



Human Rights & Non-Profit Housing Accommodation

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BC'S HOUSING LAWYERS™

Workshop Outline

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Human Rights Code (the Code)

Two sections in particular have application to rental accommodation

- Section 8 Discrimination in accommodation, service and facility
- Section 10 Discrimination in tenancy premises

Section 8 Discrimination in accommodation, service and facility

(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 or age of that person or class of persons.

Section 8 Discrimination in accommodation, service and facility contd.

- On the face of it, this section of the Code would appear to be restricted to services and facilities customarily available to the public.
- Strata corporations have argued that services and facilities on their common property are not customarily available to the public.
- This argument has been rejected by the Tribunal that has found:
“... that there is a public relationship between a condominium corporation and condominium owners, and that the corporation provides a variety of services to its owners.”

Section 8 Discrimination in accommodation, service and facility contd.

Section 8 does not cover any of the services provided by a landlord “as an incident of landlord-tenant relationship ... such as maintenance, security or garbage removal” (*Tenant A v. Landlord and Manager (No. 2)* 2007 BCHRT 32). Such services are covered by s. 10, the tenancy provision of the *Code*. However, if a landlord provides such services outside the landlord/tenant relationship, those would be covered by s. 8.

Section 8 Discrimination in accommodation, service and facility contd.

- Simply put, the section means that the Landlord shall not discriminate and has a **duty to accommodate** a person under a disability, up to the point of undue hardship.
- The duty to “accommodate” should not be confused with the providing of “accommodations”.

Section 10 Discrimination in tenancy premises

(1) A person must not

(a) deny to a person or class of persons the right to occupy, as a tenant, space that is represented as being available for occupancy by a tenant,

or

(b) discriminate against a person or class of persons regarding a term or condition of the tenancy of the space,

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age or lawful source of income of that person or class of persons, or of any other person or class of persons.

Section 10 Discrimination in tenancy premises contd.

(2) Subsection (1) does not apply in the following circumstances:

- (a) if the space is to be occupied by another person who is to share, with the person making the representation, the use of any sleeping, bathroom or cooking facilities in the space;
- (b) As it relates to family status or age,
 - (i) if the space is a rental unit in residential premises in which every rental unit is reserved for rental to a person who has reached 55 years of age or to 2 or more persons, at least one of whom has reached 55 years of age, or

Section 10 Discrimination in tenancy premises contd.

- (ii) a rental unit in a prescribed class of residential premises;
- (c) As it relates to physical or mental disability, if
 - (i) the space is a rental unit in a residential premises,
 - (ii) the rental unit and the residential premises of which the rental unit forms part:
 - (a) are designed to accommodate persons with disabilities, and

Section 10 Discrimination in tenancy premises contd.

- (b) conform to the prescribed standards, and
 - (iii) the rental unit is offered for rent exclusively to a person with a disability or to 2 or more persons, at least one of whom has a physical or mental disability.
- Simply put, the section means that the Landlord shall not discriminate and has a duty to accommodate a person under a disability

Section 10 Discrimination in tenancy premises contd.

A tenant's disability does not mean that they are relieved from compliance with the *Residential Tenancy Act* or the tenancy agreement. Rather, it means that if the tenant is adversely impacted by the *Act* or the tenancy agreement due to disability, then the Landlord must take reasonable steps to accommodate the tenant up to the point of undue hardship. Both parties have a responsibility in the accommodative process. The Landlord must comply with the procedural and substantive components of the duty to accommodate and the tenant must participate in the accommodative process and accept a reasonable accommodation.

Steel v. Bounty Housing Co-operative, 2010 BCHRT 1

Neiser v. H.W. Flesher Housing Co-operative, 2016 BCHRT 122

Protected Grounds

- Race
- Religion
- Colour
- Marital status
- Ancestry
- Family status
- Place of origin
- Age
- Sex
- Physical or mental disability (which includes HIV/AIDS and drug or alcohol addiction)
- Sexual orientation
- Lawful source of income

Traditional Human Rights Analysis

The traditional analysis for discrimination under the Human Rights Code requires the claimant to establish:

- That the claimant is, or is perceived to be, covered by a protected ground under the Human Rights Code;
- That the claimant must have experienced adverse treatment
- That the protected ground must have been a factor in the adverse treatment.

