

Vancouver Island Strata Owners Association

STRATA CORPORATIONS AND THE HUMAN RIGHTS CODE

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OVERVIEW

The *Human Rights Code* (the “Code”) is a piece of legislation that is familiar to some but not all strata corporations and some of the owners within them. However, the impact that it can have on strata corporations and the decisions they make can be profound. The obligations imposed by it can be significant in their application, even overriding bylaws.

The *Code* is a provincial statute. Broadly speaking its purpose is to prevent discrimination and discriminatory practices. The specific intent of the *Code* is laid out in Section 3 and is as follows:

- (a) to foster a society in which there are no impediments to full and free participation in the economic, social, political and cultural life;
- (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*; and
- (e) to provide a means of redress for those persons who are discriminated against contrary to this *Code*.

Section 4 of the *Code* provides that it prevails over all other legislation; including the *Strata Property Act (SPA)*. In fact, Section 121 of the *SPA* states that a bylaw which contravenes the *Code* is unenforceable. One exception to this rule, which more will be said below, is Section 41(2) of the *Code*, which permits discrimination based on age.

THE CODE APPLIES TO THE STRATA CORPORATIONS

When prohibiting discriminatory conduct, the *Code* refers to the obligations of “a person”. At law a “person” includes not only an individual but also a corporation (which would capture a strata corporation) and employment related organizations (ie. a union).

The application of the *Code* to strata corporations was confirmed in *Konieczna v. The Owners Strata Plan NW2489*, 2003 BCHRT 38. In that case the British Columbia Human Rights Tribunal

(“BCHRT”) held that “the strata corporation can be considered to provide “services which are customarily available to the public.” As a result of its carrying out its statutory duties under the SPA, the strata corporation was held to be providing “management services”. This was the same finding as was reached in both *Ganser v. Rosewood Estate Condominium Corp. (No. 1)* (2002), 42 C.H.R.R. D/264, *Williams v. Strata Council No. 768*, 2003 BCHRT 17, and *The Owners, Strata Plan LMS 2900 v. Hardy*, 2016 CRTBC 1.

Strata corporations can be affected by the following provisions of the *Code*:

- S.7 – discriminatory publications (i.e. minutes);
- S.8 – accommodation, service and facility;
- S.9 – purchase of property (requests made by a buyer);
- S.10 – tenancy (bylaws pertaining to tenants);
- S.11, 12 and 13 – employment (caretakers, concierges, etc);

The duties under the *Code* relate to owners, tenants, occupants and even prospective owners.

Strata council members can also be liable for breaches of the *Code* where compliance is dependent on their actions - *Kayne v. Strata Plan LMS2374*, 2004 BCHRT 62. However, claims against strata managers are usually dismissed as they have no say in whether or not to grant an accommodation – *McDaniel v. Strata Plan LMS1657*, 2012 BCHRT 42.

DOES THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS APPLY TO STRATA CORPORATIONS?

While Charter principles often generally influence the law, the Charter itself applies only to interactions between an individual and the state. It does not apply to private relationships such as that between an owner and a strata corporation - *Condominium Plan No. 931 0520 v. Smith*, (1999) 24

RPR (3d) 76). The underlying reasoning for this was explained in *Strata Plan NW 499 v. Kirk* 2015 BCSC 1487 where the court said the following:

“Though a strata corporation is created by statute and all powers and duties derive from the statute, it is not subject to the control of government in carrying out its duties and powers. The interplay between the owners, strata bylaws and the *Act* is in the nature of a private agreement to use the same real property in a common purpose, which is the creation of an individual living space. Strata’s manage and maintain the common property and common assets through an executive council elected by the members to exercise the powers and perform the duties necessary to facilitate each owner’s use of space. The Strata does not act in furtherance of any government program or policy.”

JURISDICTION OVER THE *CODE*

Jurisdiction over the application of the *Code* falls primarily to the BCHRT. However, the Civil Resolution Tribunal (“CRT”) also has the ability to apply the *Code*. However, s.114 of the Civil Resolution Tribunal Act (“CRTA”), which in turn references s.46.2 of the Administrative Tribunals Act, permits the CRT to refuse to do so where it feels there is a more appropriate forum in which the *Code* may be applied (i.e. the BCHRT).

The CRT does not have jurisdiction to consider whether there is a conflict between the *Code* and the SPA -*The Owners, Strata Plan K 669 v 1104456 B.C. Ltd*, 2018 BCCRT 553. Nor can it deal with claims of discrimination and award damages - *Leary v. The Owners, Strata Plan VR 1001*, 2017 BCCRT 76; *Campbell et al v. The Owners, Strata Plan BCS 2742*, 2019 BCCRT 111. The CRT will generally apply the *Code* to address whether a bylaw contravenes it and thus whether it is enforceable under it. Where an owner feels there has been discriminatory conduct on the part of the strata corporation, they must apply to the BCHRT for relief.

WHAT IS DISCRIMINATORY CONDUCT?

Section 2 of the *Code* provides that there does not need to be any intention to discriminate in order for there to be in violation of the *Code*. If the effect of an action or decision is discriminatory, that is enough to amount to a violation.

