

Headline: A Tale of Two Smokers: Strata Councils Must Act on Complaints of Second-Hand Smoke

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McDaniel and McDaniel v. Strata Plan LMS 1657 (No. 2), 2012 BCHRT 167 and *Chorney v. Strata Plan VIS 770*, 2011 BCSC 1811

The BC Human Rights Tribunal made front page news recently for its decision to award two former condominium owners \$8,000 in damages for exposure to second-hand smoke. Although that was the first major pronouncement on the issue by the Tribunal, a decision by the BC Supreme Court last year on the same subject has taken on new significance.

In *McDaniel*, the owners alleged discrimination on the basis of physical disability. Both of them had serious pre-existing medical conditions that were aggravated by exposure to second-hand cigarette smoke. They complained to the strata corporation that second-hand smoke from common property and other strata lots was infiltrating their suite. The strata corporation sent notices out to the owners who were smoking to "remind them" that cigarette smoke was included in the nuisance bylaw. The strata corporation also convened a special general meeting to pass a bylaw against smoking on common property, but the bylaw amendment failed to pass. At the hearing before the Tribunal, the strata corporation took the position that it had "done all it could do" to accommodate the McDaniels' disability. The Tribunal disagreed and awarded the McDaniels \$8,000 for injury to dignity. The Tribunal found that what the strata corporation failed to do was to enforce the existing bylaws, which prohibit an owner from using his or her strata lot or the common property in a manner that unreasonably interferes with the use and enjoyment of other owners. The Tribunal also refused to grant the other relief sought by the McDaniels, which included the imposition of a no-smoking bylaw on the strata corporation.

That brings us to the decision in *Chorney*. *Chorney* is about a dysfunctional strata corporation operating under a court-appointed administrator. The petitioners complained of second-hand smoke coming from a neighbouring unit. The administrator issued several warning letters to the smoking owner alleging that she was breaching the strata corporation's nuisance bylaw. The smoker ignored the warnings and the administrator convened a special general meeting to approve a court action for an injunction to restrain the owner from smoking. The resolution was soundly defeated. The administrator then advised the petitioners that he would lend support to any court application they might bring, so the petitioners applied to the Court for an injunction on similar terms to those proposed by the administrator. The administrator filed an affidavit in support of the petitioners' application, but stated that he was powerless to do anything about the petitioners' complaints because the owners had defeated his resolution to authorize litigation. The administrator also stated that this dispute was really a matter between owners that did not concern the strata corporation.

The Supreme Court disagreed with the administrator's approach. Although the Court did not grant the petitioners' request for an injunction, it did order the administrator to enforce the strata corporation's existing nuisance bylaws and to apply fines if the administrator found that the strata corporation's bylaws had been contravened. The Court further held that, if the enforcement procedures were ineffective, the administrator could return to court and seek an injunction to enforce the bylaws.

The *McDaniel* and *Chorney* decisions offer useful guidance for strata councils faced with complaints about second-hand smoke. The first point to take away is that second-hand smoke may contravene the strata corporation's existing nuisance bylaws. It is not necessary to have a "no-smoking bylaw" to deal with a complaint about second-hand smoke. The second point is that complaints about second-hand smoke are not private matters between owners. The strata corporation must enforce the bylaws, even if the alleged contravention of the bylaws affects only one owner. In my submission, the result in *McDaniel* might have been different if the strata corporation had taken steps to enforce its nuisance bylaws. Instead, the council only issued warning letters. Had the strata corporation moved to enforce its bylaws, it would have been in a better position to argue that it had done all it could reasonably do to accommodate the complainants' disability.