Armstrong v. British Columbia (Ministry of Health), 2010 BCCA 56

Lavender Housing Co-operative v. Ford , 2011 BCCA 114

The protected ground need only be a factor in the adverse treatment to establish discrimination. It does not need to be the sole or overriding factor.

The BC Human Rights Tribunal Process

- An independent, quasi-judicial body created by the Human Rights Code.
- Responsible for dealing with complaints made under the Code.
- Responsible for resolving Human Rights complaints by either:
 - Helping the parties resolve the complaint; or
 - By holding a hearing and making a decision.
- Operates like a Court, but is somewhat less formal.

The BC Human Rights Tribunal Process contd.

- Complainant files a complaint directly with the Tribunal
- The Tribunal will initially attempt to determine whether, on its face, the complaint is:
 - within the jurisdiction of the Tribunal and/or
 - the time limitations for bringing a complaint under the Human Rights Code.
- If the complaint is dismissed, a potential respondent may never know that a complaint had been made.
- It may take several attempts by a complainant, with several amendments to their complaint being made, before it is accepted by the Tribunal to proceed.

The BC Human Rights Tribunal Process contd.

- After receiving the complaint, the respondent has 35 days to file a response
- This deadline may be relaxed if the parties agree to an early settlement conference.
- In formulating a response, the respondent should consider the following:
 - If there has been a violation of the Code, early settlement would be the wisest course to avoid any increased liability;
 - If the respondent is of the opinion that there has been no Code violation then the respondent will consider:
 - i. A substantive defense; and/or
 - ii. An application to dismiss.

The BC Human Rights Tribunal Process contd.

Application to dismiss

- A respondent to a human rights complaint may ask the Tribunal to dismiss all or part of the complaint because they believe:
 - The Tribunal lacks jurisdiction to address the complaint;
 - the acts or omissions alleged in the complaint do not conflict with the Code;
 - there is no reasonable prospect of success;

The BC Human Rights Tribunal Process contd.

- proceeding would not benefit the complainant or further the purposes of the Code;
- The application to dismiss must be made:
 - at least 70 days following the acceptance of the complaint by the Tribunal;
 - or
 - within 30 days from the date which new information or circumstances which would form the basis of a dismissal application are brought to that party's attention.

The BC Human Rights Tribunal Process contd.

- the complaint was filed for improper motives or in bad faith;
 - another proceeding has dealt with the substance of the complaint;
 - the time limit for bringing the complaint has expired.
- From a tactical perspective, making an application to dismiss at the outset may be good practice.
 - The reason for dismissal could be plain and obvious.

The BC Human Rights Tribunal Process contd.

- The application to dismiss requires a response from the complainant.
- Since the abolishment of the Commission and the removal of their investigative procedure, the Tribunal now must rely upon information and advice provided by the parties on applications.

The BC Human Rights Tribunal Process contd.

1. Mediated settlement
 - The parties to the dispute may engage in settlement discussions with or without the assistance of the Tribunal at any time.
2. Document and information exchange
 - Prior to the hearing date and based on Tribunal imposed deadlines, the Tribunal will order:
 - Document exchange;
 - Delivery of remedies sought;
 - Witness lists
3. Hearing Date
 - The Tribunal will set down a hearing date on days convenient to the parties.

Director Issues

Who wants to be a director?

One hundred fifty (150) years of corporate and commercial law have established the concept of limitation of liability on directors who act on behalf of the corporations whom they serve.

- For instance, an aggrieved party cannot sue a director of a company that made a corporate decision to breach a contract for services when the corporation was a party to a contract with the aggrieved party. The aggrieved party's action lies against the corporation only.
- Directors do not enjoy similar immunity under the *Human Rights Code*. The *Code* prevails over all other legislation and law.

Director Issues contd.

