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## Accessibility in Strata Developments: What Does the Human Rights Code Require?

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Accessibility in multi unit residences is a critical and vital issue for individuals with disabilities. Strata corporations must understand their obligations in respect of accessibility in order to respond appropriately to requests for alterations either to strata lots or to common property.

Accessibility is addressed through *the Human Rights Code* (the “HRC”) which is legislation that prohibits discrimination on a variety of factors. The Human Rights Tribunal (the “HRT”) enforces the HRC.

Whether examining the *Strata Property Act* (the “SPA”) or the HRC, it is evident that strata corporations must be mindful of, and are subject to the HRC. Section 121(1)(a) of the SPA provides that a bylaw of the strata corporation is not enforceable to the extent that it contravenes the HRC, except as it relates to age restrictions. Section 4 of the HRC provides that the HRC prevails over all other legislation. As a consequence, the HRC not only applies to the creation and enforcement of a strata corporation’s bylaws, but to all of the decisions the strata corporation makes either by the strata council or by a vote of the owners.

Some strata councils have difficulty accepting that the strata corporation may have an obligation to make a development more accessible to individuals with disabilities for the reason that often, the physical components and layout of the building were known to the person with the disability at the time they purchased or rented their strata lot. However, such a view does not support the overall purpose of human rights legislation.

In the decision *Biggings obo Walsh v. Pink*<sup>1</sup>, the HRT explained the purpose of human rights legislation as it relates to accessibility. Although the decision relates to access to a rental unit, the explanation is equally applicable to strata developments.

The goal of human rights legislation is transformative. It is intended to foster an equitable society ... Accommodation is the process of “fine-[tuning] society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them”.

If strata corporations were able to avoid making buildings and facilities accessible on the basis that the owner should not have bought in the building in the first place, individuals with disabilities would be banished to very specific and limited housing. Such a view is not acceptable and would not support a strata corporation’s failure to make appropriate alterations to permit accessibility as explained in more detail below.

### What Does Discrimination Look Like

The HRT has determined that section 8 of the HRC applies to strata corporations in their interaction with owners and tenants. Section 8 of the HRC provides:

#### Discrimination in accommodation, service and facility

8 (1) A person must not, without a bon fide and reasonable justification,

- (a) deny to a person or class of persons regarding any accommodation, service or facility customarily available to the public

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<sup>1</sup> *Biggings obo Walsh v. Pink and others*, 2018 BCHRT 174

(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.

(2) A person does not contravene this section by discriminating

(a) on the basis of sex, if the discrimination relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of life or health insurance, or

(b) on the basis of physical or mental disability or age, if the discrimination relates to the determination of premiums or benefits under contracts of life or health insurance.

When considering whether the application of a bylaw or a decision of the strata corporation is discriminatory, many strata councils and owners are of the view that as long as the bylaw or decision is applicable to all owners, it cannot be discriminatory. This view was expressed by the strata council in *Konieczna v. Strata Plan NW 2489*<sup>2</sup>. However, this is not how the HRT determined whether the application of a bylaw was discriminatory.

In *Konieczna*, the strata corporation's bylaws provided that wall to wall carpeting with appropriate underlay was the only acceptable in suite flooring. The complainant suffered from allergies. The complainant's doctor and respiratory specialist both advised that the carpet in the complainant's strata lot should be removed. However, the strata council refused to grant an exemption from the bylaw to permit the installation of hard surface flooring. With respect to whether the bylaw was discriminatory, the HRT concluded that it was for the following reasons:

The policy applies equally to all residents. Although the bylaw is neutral on its face, and applies equally to all residents, the complainant is adversely affected by the bylaw because of her physical disability. The bylaw affects her

health and quality of life in a way it does not for other residents who do not suffer from the complainant's disability. Thus, the bylaw adversely affects the complainant by imposing on her a burden which is not imposed on other [owners].

As confirmed in *Konieczna*, discrimination will exist if the application of a bylaw or a decision of the strata council or strata corporation adversely affects an individual differently because of a disability.