Discrimination has been defined as “a distinction, whether intentional or not but based on grounds relating personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. -*Andrews v. Law Society of B.C.*, (1989) 1 S.R.C.143

The difficulty for strata councils and strata corporations when dealing with issues that may give rise to a complaint under the *Code* is that they have to balance the interests of a diverse group of people. Very rarely would it ever be the case that there was an actual intention on the part of a strata corporation to discriminate against a particular person or group of persons. Rather the discrimination usually results from the implementation of a policy designed to address some other problem or issue. This is referred to as “adverse affect” discrimination. A common example of this is a bylaw which prohibits pets. While the bylaw applies to all owners equally, it negatively impacts a person who needs a therapy or assistance dog.

Not every instance where an owner is treated differently will amount to discrimination under the *Code*. In order for there to be discrimination it must be based on one of the enumerated grounds or factors set out in the *Code*. Those factors are the “race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person.” There must also be a connection between the differential treatment and the alleged ground of discrimination- *Smith v. Strata Corp NW2206*, 2018 BCHRT 247. Simply because a person has a disability, is of certain sexual orientation or is from a country outside of Canada does not mean that a denial of their request amounts to discrimination or a breach

of the *Code* (*Choi v. Bernard* 2013 BCHRT 23; *Rao v. Strata Plan NW53*, 2009 BCHRT 166).

A person alleging discrimination must show that:

- they have a characteristic protected from discrimination;
- that they have experienced an adverse impact in a protected area; and
- that the protected characteristic was a factor in the adverse impact

As a result, the *Code* and the BCHRT cannot be used by owners as means to force their strata corporation to agree with their point of view or treat them in a particular way. In *Meyer and Meyer v. Strata Corporation LMS 3080 and Boies*, 2005 BCHRT 89, where the complaints revolved around how a general meeting was conducted, the BCHRT held that: “neither the *Code* nor the Tribunal is responsible for policing every aspect of an individual’s social or council-related activities simply because that individual lives in a strata complex”. In short, the BCHRT is not there to tell people to be nice to each other. However, harassment based on a protected ground is discrimination within the meaning of the *Code*.- *Finnamore v The Owners, Strata Plan NW 3153*, 2018 BCHRT 26. In *Finnamore* the BCHRT said the following:

[25] However, not every negative comment or single incident that is connected to a prohibited characteristic will be discriminatory harassment contrary to the *Code*. It is certainly undesirable for people to treat each other rudely, disrespectfully, or inappropriately. However, it is not the Tribunal’s purpose to adjudicate disputes other than where a person’s protected characteristic, actual or perceived, has presented as a barrier in their ability to fully, and with dignity, access an area of life protected by the *Code*. In performing this function, the Tribunal is cognizant that the disputes brought to it arise between human beings, with all the imperfection that entails. Not every failure to be kind or respectful requires state intervention. This includes failures with discriminatory overtones – and therefore highlights a distinction between comments that may be “discriminatory” in the everyday sense of that word, and comments that amount to discrimination, within the meaning and scope of human rights legislation:

Brito v. Affordable Housing Societies, 2017 BCHRT No. 270, at para. 41.

[26] In the analysis of whether negative comments made between residents while interacting on a strata corporation's common property rise to a level of harassment that adversely affects a person residing in a strata complex, the context is critical. Where conduct occurs during a single incident, or does not otherwise amount to a pattern of conduct, the Tribunal will consider all of the circumstances to determine whether it violates the *Code*: *Hadzic v. Pizza Hut Canada* (c.o.b. Pizza Hut), [1999] B.C.H.R.T.D. No. 44 at paras. 32-33; *Pardo v. School District No. 43*, 2003 BCHRT 71 (CanLII). Those circumstances include "the nature of the relationship between the involved parties, the context in which the comment was made, whether an apology was offered, and whether or not the recipient of the comment was a member of a group historically discriminated against": Pardo at para. 12.

SECTION 8 - PROVISION OF ACCOMMODATION, SERVICES AND FACILITIES

While the *Code* deals with discrimination related to a variety of different activities, most issues involving strata corporations relate to accommodating the needs of an individual owner, tenant or occupant. By and large, those complaints fall under Section 8 - Discrimination in Accommodation, Service or Facility.

Section 8(1) provides as follows:

- (1) A person must not, without a bona fide and reasonable justification,
 - (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
 - (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or class of persons.

The very broad definition of the word “service” (being something of benefit provided to one person by another) captures many things which a strata corporation does in relation to the exercise of its powers and the fulfillment of its duties under the *SPA*. Those include such things as administering the common property, assigning parking stalls, considering and approving alteration requests, enforcing bylaws and considering the need for exemptions under a bylaw.

The most common ground upon which discrimination is alleged is a physical or mental disability. What constitutes a “disability” was discussed in *Anastacio v. Patterson Dental*, 2014 BCHRT 111:

21 The Tribunal has held that physical disability within the meaning of the *Code* generally requires a state that is involuntary, has some degree of permanence, and impairs a person's ability, in some measure, to carry out the normal functions of life: *Boyce v. New Westminster (City)*, [1994] B.C.C.H.R.D. No. 33 (B.C. Human Rights Council), para. 50.