“However, in naming a corporate party as respondent, the claimant is not thereby precluded from also naming individual respondents who are employees, directors or officers of the corporate respondent: ... what is required is some allegation and complaint that the named individual respondents breached the *Code*. “

Dindial v. Capital Region Housing Corporation and others
(No. 2) 2004 BCHRT 95

Director issues contd.

“The situation of Strata Council members is not different from that of officers or directors of corporations. Many complaints are filed with the Tribunal that name a corporate respondent and also officers or directors of the corporation. This is because, under the *Code*, “persons” must not contravene the requirement of the *Code*. If individuals are able to hide behind a corporate veil, the purposes of the *Code* could be thwarted. In my view, the potential of personal liability is an important factor that serves to ensure compliance with the *Code*.”

Kayne v. The Owners Strata Plan LMS 2374 [2004]
BCHRT 62

Director issues contd.

- There may be insurance coverage available for directors on a Human Rights claim. Coverage depends on how the complainant has drafted the complaint. For example, an allegation of wrongful eviction along with an allegation of a Human Rights violation has triggered potential coverage for legal defense costs. Always notify your insurer when a Human Rights claim is made.
- Additionally, it is improper for corporations to simply agree to defend the director if the director is made a party in a Human Rights complaint. Certain steps must be undertaken pursuant to provisions of the *Business Corporations Act* and/or *Society Act* before the company may agree to undertake the defense of a director.

Defences

- There are the usual defences available to Landlords namely
 - that the Tribunal lacks jurisdiction or
 - the complainant simply can't make out a case of discrimination based on the facts.
 - That a reasonable accommodation was offered and refused.
- Even if the complainant is able to establish a case of discrimination, the Landlord does have defences that they may rely upon.

Defences contd.

- When a complainant establishes a case of discrimination under the *Code*, the onus then shifts to the respondent Landlord to establish a bona fide reasonable justification (“BFRJ”) for its conduct. In order to establish this justification, the Landlord must prove that:
 1. They adopted the standard for a purpose or goal that is rationally connected to the function being performed.
 2. It adopted the standard in good faith, and in the belief that it is necessary to the fulfillment of the purpose or goal; and

Defences contd.

3. The standard is reasonably necessary to accomplish its purpose or goals, in the sense that the Respondent cannot accommodate the Complainant without incurring undue hardship.

British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1993] 3 SCR 868 (“Grismer)

Defences contd.

In most situations, Landlords are able to prove Items 1 and 2. It becomes harder to prove the Landlord cannot accommodate the Complainant without incurring undue hardship.

- The defence the Landlord may be able to rely upon on most occasions is excessive cost. Several factors come into play with the excessive cost argument:
 - Most non-profit housing providers in this province receive some level of public funding;
 - Non-profit housing providers have often had agreements with CMHC or BC Housing that limits the expenditures they can make.
 - Budgets may be subject to review by CMHC or BC Housing;
 - Many non-profits have absolutely no room whatsoever for any type of capital improvement that might be required for an accommodation.

Retaliation

- Retaliation for commencing a Human Rights complaint is not allowed under s. 43 of the *Human Rights Code*.

Section 10 (1) (a): Refusal to Rent

The Tribunal has found discrimination where a landlord has refused to rent on the basis that the prospective tenants were:

- HIV positive (*McDonald v. Schuster Real Estate Co.*, 2005 BCHRT 177);
- In receipt of a disability pension or income assistance (*Neale v. Princeton Place Apts. Ltd.* 2001 BCHRT 6);
- On sick leave (*Trudeau v. Chung* [1991] B.C.C.H.R.D. No. 12;
- A family (*Cha v. Hollyburn Estates Ltd.* 2005 BCHRT 409);
- Pet owners (*Holt v. Cokato Apartments Ltd.* [1987] B.C.C.H.R.D. No. 22; and
- Pregnant or had children (*Segin v. Chung*, 2002 BCHRT 42; *Huot v. Chow*, [1996] B.C.C.H.R.D. No. 45

Age Discrimination

The prohibition against discrimination on the base of age and family status is limited by s.10(2)(b), which provides that s. 10(1) does not apply in 55+ properties.