In the case of *Mahoney obo Holowaychuk v. The Owners, Strata Plan NW 332*<sup>3</sup> the HRT explained the meaning of equal treatment as follows:

equal treatment based on disability means that persons with disabilities have a right to the provision of services and facilities in as dignified and full a way as able-bodied individuals the outside of the building

### **Establishing Discrimination**

The decisions of the HRT provide a useful guide for strata corporations when considering what constitutes discrimination and what steps a strata corporation must take in response to requests for alterations either to a strata lot or to common property.

In order for an individual to challenge a decision of the strata corporation under section 8 of the HRC, the complainant must establish a *prima facie* case of discrimination.

A *prima facie* case of discrimination is established if the complainant can show that he or she was denied a service or received differential treatment with respect to a service or disability customarily available to the

<sup>2</sup> *Konieczna v. The Owners, Strata Plan NW2489, 2003 BCHRT 38*

<sup>3</sup> *Mahoney obo Holowaychuk v. The Owners Strata Plan NW332 and others, 2008 BCHRT 274*

public because of 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. When considering access to strata lots and common property in a strata development, the most common basis for discrimination is on the basis of a physical or mental disability.

The first step, therefore, is that the complainant must establish that they have a disability. In *BH obo CH v. Creekside Estates Strata KAS1707*<sup>4</sup> the strata corporation argued that the complainant had failed to provide sufficient medical evidence. The HRT stated that the onus is on the complainant to establish that he has a disability and to disclose at least the nature of the disability, and if an accommodation is being asked for, the nature of the accommodation and how it ties to the disability.

In some cases, additional medical evidence may be ordered to be provided by the HRT. In *Basic v. Strata Plan BCS 1461 (No. 2)*<sup>5</sup>, the complainant requested the installation of automatic door openers on certain common property doors. The complainant provided a doctor’s note stating “the complainant is required to be in a wheelchair due to morbid obesity and secondary weakness of his lower limbs”. The HRT found the information provided to be insufficient for the strata corporation to determine the nature of the disabilities and any limitations arising from those disabilities. To obtain sufficient information the HRT ordered the complainant to provide his complete medical records to the HRT, after which the HRT would advise the respondents, as appropriate, and receive submissions regarding disclosure.

Not all claims that an individual has a disability are supportable. In *Harton v. Strata Plan LMS 195*<sup>6</sup>, the

strata corporation denied the complainant permission to install a sun screen on his balcony. The complainant stated that he had fair skin, and was at risk of developing skin cancer. The only medical information provided to the strata corporation was a doctor’s note which stated “For medical reasons Brian Harton requires a sun screening device for his balcony – to prevent skin damage.”

The HRT refused to agree that the complainant had a disability and stated that the concept of a physical disability “for human rights purposes, generally indicates a physiological state that is involuntary, has some degree of permanence, and impairs the person’s ability, in some measure, to carry out the normal functions of life”. In *Harton*, the HRT did not agree that the complainant’s susceptibility to skin damage impaired or adversely affected his ability to perform normal functions of daily life.

Once a complainant can establish a disability, the complainant must then show that they received differential treatment or were denied a service or facility and that their disability was a factor in the differential treatment or that it adversely affects the disability.



The facts must show that the differential or adverse treatment alleged is related, in whole or in part, to a prohibited ground of discrimination. In other words, in order to amount to discrimination under the HRC there must be facts alleged which show, or from which a reasonable inference could be drawn, that there was a connection, or nexus, between the allegedly discriminatory conduct and a prohibited ground of discrimination.

In *Basic*, referred to above, the HRT noted that the doctor’s letter simply recorded what the complainant told him and was of little assistance in understanding whether the decreased mobility results in the need for automatic door openers.