22 The Tribunal has held that normal ailments such as a cold or flu are not disabilities within the meaning of s. 13 of the *Code*: *Morris v. British Columbia Railway*, 2003 BCHRT 14 (B.C. Human Rights Trib.), para. 214; *Karim v. Khan*, 2010 BCHRT 175 (B.C. Human Rights Trib.), para. 53.

23 While illness can and often does rise to the level of a disability within the meaning of the *Code* in cases such as cancer, or other medical conditions which are characterized by significant degree of permanence and which substantially interfere with a person's ability to participate fully in his or her employment and enjoyment of life, gastroenteritis is not such an illness, however severe its symptoms may be for a brief period of time.

When it comes to a person with a disability, there is an overriding duty to accommodate that person to the point of undue hardship. In *Herbert Stengert obo others v. Strata Plan BCS2427*, 2018 BCHRT 70 the BCHRT succinctly explained the obligations of the strata corporation with respect to exploring an accommodation:

[19] As a service provider, a strata corporation must accommodate a strata resident with a disability to the point of undue hardship. The accommodation process described by the Supreme Court of Canada in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 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. 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: *Renaud*.

The duty to accommodate arises only upon the strata corporation becoming aware that a person suffers from a disability - *Brown v. The Owners, Strata Plan LMS952*, 2005 BCHRT 137, *Menzies v. Strata Plan NW2924*, 2010 BCHRT 33. The person claiming a need for the accommodation on the basis of a disability must also be prepared to disclose the nature of their condition and have medical evidence available to support the specific type of accommodation they are requesting - *Menzies v. Strata Plan NW2924*, 2010 BCHRT 33. Where medical evidence is presented in support of the need for an accommodation there must be a nexus between the disability and the accommodation requested - *Judd v. Strata Plan LMS737*, 2010 BCHRT 276; *Dandurand v Strata Plan KAS 3558*, 2016 BCHRT 47. However, it is not always necessary to have a medical report outlining the

restrictions or limitations of a person with disabilities. Sometimes it is obvious - *Birchall and Another Obo v BCS 61 Strata Corporation*, 2017 BCHRT 72. For example, a person with a disability parking pass should not be made to prove they have disability that impacts their mobility.

The lack of a need for a mobility aid or the fact that other owners with similar physical limitations can do a task, does not negate the strata corporation's duty to accommodate. Accommodation is an individualized process - *Khan v Strata Plan VR 127*, 2016 BCHRT 43

There must also be a request made for accommodation and the request must be denied before there can be discrimination. - *Shakun v. Ospikia Place PG6 Council and Pace Realty Corporation*, 2009 BCHRT 121.

When faced with a request for an accommodation, a strata corporation must understand its obligations versus those of the owner making the request. In *Leary v. Strata Plan VR1001*, 2016 BCHRT 139, the BCHRT set out a framework for addressing a request for accommodation, assigning certain tasks to each of the parties:

The person seeking accommodation must:

- Advise the strata council of their disability and provide enough information for the strata council to understand that the person has a disability.
- Co-operate with the strata to provide sufficient medical information to establish the need for accommodation and allow the parties to understand what options are appropriate. This may include a medical report. A brief doctor's note on a prescription pad will probably not be comprehensive enough.
- 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, including facilitating access to their unit and answering ongoing requests for information.

The strata council must:

- Address requests for accommodation promptly, and take them seriously.
- Gather enough information to understand the nature and extent of the need for accommodation. (The strata corporation 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.
- Obtain expert opinions or advice where needed.
- Take the lead role in investigating possible solutions.
- Rigorously assess whether the strata can implement an appropriate accommodation solution.
- Ensure that the strata representatives working on the accommodation are able to approach the issue with an attitude of respect.

When attempting to determine the precise scope of an accommodation, there must be a dialogue between the owner and the strata corporation as to what is required and whether there are other suitable options -*Calderoni v. Strata Council Plan K6*, 2009 BCHRT 10. The owner cannot simply demand a specific type of accommodation and expect it to be done. While the accommodation needs to be adequate, it is not necessarily only what the disabled person has requested. Where a reasonable alternative exists the owner must be willing to accept it -*Ross v. Strata Plan NW 608*, 2007 BCHRT

80. Conversely, what is an appropriate accommodation cannot be determined by a vote of the owners – *Leary, supra*. The fact that the owners do not wish to implement a required accommodation does not absolve the strata corporation from its obligations.

The burden placed on a disabled individual is an element that will be taken into consideration when assessing the adequacy of the steps taken by a strata corporation to accommodate a disabled person - *D v The Owners, Strata Plan VIS----* 2017 BCCRT 68. However, where the problem can easily be solved by the complainant, there may be no adverse impact - *Stephenson v Strata Corporation VIS 1419*, 2014 BCHRT 110.

The strata corporation's duty to accommodate is ongoing, even after a complaint is filed - *Bowker v Strata Plan NWS 2539*, 2019 BCHRT 43

A delay in finding a reasonable accommodation could be construed as a failure to accommodate. A failure on the part of a strata corporation to educate itself or a demonstration of a reluctance in implementing the accommodation (including enforcing the strata bylaws) can result in a breach of the *Code* - *Bowker v Strata Plan NWS 2539*, 2019 BCHRT 43.