Age discrimination bylaws are not prohibited under s.9 in stratas. Age discrimination under s.10 is only prohibited to those aged 19 and over (*Bushek v. Strata Plan No. LMS13* [1997] B.C.C.H.R.D. No. 3).

Pets

A refusal to an individual with a pet will be discriminatory where the pet is a service or therapy animal necessary for people with disabilities. Two examples:

- (a) A landlord refuses to rent to a blind individual with a guide-dog, on the basis of a no pet policy (*Holt*).
- (b) Landlord refuses to rent to individual with mental disability with a therapy dog.

The Tribunal would require clear medical evidence of the need for a pet before finding a no pet policy discriminatory.

Pet policies have the potential to engage competing interests. For instance, can we balance the interests of the blind applicant against the existing tenant with severe pet allergies?

Source of Income Discrimination

This protection applies to prevent landlords from refusing to rent to prospective tenants on the basis that they are in receipt of social assistance.

For example:

- (a) In *Neale*, the landlord told the complainant that the landlord would not accept tenants who were “on assistance” explaining “[i]t’s not discrimination but they would like their tenants to be working” (*Neale*). The Tribunal found that this was discriminatory to assume, without knowing, that the complainants income was “inadequate because it was derived from social assistance” (para. 58).
- (a) The respondent refused to rent to the complainant because he received a disability pension (*Tanner*).

The prohibition on discrimination based on lawful source of income does not mean that a landlord cannot ask about the *amount* of a complainant’s income.

Number of Occupants in a Rental Unit

The Tribunal has considered whether a refusal to rent based on a policy of maximum occupancy per unit can be discriminatory on the basis of family status. It is not discriminatory as long as it is applied without distinction. For instance in *Cha*, the Respondent's leasing agent told the complainants that, because they are a "family" they could only rent a two bedroom apartment instead of a one bedroom apartment. The Tribunal held that they had been discriminated against on the basis of family status. There probably would have been no discrimination if the leasing agent had used "maximum occupancy" as the reason rather than "family".

Family

In *Segin*, a landlord refused to rent to pregnant complainant because of concerns that her child would one day fall down the stairs. The Landlord said that the building was an “adult only building”. The Tribunal found that the pregnancy and family status were discriminatory barriers to renting the suite.

In *Huot*, a landlord concerned that the pregnant complainant’s baby would cry at night, disturbing other tenants. The landlord required prospective tenants to have a “quiet lifestyle”. In these circumstances, the Tribunal found discrimination on the basis of family status and pregnancy

Family Status/Relatives

Individuals are protected from discrimination based on the acts or omissions of their relatives. The theory is that one should be judged by their own actions, not the actions of others.

In *Campbell v. Abbotsford Co-operative Housing Association*, the Complainant and her incarcerated husband made application to join the co-operative. The co-op rejected the application because the husband was incarcerated and Ms. Campbell lodged a complaint. The complaint that was dismissed because being incarcerated is not a protected ground under the Human Rights Code.

Family Status/Relatives contd.

In *Victoria Gardens Housing Co-op v. Nicolosi*, the co-op rejected Ms. Nicolosi's application for membership for, among other things, that fact that her daughter was already residing in the co-op had created quite a lot of trouble for the co-op. The Supreme Court upheld the decision of the Tribunal finding discrimination as against the elder Nicolosi because the co-op had considered the behavior of the younger Nicolosi in determining the elder Ms. Nicolosi should not be allowed into membership.

The irony in these situations is that if the elder and younger Ms. Nicolosi applied together, the co-op would have been justified in rejecting their joint application as was found in the *Campbell* case above.

Smoking

- 2016 brought numerous decisions regarding second hand smoke complaints
- One of the most recent complaints required the strata corporation to:
 - (a) Engage an air quality specialist to determine the source of smoking coming into the complainant's unit;
 - (b) Work with the unit owner to determine if preventing smoke ingress is possible ;
 - (c) Pay the complainant \$7,500 for injury to dignity, feelings and self-respect.