<sup>4</sup> *BH obo CH v. Creekside Estates Strata KAS1707 and another, 2016 BCHRT 100*

<sup>5</sup> *Basic v. Strata Plan #BCS 1461 and Bosa Properties (No 2), 2007 BCHRT 277*

<sup>6</sup> *Harton v. Strata Plan LMS 1995, 2010 BCHRT 132*

Additionally, the fact that an individual has a disability does not necessarily mean that a failure to agree to their request for alterations is discriminatory. In the case of *Ross v. Strata Plan NW 608*<sup>7</sup> the complainant owned a ground floor strata lot and requested permission to install a gate in the fence surrounding his patio and a pathway over common property to permit easier access to the public sidewalk. The HRT concluded that the only basis for the request was convenience and that the gate and pathway were not necessary to accommodate a disability.

Determining whether an individual has a disability, and whether their request for an alteration is required in order to prevent discrimination is often not a simple or straightforward task. Although not every request must necessarily be granted, strata corporations should be diligent in gathering the necessary information relating to the disability and establishing the connection between the disability and the request.

### **Accommodating a Disability**

Once a *prima facie* case of discrimination has been established, a strata corporation must show that the discriminatory conduct was bona fide and reasonable justified. The strata corporation must establish that it accommodated the complainant to the point of undue hardship<sup>8</sup>. When considering whether the conduct was *bona fide* and reasonably justified, the HRT has identified the following factors:

1. Was the policy change/action reasonably necessary to accomplish a legitimate purpose or goal of the strata corporation?
2. Was the policy change/action implemented in good faith, and the belief that it was necessary for the fulfillment of a legitimate purpose?
3. Can the strata corporation show that it could not meet its goal and still accommodate the

complainant without incurring undue hardship?<sup>9</sup>

Generally speaking, a strata corporation will be able to meet the first two criteria. The difficulty arises with respect to the third factor. A strata corporation often cannot demonstrate that it could not meet its goal and still accommodate the complainant without incurring undue hardship. It is within this third element of the defence that the strata corporation's 'duty to accommodate' arises.

As noted in *Biggings*<sup>10</sup>, referred to above,

Where a physical barrier prevents a person with a disability from accessing their rental unit safely and with dignity, accommodation requires that the housing provider take all reasonable and practical steps to remove that barrier. ... This exercise is not always easy, convenient or cost effective.

It is often the case that a strata corporation may pass bylaws or make decisions without knowing that a decision may have a discriminatory effect. However, once the strata corporation becomes aware of the discrimination, the strata corporation has a duty to consider what accommodations may need to be made<sup>11</sup>.

To establish that it has not discriminated against an individual, a strata corporation must show that the strata corporation has taken all steps available to accommodate the complainant and that any other accommodation would cause undue hardship.

As noted by the Supreme Court of Canada, there "may necessarily be some hardship in accommodating someone's disability but unless that hardship imposes an undue or unreasonable burden, it yields to the need to accommodate"<sup>12</sup>.

<sup>7</sup> *Ross v. Strata Plan NW 608*, 2007 BCHRT 80

<sup>8</sup> *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868.

<sup>9</sup> *Williams v. Strata Plan No. 768 (No 2)*, 2003 BCHRT 165

<sup>10</sup> *Biggings obo Walsh v. Pink and others*, 2018 BCHRT 174

<sup>11</sup> *Brown v. The Owners, Strata Plan LMS 952*, 2005 BCHRT 137

<sup>12</sup> *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 SCR 650, 2007 SCC 15

Undue hardship may arise if further accommodation is impossible or can only occur at excessive cost.

If the strata corporation argues that the cost is excessive, the strata corporation must provide evidence that the cost imposes an undue hardship on the owners. In *Mahoney*<sup>13</sup> the complainant was elderly and walked with a walker. The complainant alleged discrimination on the basis that the strata corporation refused to install a ramp over lobby stairs to facilitate access to the elevators. The HRT held that the strata corporation had not provided evidence that the use of the contingency reserve fund, or an amount of a special levy of approximately \$1,000 per strata lot would be an undue hardship.