Not all discriminatory decisions or actions (including a failure to accommodate) will result in a breach of the *Code*. If the strata corporation can establish a *bona fide and reasonable justification* for its actions will it not be found to be in violation of the *Code*? To determine that, three questions must be asked:

- Was the policy/action reasonably necessary to accomplish a legitimate purpose or goal of the strata corporation?
- Was the policy/action implemented in good faith, in the belief that it was necessary for the fulfillment of a legitimate purpose?
- Can the strata corporation show that it could not meet its goal and still accommodate the complainant without incurring undue hardship?

In a strata corporation setting the first two are almost invariably met. It is the last that is usually not. What amounts to undue hardship is difficult to define. It is something along the lines of “you will know it when you see it.”

In *Hollowaychuk v The Owners, Strata Plan NW332*, 2008 BCHRT 274 the BCHRT said the following with respect to the costs that would be incurred to install a ramp for an owner having difficulty navigating the entry stairs:

[103] With respect to undue hardship, the Owners argue that having the ramp constructed would constitute an undue hardship to the individual owners of the strata because of the cost involved. They argued that this was apparent given the outcomes of the votes in 2005 (involving the installation of a ramp), and 2007 (involving the drafting of architectural drawings).

[104] With respect to the expense, the Owners rely on Mr. Pearson’s estimate that the installation of the wheelchair ramp would cost a minimum of \$63,000, not including the architectural plans, or any permitting costs. If a special levy was required to pay for these costs, it would amount to slightly under \$1,000 per unit (on average): which is not at all an insignificant expense.

[107] The undue hardship arguments raised in this case are somewhat unique. Although cost is a factor that the Tribunal can always take into account in assessing undue hardship, here what is at issue is not a cost that is to be borne by an employer, or a government service provider, but, ultimately, by the individual owners of the strata.

[109] Specifically, while the Owners argue the cost per unit would constitute an undue hardship on the owners of those units, I note the following.

[110] First, there is no firm evidence before me of the cost of installing a wheelchair ramp. While Mr. Pearson has provided an estimate of \$63,000, this includes a significant cost for the installation of power doors, which may or may not be required. Further, I note that in December 2005, Council concluded that it would cost approximately \$30,000 to install a wheelchair ramp. There is, however, no evidence before me with respect to how this number was arrived at.

[111] Second, there is no evidence before me of the amount of any special levy which would be required to be charged to each of the units. It appears to be the practice to pay for some proportion of alterations to common property from the contingency fund, and to charge the remainder of any such expense as a special levy.

[112] Mr. Wallace testified that the Heritage’s contingency fund currently stands

at approximately \$95,000. While the use of any amount of the contingency fund would create a hardship on individual owners, because that money would no longer be available for other uses, it would not create as direct an impact as a special levy. Further, there is no evidence before me that any hardship caused by the use of contingency funds would be “undue”.

[113] Third, the Owners did not call any individual unit owners to testify. No owner of the building testified that a special levy of, for example, \$1,000, would create undue hardship for them. Mr. Wallace testified that he was aware of several owners who were on a fixed income who would not welcome such a levy, but there was no direct evidence before me in this regard. The only owner who did testify before me, Mr. Wallace, did not give evidence that a special levy would create an undue hardship on him.

The BCHRT’s analysis shows how cost factors will be considered and weighed, but is not determinative. It leaves open the possibility that there will be a figure in each strata corporation which the owners will not have to bear in order to provide an accommodation.

In *The Owners, Strata Plan LMS XXX v. D.B.*, 2017 BCCRT 117 the CRT considered whether a resident’s mental health issues should affect their need to comply with the bylaws. In deciding that they did not, the CRT applied the undue hardship principle saying:

[24] In particular, while I acknowledge the owner has a mental disability that causes her to have loud outbursts, I find her disability in the circumstances does not outweigh the owners’ right to quiet enjoyment of their property. I am satisfied that the owner’s conduct has significantly disrupted the lives of the other owners in the strata. It would be unreasonable to require those other owners to continue living with that conduct. I am not prepared to accept the owner’s representative’s promise that the owner will no longer be disruptive because she has started to change the company she keeps. I say that because, again, there has been an escalation in the behaviour rather than any reduction.

[25] It may be that the strata’s bylaws have an adverse impact on the owner due to her disability, in that her disability often prevents her from being able to comply with the noise bylaw. In that sense, the owner has established a prima facie case of discrimination. The question then is whether the strata has what is known in law as a “bona fide and reasonable justification” for enforcing the strata’s bylaws with respect to the owner. I find the answer is yes. The strata’s bylaws are reasonable on their face and I accept they were adopted in good faith. Based on the evidence before me, I also conclude that the strata cannot reasonably accommodate the owner’s disability in the manner requested, without incurring undue hardship. I find that hardship is undue if it threatens the viability of the strata’s co-operative framework, which I conclude is what would happen here if the strata were required to act with leniency towards the owner at this point.

In order to establish a defence of undue hardship, the strata corporation must show that it considered all reasonable alternatives for accommodation and that there were none - . *Bowker v Strata Plan NWS 2539*, 2019 BCHRT 43.