Leary v. Strata Plan VR1001, 2016 BCHRT 139

At the end of the decision, the Tribunal offered an opinion on how the strata corporation should address the request for an accommodation to second hand smoke. They were as follows:

Smoking contd.

The person seeking accommodation

The person seeking accommodation must:

- Advise the strata council of their disability. The person must provide enough information for the strata council to understand that the person has a disability that is negatively affected by second-hand smoke in the strata.
- Co-operate with the strata to provide sufficient medical information to meet these goals. This may include a medical report. A brief doctor's note on a prescription pad will probably not be comprehensive enough to establish the need for accommodation and allow the parties to understand what options are appropriate.

Smoking contd.

- Co-operate with the strata to discuss possible solutions. The person seeking the accommodation is not entitled to a *perfect* accommodation, but to one that reasonably addresses their needs and upholds their dignity in their housing.
- Co-operate with professionals or other parties who may have to be involved to explore accommodation solutions. A person may have to facilitate access to their unit and ongoing requests for information.

Smoking contd.

The strata council

The strata council must:

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

Smoking contd.

- Restrict access to a person's medical information to only those individuals who are involved in the accommodation process and who need to understand the underlying medical condition. The strata council should keep medical information confidential from the general membership of the strata.
- Obtain expert opinions or advice where needed. For second hand smoke, a "sniff test" undertaken by another strata member will rarely be sufficient to evaluate the extent of a problem with smoke in an suite. The strata may have to retain air quality experts. The strata should pay for any tests of expert reports.
- Take the lead role in investigating possible solutions. Co-operate with the person seeking the accommodation to constructively explore those solutions.

Smoking contd.

- Rigorously assess whether the strata can implement an appropriate accommodation solution. In doing so, the strata may have to consider the financial cost and competing needs of other strata members with disabilities. In some circumstances, a solution may not be possible without the strata suffering undue hardship. In the case, the strata council should document the hardship and test its conclusion to ensure that there is no other possible solution.
- Recognize that the strata cannot, through its membership, contract out of the *Human Rights Code*. This means that a strata cannot rely on a vote of its membership to deny an accommodation.
- Ensure that the strata representatives working on the accommodation are able to approach the issue with an attitude of respect. Members of a strata council whose behaviour risks undermining genuine efforts at co-operation and conciliation may need to be removed from the process.

Appropriate Response to Smoking

“however, I am persuaded that in the circumstances of this complaint, the respondents took reasonable steps to accommodate the complainants and limit their exposure to SHS. I find that the respondents were initially unaware of the complainant’s required accommodation and, when they did become aware, took steps to try to minimize exposure to SHS through such things as offering available units for relocation, amending the lease it utilized, adopting and enforcing a smoking policy and moving towards a smoke free environment by 2018, maintaining and inspecting the ventilation system and removing the “smoking pit” further away from the building and offering tenant to tenant dispute resolution to try to reach accommodations. I am also satisfied that the complainants did not fully participate in the accommodation process and sought a perfect and preferred accommodation rather than a reasonable accommodation”

Borutski and others v. Crescent Housing Society and another (No. 3) 2014 BCHRT 124

Smoker's Rights

- Medical Marijuana
- Smoking as a disability

Stopping a complaint before it starts

- Education
- Tenant code of conduct
- Leadership from the board
- Clear policies applied fairly and consistently

Resources

B.C. Ministry of Attorney General Human Rights protection

www.ag.gov.bc.ca/human-rights-protection

B.C. Human Rights Tribunal

www.bchrt.bc.ca

B.C. Human Rights Code

www.bchrt.bc.ca/human_rights_code/default.htm

BC Human Rights Coalition www.bchrcoalition.org

- Human Rights: your rights to know
www.bchrcoalition.org/files/RightsToKnow.pdf
- Responding to incidents of racism and hate: a handbook for service providers
www.bchrcoalition.org/files/Racism-handb.pdf



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