In *Basic*<sup>14</sup>, the HRT refused to accept an argument by the strata corporation that compliance with the building code is a complete defense to a claim of discrimination.

Accommodation will look different in each case. Accommodation may be the installation of automatic door openers or a wheel chair ramp, addressing the matter of second hand smoke, or permitting an owner to install a solar sun screen on their window, an air conditioner, or hard surface flooring. Regardless of the request or the outcome, there is no question that both parties must participate in identifying a solution.



<sup>13</sup> *Mahoney obo Holowaychuk v. The Owners Strata Plan NW332 and others*, 2008 BCHRT 274

<sup>14</sup> *Basic v. Strata Plan #BCS 1461 and Bosa Properties (No 2)*, 2007 BCHRT 277

### The Accommodation Process

In *McLoughlin v. British Columbia (Ministry of Environment, Land and Parks)*<sup>15</sup> the Tribunal described the nature of the accommodation process as a cooperative dialogue where the parties work together to find a solution that adequately balances competing interests:

To my mind, the process ... is one in which all those involved are required to work together to find a solution that adequately balances the competing interests. The process requires the party best placed to make a proposal to advance one. The other party or parties 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 cooperation is obviously beneficial to this process.

In the case of *Williams*<sup>16</sup>, the HRT held that the search for accommodation is shared by the parties. The HRT stated that although the complainant can make suggestions, the strata corporation was in the best position to determine how the complainant can be accommodated without undue interference in the operation of the strata property.

In *Shannon v. The Owners, Strata Plan KAS 1613 (No.2)*<sup>17</sup>, the complainant's strata lot was located in Osoyoos. The complainant had COPD which was made worse as a result of continuous exposure to in-home air conditioning. The complainant requested permission to install a solar screen which the strata corporation refused. At the hearing before the HRT, the strata corporation argued that there were reasonable alternatives that the complainant could use to cool his home other than a solar screen, which the strata corporation claimed was an unapproved alteration. The HRT held that it was incumbent on the strata corporation to share those alternatives with the

<sup>15</sup> *McLoughlin v. British Columbia (Ministry of the Environment, Land and parks)* 1999 BCHRT 47

<sup>16</sup> *Williams v. Strata Plan No. 768 (No. 2)*, 2003 BCHRT 165

<sup>17</sup> *Shannon v. The Owners, Strata Plan KAS 1613 (No. 2)*, 2009 BCHRT 438

complainant so that they could be considered in a cooperative manner.

A complainant, however, must be responsive and give serious consideration to reasonable suggestions for accommodation<sup>18</sup>.

In considering requests for alterations to accommodate a disability, a strata corporation has a duty to ensure that a strata lot owner follows the procedure set out in the bylaws regarding a proposed renovation. In *Calderoni v. Strata Plan No. K6*<sup>19</sup> the complainant requested permission to convert a car port into living space, however she did not provide the strata corporation with a drawing of what she proposed, or that her request would satisfy local building codes. The HRT dismissed the complainant's claim on the basis that it was premature.

In *Testar v. The Owners, Strata Plan VR 1097*<sup>20</sup> following a stroke that impacted her eyesight in one eye, the complainant requested a tram to access her bare land strata lot that was at the bottom of a steep hillside which was accessible by approximately 100 stairs. In response to the request, the strata council requested detailed plans and other information including the impact on and interference with other strata lots. The requested information was not provided. The HRT dismissed the complainant's claim for two reasons. Firstly, the HRT was not satisfied that the complainant had made out a prima facie case of discrimination. Although the complainant had a disability, the HRT stated that it was not provided with evidence that the complainant could not ascend and descend the stairs in a dignified manner. Additionally the HRT found that the parties had not fully engaged in the process described above in *McLoughlin*.