MANAGEMENT OF THE COMMON PROPERTY

Pursuant to its duty under s.8 of the *Code* a strata corporation may be obliged to permit or even to make (at its expense) changes to the common property in order to accommodate someone with a disability. This can include such things as the need to construct a ramp to allow wheelchair access - *Perron v. The Owners, Strata Plan NW164*, 2009 BCHRT 59; *Holowaychuk v. The Owners, Strata Plan NW332*, 2008 BCHRT 274), the use of a particular parking space or making entry door accessible (*Herbert Stengert obo Six Residents of 19673 Meadow Garden Way v The Owners, Strata Plan BCS 2427*, 2018 BCHRT 70)

The fact that when a building was built, the *Building Code* did not require it to be accessible makes no difference to the strata corporation's duty to accommodate - *Basic v. The Owners, Strata Plan BCS 1461*, 2007 BCHRT 165. Nor is the fact that the developer put a certain arrangement in place an automatic defence - *Birchall and Another Obo v BCS 61 Strata Corporation*, 2017 BCHRT 72. However, the strata corporations need not provide access in the exact way the owner requests. It can meet its obligation by providing a reasonable alternative - *D v The Owners, Strata Plan VIS*, 2017 BCCRT 68. It may not even need to provide the requested accommodation if an acceptable alternative already exists – *Ross v. Strata Plan NW608*, 2007 BCHRT 274

Even in carrying out its repair and maintenance duties the strata corporation can be held to have a duty to do so in a timely manner where a delay would adversely impact someone with a disability - *Birchall and Another Obo v BCS 61 Strata Corporation*, 2017 BCHRT 72; *Kates v. Strata Plan VAS2844*, 2018 BCHRT 20; *Garrow v. Strata Plan LMS1306 (No.3)*, 2012 BCHRT 4.

ALTERATION REQUESTS

Strata corporations can receive requests to approve an alteration (whether to the common property or a strata lot) in order to accommodate a disability. This can even involve a request to permit something (such as air conditioner or sunshade) that is otherwise prohibited by the bylaws.

The strata corporation has a duty to undertake an honest and thorough assessment of the request - *Seymour v Strata Plan VIS 2551 (No. 2)*, 2018 BCHRT 186. An owner making a request has an obligation to provide information about the proposed alteration in order to allow the strata corporation to properly assess the request - *Testar v. The Owners, Strata Plan VR 1097*, 2009 BCHRT 41; *Calderoni v. Strata Council Plan K6*, 2009 BCHRT 10. Concerns about the impact of the alteration on the building are a legitimate factor to consider - *Dennis Susko v The Owners Strata Plan LMS 2226*, 2018 BCCRT 249.

Where an accommodation is warranted and there are no alternative options, the request must be approved regardless of any prohibition in the bylaws - *Shannon v. The Owners, Strata Plan KAS1613 (No. 2)*, 2009 BCHRT 438.

PETS

Despite bylaws which prohibit pets, owners, tenants and occupants can, under certain circumstances, have a pet where that pet is needed for medical reasons. Medical exemptions to a pet bylaw arise in one of two ways; under the *Guide Dog and Service Dog Act* (GDSA) or pursuant to the *Code*. Non medical exemptions arise only if the bylaw itself permits a discretionary exemption. Strata councils cannot otherwise waive compliance with a bylaw.

S.123(1.01) of the *SPA* recognizes the exemption under the GDSA. It provides:

A bylaw that prohibits a pet or other animal or that restricts the access of a pet or other animal to a strata lot or common property does not apply to

(a) a guide dog or service dog, or

- (b) a dog that is a member of a retired guide or service dog team if the person who is a member of the team is an owner, tenant or occupant.

Owners, tenants, occupants and visitors with a certified guide or service dog are exempt from any prohibitions on the type, number or size of pet. That same exemption applies to retired guide and service dogs remaining with their owner.

There are two types of dogs certified under the GDSA. Guide dogs assist those who are blind. Service dogs are “trained to perform specific tasks to assist a person with a disability”. Dogs which do not perform those particular tasks, do not fall within the scope of the GDSA.

In order to qualify for an exemption under the GDSA, the dog must be certified as a guide or service dog. That certification comes from the Province, not the various organizations which purport to “certify” therapy and service dogs.

However, most pet exemptions arise under s.8 of the *Code*. A dog need not be certified in any way in order to qualify as an assistance animal under the *Code* - *Devine v. David Burr Ltd. and others (No. 2)*, 2010 BCHRT 37.

In order for an owner to establish the need for a pet for medical reasons, it is necessary for them to prove there is a nexus between their disability and the need for the pet – *Judd v. Strata Plan LMS 737*, 2010 BCHRT 276. In other words, is it absolutely essential to the treatment of the owner’s disability that they have the pet? In most cases that question can only be answered through a medical report which provides a treatment recommendation beyond simply that it would be nice or beneficial to have a pet. The test adopted in *Judd* was relaxed somewhat in *BH obo CH v. Creekside Estates Strata KAS1707 and another*, 2016 BCHRT 100 where the BCHRT held that “in the case of a person who requires a pet for reasons related to addiction, a complainant must show that not having a pet could put the individual at significant risk of a relapse.” In *UL obo SL v. Strata Plan LMS 4555 and others*, 2014 BCHRT 66 the BCHRT set the test as whether refusing the pet “would likely lead to adverse consequences” for their condition.

