1)(c), the burden is not on Mr. Weitzel to establish the elements of his case, but rather, it is on the Strata to show that he has no reasonable prospect of success of doing so: *Stonehouse v. Elk Valley Coal (No. 2)*, 2007 BCHRT 305. If the Strata is able to show that Mr. Weitzel has no reasonable prospect of establishing any one of the three elements, then the dismissal application must succeed and the complaint be dismissed. The threshold for such a review is low: Mr. Weitzel must only show that his evidence is not mere speculation or conjecture: *Hill* at para. 27.

[21] Alternatively, the Strata may show that there is no reasonable prospect of success in light of its justification for the conduct. In particular, if it is reasonably certain that the Strata would establish a defence at a hearing of a complaint, then there is no reasonable prospect that the complaint will succeed: *Purdy v. Douglas College and others*, 2016 BCHRT 117 at para. 50 [**Purdy**].

[22] In conducting an assessment of the evidence, I make no findings of fact on the merits of the complaint. However, I nonetheless apply a content-based analysis not unlike that which would be applied by a fact-finder. Among other things, I look for both internal and external consistency, place the evidence in context, consider the overall relationship of the parties and



consider all of the circumstances in which the alleged acts of discrimination occurred. On this basis, I gauge the relative strengths and weaknesses of the evidence and determine what aspects of the complaint do not rise above conjecture and, in light of all of the material before me, have no reasonable prospect of success. When assessing the Strata's defence, as noted, I am considering whether it is reasonably certain to prove the necessary facts.

[23] The Strata submits sworn affidavits from the Strata Manager and a member of the Strata Council. Exhibits include communications between the Weitzels, the Strata, and the new occupants. Other exhibits include the Strata report from its informal sound test, minutes from Strata meetings, and the Strata bylaws.

[24] In response, Mr. Weitzel submits his sworn affidavit. Exhibits include communications with the Strata and media articles about the Weitzels' physical challenges and their advocacy for persons with disabilities. Some articles refer to Mr. Weitzel having a neurological condition. Some articles refer to a previous complaint the Weitzels' had with the Strata regarding second-hand smoke. He also submitted a sworn affidavit from Mrs. Weitzel that simply indicated she read Mr. Weitzel's affidavit and swore the information in it was true.

#### *Disability*

[25] There is no dispute between the parties that Mr. Weitzel has a disability as the Strata acknowledges that it knew he has mobility issues and uses an electric wheelchair. Mr. Weitzel's evidence is that he has hereditary spastic paraplegia - a neurological disorder - with related depression and dementia. While the Strata argues that Mr. Weitzel has not provided medical evidence to substantiate his condition, in my view, the information provided by Mr. Weitzel at this preliminary stage is sufficient to bring this aspect of his complaint beyond the realm of conjecture. It follows that I am not persuaded there is no reasonable prospect Mr. Weitzel could succeed in establishing that he has a disability.

*Adverse impact*

[26] Mr. Weitzel's complaint relates to two general matters: the Strata's decision to approve a flooring change in the upper unit; and the Strata's response to Mr. Weitzel's noise complaints. Mr. Weitzel alleges that the Strata's actions in respect of these matters resulted in the excessive noise that is negatively affecting his health due to lack of sleep, stress and anxiety. He says that he never had noise issues with the previous neighbours who lived above and that the noise problems started after the flooring was changed in that unit.

[27] The Strata disputes that Mr. Weitzel experienced an adverse impact because it says there was no excessive noise coming from the unit in question. To support its case, the Strata relies on an informal sound test conducted by several members of the Strata Council where a few members went into the upper unit and replicated normal living movements as well as louder noises while the remaining members remained in the Weitzel's unit to listen. After this investigation, the Strata Council ultimately concluded that there was no excessive noise.

[28] In respect of its decision to approve a flooring change in the upper unit, the Strata acknowledges that the soundproofing underlay it required as a condition of approving the flooring change was never installed. The Strata now provides a letter from the company that installed the flooring which says that soundproofing underlay was not required. However, the Strata does not explain why it initially approved the flooring change on the condition that the highest soundproofing underlay be installed but subsequently changed its position. Further, while the Strata also submits that other upper floor units have installed similar flooring without complaints from lower unit occupants, it has not provided evidence regarding the specific flooring that was installed or whether soundproofing underlay was installed in those units.

[29] Mr. Weitzel disagrees with the Strata's conclusion that the noise is not excessive. Further, contrary to the Strata's position that no one else has complained, his evidence is that there is another neighbour residing in a lower unit who has also complained about the noise.

[30] Based on the materials before me, I am not persuaded that Mr. Weitzel has no reasonable prospect of successfully establishing that he experienced an adverse impact. While

the Strata says that it conducted a sound test, the evidence before me is simply that the Strata Council members' subjective view of the noise levels differs from that of Mr. Weitzel. As the Strata did not engage a professional to conduct a sound test that included objective decibel readings, for example, I am left with two conflicting subjective views regarding the noise level that can only be determined by making findings of fact after a hearing.

*Disability a factor in the adverse impact*

[31] The Strata says that there is no nexus between Mr. Weitzel's disability and any adverse impact. In considering whether there is a nexus between a prohibited ground of discrimination and the negative impact alleged, the facts must be capable of supporting a reasonable inference that the ground is at least a factor in the adverse impact experienced: *Moore*.