### **Who Must Be Accommodated?**

There is no question that strata corporations must accommodate owners, however, the need to accommodate tenants is less clear. The HRT has concluded that a strata corporation must not

contravene the HRC in their dealings with tenants<sup>21</sup>. Additionally, strata corporations are also subject to section 9 of the HRC when dealing with prospective purchasers<sup>22</sup>. Section 9 of the HRC provides:

### **Discrimination in purchase of property**

9 (1) A person must not

- (a) deny to a person or class of persons the opportunity to purchase a commercial unit or dwelling that is in any way represented as being available for sale,
- (b) deny to a person or class of persons the opportunity to acquire land or an interest in land, or
- (c) discriminate against a person or class of persons regarding a term or condition of the purchase or other acquisition of a commercial unit, dwelling unit, land or interest in land because of the race, colour, ancestry, place of origin, religion, marital status, physical or mental disability, sex, sexual orientation, or gender identity or expression of that person or class of persons.

In *Jones v. The Owners Strata Plan 1571*, the complainant alleged discrimination in the purchase of a strata lot when the strata council refused permission for an exemption for an assistance dog that exceeded the size restriction in the bylaws. Although s. 9 of the HRC does not specifically refer to the defence of bona fide and reasonable justification, as is contained in s. 8 of the HRC, the HRT in *Jones* found that the strata corporation had failed to accommodate the complainant to the point of undue hardship.

### **Conclusion**

The need for strata corporations to accommodate individuals with disabilities in creating accessible common property and permitting alterations to strata lots is both important and necessary. While in some

<sup>18</sup> *Epp v. Strata Plan VR2692, 2009 BCHRT 97*

<sup>19</sup> *Calderoni v. Strata Plan No. K6, 2009 BCHRT 10*

<sup>20</sup> *Testar v. The Owners, Strata Plan VR 1097, 2009 BCHRT 41*

<sup>21</sup> *Lazore and McLaren v. Strata Plan 2527 and others, 2008 BCHRT 212*

<sup>22</sup> *Jones v. The Owners, Strata Plan 1571 and other, 2008 BCHRT 200*

cases what is necessary to accommodate a disability may be obvious and straightforward, in other cases, as a review of the foregoing cases considered by the HRT demonstrates, whether accommodation is necessary and what the accommodation will look like is neither obvious nor straightforward. What is clear however, is that strata corporations must not disregard claims of discrimination, or requests for alterations to accommodate a disability. Such requests must be considered to determine if a prima facie case of discrimination exists, and if so, what accommodations are required to satisfy the strata corporation's obligations.



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#### **Leary\* Bite-sized Checklist**

The **person seeking accommodation** must “C” to the following:

1. **Connect**: they must inform the strata of their disability and explain how their disability has been adversely impacted.
2. **Communicate**: they must provide the strata with medical information or a medical opinion explaining their disability and requested accommodation.
3. **Consider**: they must consider a range of possible solutions with the strata, not just the perfect or erred accommodation.
4. **Co-operate**: they must co-operate with professionals or parties involved with crafting solutions for them.

The **Strata must** get straight “A”s :

1. **Act**: council must address accommodation requests promptly and seriously.
2. **Assemble**: the strata must gather relevant and sufficient information to understand the accommodation.
3. **Access**: the strata must restrict access to a person's medical information and keep it confidential to only those involved in the accommodation process.
4. **Ask**: the strata must obtain expert opinions or professional advice where needed. When in doubt, ask for help.

\* *Leary v. Strata Plan VR1001, 2016 BCHRT 139*

### **Accommodation Checklist**

The following checklist is from the BCHRT Decision 139 of *Leary v. Strata Plan VR1001*\* and is a valuable method of assessing requests for alterations or changes that require consideration and accommodation under the BC Human Right's Code.

#### **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.
- 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.

#### **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.
- 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 a suite. The strata may have to retain air quality experts. The strata should pay for any tests or expert reports.
- Take the lead role in investigating possible solutions. Co-operate with the person seeking accommodation to constructively explore those solutions.
- 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 an undue hardship. In that case, the strata council should document the hardship and test its conclusion to ensure 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 corporation 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.

\* *Leary v. Strata Plan VR1001*, 2016 BCHRT 139