Where the bylaws allow for pets but set restrictions such as height or weight, the need for an accommodation does not automatically mean those restrictions don't apply. If the accommodation can be met by a smaller dog, then the smaller dog ought to be selected. Misunderstanding or not knowing the growth height of the dog is not an excuse - *The Owners, Strata Plan XX 1234 v D.N. and P.J.*, 2019 BCCRT 284. To require the strata corporation to accept a pet which violates the restrictions set out in the bylaws can amount to an undue hardship - *The Owners, Strata Plan LMS YYYY v N.K.*, 2018 BCCRT 108. Along similar lines, a pet which is poorly behaving and creates a nuisance for other residents need not be accommodated - *Devine v. David Burr Ltd. and others (No. 2)*, 2010 BCHRT 37.

The strata corporation also has a duty to consider accommodation requests from potential purchasers. A failure to do so can amount to discrimination as well- *Jones v. The Owners, Strata Plan 1571 and others*, 2008 BCHRT 200.

SMOKING

The *Code* is often engaged in situations where an owner is affected by second hand smoke. Where that owner has a disability which is negatively impacted by the second hand smoke, a duty on the part of the strata corporation to protect that owner from the smoke can arise. Just as with any requested accommodation, the owner must establish a nexus between their disability and the effect of the second hand smoke on that disability - *Leary v. Strata Plan VR1001*, 2016 BCHRT 139. Where there is a nexus, there is a duty to accommodate and take steps to prevent the smoke affecting the owner – *Buttnor v. Strata Plan VIS 5339*, 2011 BCHRT 309. Mere exposure to second hand smoke is not enough to engage the *Code*. There must be evidence that it negatively impacts a person's medical condition – *Beckett v. Strata Plan NW2603*, 2016 BCHRT 27.

Accommodation can take the form of simply enforcing the bylaws. Conversely, a failure to enforce the bylaws in order to cause another owner or tenant to stop smoking can result in a finding of a breach of the *Code* - *Talbot v Strata Plan LMS 1351 and Another*, 2017 BCHRT 59. The absence of a bylaw prohibiting smoking does not relieve the strata corporation from its obligations - *Kabatoff v. Strata Corp NW2767*, 2009 BCHRT 344. In such as case, the strata corporation may be obligated to

pass a bylaw in order to meet its obligations.

The duty to accommodate also requires the strata corporation to thoughtfully develop a strategy to implement the accommodation - *Bowker v Strata Plan NWS 2539*, 2019 BCHRT 43. That strategy may involve testing and even carrying out work to strata lots and the common property in order to stop the spread of the smoke. A delay in identifying and implementing a solution can result in a breach of the *Code* and a higher damage award if the owner's medical condition worsens as a result.

A duty to accommodate can also arise where an owner needs to smoke or vape for medical reasons and the bylaws prohibit them from doing so. In that case, an accommodation can also take the form of allowing some one to smoke. This will most likely arise in the case of medical marijuana. Where the bylaws prohibit smoking, an owner has no right to smoke marijuana for medical reasons unless that is the only way they can consume it - *The Owners, Strata Plan LMS 2900 v Matthew Hardy*, 2016 BCCRT1. (It is entirely possible a similar accommodation would be required for a person who could only satisfy their nicotine addiction by smoking). Where such an accommodation is required it is open to the strata corporation to set reasonable restrictions on that right (such as where to smoke, to use an air filter, etc.).

A strata corporation may be required to allow an owner to smoke in their strata lot or on a balcony where they have a disability that would prevent them from leaving the building to smoke – *Dandurand v. Strata Plan KAS3558*, 2016 BCHRT 47.

AGE

A strata corporation can pass a bylaw which restricts the age of persons who can live in in a strata lot. S.123(1.1) of the *SPA* specifically contemplates such bylaws. It provides:

Without limiting a strata corporation's power to pass any other bylaws, a strata corporation may pass a bylaw that restricts the age of persons who may reside in a strata lot.

S.41(2) of the *Code* specifically exempts such bylaws from the effect of the *Code*. It provides:

“Nothing in this *Code* prohibits a distinction on the basis of age if that distinction is permitted or required by any Act or regulation”.

However, such bylaws can only apply to the age of persons living in the strata lot and not the age of who may own the strata lot. S.121 of the *SPA* provides that a bylaw cannot restrict the ability of an owner to sell or otherwise deal with title to their strata lot. As such, a bylaw which specifically refers to the age of an owner would run afoul of s.121 and be unenforceable. The fact that an age restriction bylaw may practically prevent certain persons (i.e. those under the specified age) from purchasing a strata lot does not mean it runs afoul of s.121 - *Marshall v. Strata Plan No. NW 2584*, 1996 CanLII 8500 (BCSC); *Drummond v Strata Plan NW 2654*, 2004 BCJ No 1405.

Anyone residing in a strata lot at the time an age restriction bylaw is passed is exempt from the bylaw – s.123(2) *SPA*. It is important to note that the exemption applies to individuals and not the strata lot. Nor does that exemption apply to children born after the bylaw is passed - *Hallonquist v. Strata Plan NW307 and another*, 2014 BCHRT 117.