[32] The Strata argues that Mr. Weitzel never requested accommodation for his neurological condition. It further says that Mr. Weitzel has not provided any medical evidence to show that his neurological condition is aggravated by noise.

[33] I do not find the Strata's arguments persuasive as Mr. Weitzel informed the Strata that he has a neurological disorder and that the excessive noise from the upstairs unit – which he says started after the approved flooring change - negatively affected his health by causing him lack of sleep, stress and anxiety. In the same letter, Mr. Weitzel proposed two possible solutions to the issue: first, that the Strata pay to have soundproofing underlay installed in the upper unit; or second, that the Strata pay for sound insulation in his unit.

[34] In my view, this letter plainly suggests that Mr. Weitzel was requesting accommodation because his health was being negatively impacted by the noise emanating from the unit above. At that point, if the Strata had questions or needed more information from Mr. Weitzel, including medical information from his doctor, it was incumbent on the Strata to ask for any information that it reasonably required to assess and respond to Mr. Weitzel's request.

[35] On the information provided, I am not persuaded that there is no reasonable prospect that Mr. Weitzel will be able to prove that his disability was a factor in the alleged adverse

impact that he experienced as a result of the Strata's failure to resolve his noise complaints and ensure that soundproofing underlay was installed in the unit above.

*Bona fide and reasonable justification*

[36] The Strata argues, in the alternative, that the complaint has no reasonable prospect of success because its actions were justified and it accommodated Mr. Weitzel to the point of undue hardship.

[37] The accommodation process described by the Supreme Court of Canada in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 is one in which all those involved are required to work together to find a solution that adequately balances the competing interests. The duty to accommodate requires a respondent to take positive steps to achieve a reasonable solution. The process requires the party best placed to make a proposal to advance one. The other party must then respond with alternative suggestions and refinements as necessary and the exchange should continue until a satisfactory resolution is achieved or it is clear that no such resolution is possible. A spirit of co-operation is obviously necessary to this process. The Tribunal has made it clear that, when determining whether an individual with a disability has been reasonably accommodated, the respondent is not required to provide a "perfect solution" from the complainant's point of view but, rather, to provide a reasonable accommodation in the circumstances of the case: *Purdy; Allen v. UBC*, 2013 BCHRT 90.

[38] Whether a respondent has met the duty to accommodate is a question of fact. It will depend on the specific circumstances and relevant considerations appropriate to each case. In an application under s. 27(1)(c), the Tribunal's role is not to determine, as a matter of fact, whether the respondent met its duty. Rather, the Tribunal considers the likelihood that the respondent will be able to establish that defence. The respondent must persuade the Tribunal that it is reasonably certain it will be able to do so. This requires the respondent to provide the Tribunal with evidence showing that it took all reasonable and practical steps, including effort to look at alternative approaches. The Tribunal will be alert to shortfalls in the evidence

regarding relevant considerations and situations where the evidence requires testing by way of cross-examination.

[39] The Strata submits that there was a legitimate business-related purpose for how it applied and enforced its bylaws. The Strata says that while it could not unreasonably withhold its approval of the flooring change request, it did require soundproofing underlay to be installed as a condition of that approval. The Strata further submits that requiring the rest of the Strata owners to pay to reinstall the flooring in the unit above or to pay to install sound insulation in Mr. Weitzel's unit would amount to undue hardship.

[40] In order to establish the defence of undue hardship, the Strata must show that it considered all reasonable alternatives for accommodation and that there were none. The materials before me suggest that the Strata may not appreciate the full extent of what the duty to accommodate requires. The Strata has provided no evidence to support its undue hardship argument. For example, it has not provided any information on how much re-installing the flooring with soundproof underlay or installing sound insulation in Mr. Weitzel's unit would cost. It has also not provided any information regarding the state of its contingency fund. Further, the Strata has not explained why it has not simply required the new occupants to adhere to the terms of the approval and install the soundproofing underlay.

[41] The Strata has also not provided any evidence regarding the extent to which it inquired into or understood how noise affects Mr. Weitzel's condition by requesting further information from Mr. Weitzel or his physician, for example. If the Strata had questions in this regard or required further information in order to assess Mr. Weitzel's request, it was incumbent on the Strata to seek out that information.

[42] As discussed above, this complaint also concerns the Strata's response to Mr. Weitzel's noise complaints after the floor installation was completed. The materials before me suggest that despite Mr. Weitzel's complaints, the Strata did not ask the new occupants about the installation or discover that the soundproofing underlay had not been installed for over a year. The Strata has not explained whether it took any steps to confirm that the soundproofing

underlay was installed in the first place or why it did not question the new occupants about this matter much sooner.

[43] In sum, on the materials before me, I am not persuaded that it is reasonably certain the Strata will be able to establish that it accommodated Mr. Weitzel's disability to the point of undue hardship.

[44] I dismiss the Strata's application to dismiss the complaint under section 27(1)(c).

#### **IV CONCLUSION**

[45] For the reasons set out above, I deny the Strata's application to dismiss in its entirety. The complaint will proceed.

[46] I encourage the parties to take advantage of the Tribunal's mediation services to try to resolve this matter by mutual agreement.



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Grace Chen, Tribunal Member