In *Ryan v. Strata Plan VIS 3537*, 2005 BCHRT 559 the BCHRT considered the issue of whether a bylaw restricting the age of occupants to 55 years and older was discrimination on the basis of family status (i.e. its true intention was to keep children out). It held that the bylaw was not discriminatory since the reason the strata asked the 16 year old daughter to move was because of her age, not the fact that she was part of a family. Whether the decision would be different if the bylaw said “no one under 19 years of age could reside in a strata lot” is unclear. The tribunal in *Hallonquist* suggested it would not.

OTHER SITUATIONS

Not all potential breaches of the *Code* involve the need to accommodate a disability.

In both *Smith v. BV Administration and White Rock Baptist Village Strata Plan NW 2847*, 2009 BCHRT 79 and *Morris v. Strata Plan NW 3388*, 2008 BCHRT 33 the strata corporations were

oriented toward retirees of a certain religious background. In *Smith* it was the “Baptist” Village and in *Morris* it was a “Mennonite” building. In *Smith* the allegations centered around certain religious practices such as opening meetings in prayer. In *Morris* the allegation was unfair treatment because she was not Mennonite and was divorced. While neither case made it to the hearing stage, it is interesting to consider the potential impact of the Code in situations like this.

In *Kargut obo Others v Strata Plan BCS 802, 2017 BCHRT 269* the complaint involved whether general meetings could be conducted in Mandarin. Neither the SPA nor the bylaws specified in what language the meeting must be held or the minutes must be kept. While discrimination on the basis of language may not be prohibited, it could amount to discrimination on the basis of a person’s place of origin. When the distinction is based on what may appear to be racial or ethnic divisions, the distinction may be found to violate the Code. In refusing to dismiss the complaint the BCHRT made the following observations:

[144] As noted above, that a majority of owners are Mandarin speakers is not an answer to this complaint. Wellington Court is not, and cannot be, a closed community open only to people of one ethnic group. Any owner is free to sell their unit to anyone and anyone is entitled to purchase a unit. That buyer in turn is entitled to meaningfully participate in the Strata’s governance.

[145] By the same token, a majority of the owners are Mandarin speakers, although it may be only a few who do not have a facility with English. In those circumstances, it may be unlikely that the complainant group could obtain a remedy, even if wholly successful, that provides for all Strata Council meetings to be conducted in English only. The Strata may be under an obligation to provide reasonable accommodation to the Mandarin speakers.

In its decision the BCHRT implied that a meeting can be conducted in the language desired by the majority, but strata minutes and relevant strata correspondence are best translated into English.

However, there is no requirement that communication with the strata corporation or between council members must be in English - *Waldman v. Ng et al*, 2018 BCCRT 143

BYLAW ENFORCEMENT

A Strata corporation must also be cognizant of its obligations under the *Code* when carrying out its duty under s.26 of the *SPA* to enforce the bylaws.

Were an owner complains that activities of another owner are negatively impacting their disability, the strata corporation has a duty under the *Code* (in addition to its duty under the *SPA*) to fully investigate the allegations, determine if there has been a breach of the bylaws and then take appropriate steps to address that breach - *Weitzel v Strata Plan NW 2536*, 2019 BCHRT 17. Where there is a clear breach of the bylaws that also involves a breach of the *Code*, then there is a duty under the *Code* to enforce the bylaw - *Finnamore v The Owners, Strata Plan NW 3153*, 2018 BCHRT 26.

When taking steps to meet those obligations, the strata corporation cannot rely solely on the imposition of fines, when there has been no change in behaviour, to say that it has met its duty under the *Code* - *Pope v The Owners, Strata Plan VIS30*, 2017 BCHRT 45.

Enforcing a bylaw such that it restricts a cultural practice (such as cooking certain ethnic foods) can amount to discrimination under the *Code* – *Chauhan v. Norkam Seniors Housing Cooperative Association*, 2004 BCHRT 242. A bylaw which prevents a person from carrying out religious practices can also be discriminatory – *Syndicate Northcrest v. Amselem*, 2004 SCC 47.

A strata corporation might well owe a duty to a mentally ill tenant to not enforce the bylaws against them when their behaviour is a result of the disability - *Lazore and MacLaren v. Strata Plan 2527 and others*, 2008 BCHRT 212. In the case of an owner or tenant with a mental disability there is an obligation on the part of the strata corporation to discuss a possible accommodation with that person before taking enforcement steps - *M and another v. Strata Plan LMS2768 and others*, 2010 BCHRT 198. Where the conduct becomes unbearable the point of undue hardship is reached and

there is no longer any duty to tolerate minor to moderate breaches - *The Owners, Strata Plan LMS XXX v. D.B.*, 2017 BCCRT 117.

Where a strata corporation refuses to enforce a bylaw on the basis it has a duty to accommodate, there must be evidence of the disability and how it requires the strata corporation not to enforce the bylaw - *Weinrauch et al v. The Owners, Strata Plan NW 3119 et al*, 2019 BCCRT 257.

There may be occasions when an exemption to a bylaw must be granted because of an owner's disability. While that most often arises with respect to pets, it can occur in relation to other matters as well. In *K.M. v The Owners, Strata Plan ABC XXXX*, 2018 BCCRT 29 the owner requested permission to have a roommate (which was contrary to the rental prohibition bylaws) claiming that living with other people is good for her mental health. Her doctor confirmed in a letter that the applicant has "more optimal mental health with companionship offered by a roommate". However, the note from the doctor failed to state the severity of the mental health if the applicant does not have a roommate. The nexus test as not met and no exemption was required.

The passage of bylaws and rules to address and constrain the behaviour of a particular person with a mental disability may amount to a breach of the *Code* - *Erdodi v. Strata Plan LMS 1991 and others*, 2004 BCHRT 335.

RETALIATION

The *Code* protects owners and tenants who complain to the BCHRT. Section. 43 of the *Code* provides that : "a person may not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, deny a right or benefit to or otherwise discriminate against a person because that person complains or is named in a complaint, gives evidence or otherwise assists in a complaint or other proceeding under this *Code*"

To establish a complaint under s. 43, the complainant must show that:

- a previous complaint has been made under the *Code* and that respondent was aware of the complaint
- the respondent engaged in or threatened to engage in retaliatory conduct; and
- a reasonable complainant would have perceived that the respondent intended to retaliate against the applicant

Birchill v BCS 61 Strata Corporation and another, 2018 BCHRT 29

Taking steps to enforce a bylaw where there has in fact been a breach is not retaliatory - *Tenant X v Rosegate Strata Corporation NW 2402*, 2015 BCHRT 162 .

BCHRT PROCESS

An owner who believes that the strata corporation has breached the *Code* and their rights under it can file a complaint with the BCHRT. However, under s.22 of the *Code* they must do so within one year of the alleged contravention or within one year of the last alleged instance of the contravention. A late complaint may be accepted if the tribunal member determines that

(a) it is in the public interest to accept the complaint, and

(b) no substantial prejudice will result to any person because of the delay.

A failure to accommodate a disability is an ongoing contravention - *Khan v Strata Plan VR 127*, 2016 BCHRT 43.

At the time the complaint is filed the parties are given an opportunity to participate in settlement discussions with the assistance of a tribunal member. Often a compromise can be reached. However, the strata council's ability to settle is often constrained by the provisions of the *SPA*. Settlements may have to be made subject to the approval of the owners given their terms. A failure of the owners to

approve accommodation arrived at as part of a settlement does not relieve the strata corporation of its obligations under the *Code*.

A person, such as another owner, who might be affected by an order can apply under Rule 13(3) to be an intervener and make arguments at the hearing.

The *Code* also permits the respondent to a complaint to apply to dismiss the complaint before it proceeds to a hearing. Under s.27 of the *Code* a complaint can be dismissed if:

- (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
- (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this *Code*;
- (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;
- (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;

The most common ground upon which an application to dismiss is made is that the complaint no reasonable prospect of success. Under that provision, the analysis does not require factual findings but merely the assessment on the evidence submitted by the parties in order to determine that the aspects of the complaint rise above conjecture. The process is focused on the likelihood that facts

supporting the complaint could be determined after a full hearing of the evidence. The burden is on the respondent to disprove one or more of the three elements of a discrimination claim or to establish it had a reasonable and bona fide justification for its actions.

If a complaint is not dismissed at the preliminary stage, it will proceed to a hearing where it is either dismissed or upheld based on a full assessment of the evidence and a balance of probability standard.

If the BCHRT finds a breach of the *Code*, then s.37(2) sets out the remedies that are available:

(2) if the member or panel determines that the complaint is justified, the member or panel

(a) must order the person that contravened this *Code* to cease the contravention and to refrain from committing the same or a similar contravention,

(b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this *Code*,

(c) may order the person that contravened this *Code* to do one or both of the following:

(i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice;

(ii) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged individuals or groups if the evidence at the hearing indicates the person has engaged in a pattern or practice that contravenes this *Code*, and

(d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on behalf of which a complaint is filed, may order the person that contravened this *Code* to do one or more of the following:

- (i) make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the member or panel, the person was denied contrary to this *Code*;
- (ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;
- (iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.

Awards for “injury to dignity” have ranged as high as \$12,000 in the strata corporation context, although they are typically in the \$5,000 - \$7,500 range.

As a general rule, a successful party is not entitled to costs. However, the BCHRT can award costs against a party to a complaint who has engaged in improper conduct during the course of the complaint.

An order of the BCHRT can be filed in the BC Supreme Court and enforced as an order to that court., meaning a failure to comply can lead to a finding of contempt. Settlement agreements are also enforced through the Supreme Court – s.30 of the *Code*; *Siebring v. Strata Plan NW 2275*, 2016 BCHRT 94.

A party who is dissatisfied with a decision of the BCHRT can bring an application for judicial review within 60 days of the date of the decision. The standard of review for legal issues is correctness (was the law applied properly) and reasonableness for factual issues.

This article is intended for information purposes only and should not be taken as the provision of legal advice. Shawn M. Smith is lawyer whose practice focuses on strata property law. He frequently writes and lectures for strata associations. He is a partner with the law firm of Cleveland Doan LLP and can be reached at (604)536-5002 or shawn@clevelanddoan.com. He can be followed on Twitter @stratashawn.