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March 6, 2010

## Victory for non-smoking condo couple in B.C.

A decision of the British Columbia Human Rights Tribunal late last year could have an enormous effect on owners and occupants of condominiums and rental apartments across Canada in the coming months.

Paul and Rose Kabatoff live in a suite in an attractive three-storey condominium building in Langley, B.C. They both have a number of health problems including respiratory illnesses and allergies that are negatively affected by second-hand cigarette smoke.

In August 2008, smokers moved into the suite below their own. The Kabatoffs appealed for help to their condominium corporation (known in B.C. as a strata corporation), claiming that the second-hand smoke coming from their neighbours downstairs worsened their health problems. They provided a letter from their doctor supporting their request.

Ideally, the Kabatoffs wanted the condominium to adopt a no smoking bylaw, which it would not do.

Eventually, they filed a claim with the B.C. Human Rights Tribunal, asserting that the condominium failed to provide them with a housing environment free of second-hand smoke. They alleged that the condominium refused to do anything about the smoke issue, and that they were told that if they had a problem with the smokers they should move.

The B.C. Human Rights Code makes it illegal to deny accommodation to a person because of his or her physical disability (among other reasons) without "a bona fide and reasonable justification." The Ontario code has a similar prohibition, stating that every person has a right to equal treatment with respect to the occupancy of accommodation without discrimination by reason of disability (and other reasons).

As with other provincial Human Rights Codes, the B.C. code prevails in the event of a conflict with any other legislation including the B.C. Strata Property Act.

In October, the condominium (strata) corporation applied to the tribunal to have the complaint dismissed without a hearing. They based the application on the fact that the smokers were not violating any condominium bylaws. The president of the corporation said that it does not have a no-smoking bylaw and it therefore had no authority or ability to respond to the complaint.

Essentially, its position was that since there was no prohibition of smoking in an owner's private suite or balcony in the building, there was no basis for the Kabatoff complaint.

Tribunal member Marlene Tyshynski presided at the hearing, and dismissed the condominium corporation's application to toss out the complaint. She also provided a clear road map for the Kabatoffs to pursue and even succeed with their claim.

"If the Kabatoffs are able to establish that they have disabilities that are exacerbated by second-hand smoke," Tyshynski wrote, "their complaint that Strata Corp. failed to accommodate their disabilities could amount to discrimination under the code. The Strata Corp.'s application would be denied."

If the Kabatoffs are able to produce medical evidence of physical disability at the hearing of their complaint, it seems that this condominium and similar condominium or rental buildings across the country would be forced to become completely non-smoking if any occupant complains of a disability resulting from tobacco smoke.

As a human rights issue, the no-smoking requirement would supersede any building bylaw or condominium legislation in force at the time.

The idea that external legislation could affect the governing of condominium corporations will probably not go over well with the management and boards of thousands of condo and rental buildings across the country.

On the other hand, those of us who are very sensitive to tobacco smoke will chalk this case up as a significant victory for public health advocates. (Full disclosure: I am an elected member and past chair of the executive committee of the Non-Smokers' Rights Association.)

In a telephone conversation last week, Paul Kabatoff said that negotiations are underway with the new condominium board, and that his Tribunal application may not have to proceed to a full hearing.

I wouldn't be surprised if the entire building became smoke-free within the next little while.

## Kabatoff and Kabatoff v. Strata Corp. NW 2767, 2009 BCHRT 344 (CanLII)

Print: ☐ PDF Format

Date: 2009-10-13

Docket: 7043

URL: <http://www.canlii.org/en/bc/bchrt/doc/2009/2009bchrt344/2009bchrt344.html>

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[Reflex Record](#) (related decisions, legislation cited and decisions cited)

### Legislation cited (available on CanLII)

- [Human Rights Code](#), R.S.B.C., 1996, c. 210

Date Issued: October 13, 2009

File: 7043

Indexed as: Kabatoff and Kabatoff v. Strata Corp. NW 2767, 2009 BCHRT 344

IN THE MATTER OF THE HUMAN RIGHTS CODE

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

BETWEEN:

Paul Kabatoff and Rose Kabatoff

COMPLAINANTS

AND:

Strata Corporation Plan NW 2767

RESPONDENT

REASONS FOR DECISION

APPLICATION TO DISMISS: Section 27(1)(b)

Tribunal Member:	Marlene Tyshynski
On their own behalf:	Paul and Rose Kabatoff
On behalf of the respondent:	Agnes Janzen

I Introduction

- [1] Paul Kabatoff and Rose Kabatoff filed a complaint alleging that Strata Corporation Plan NW 2767 (the Strata Corp. ) discriminated against them in the area of services on the ground of physical disability, contrary to s. 8 of the *Human Rights Code* because it failed to provide them with a housing environment free of second-hand smoke.
- [2] The Kabatoffs own and reside in a suite in the Strata Corp. They both have a number of health problems including respiratory illnesses and allergies that are negatively impacted by second-hand smoke. In or about August 2008, persons who smoke moved into the suite below the Kabatoff's. The Kabatoffs state that the second-hand smoke emanating from the new residents suite exacerbates their health problems. They appealed to the Strata Corp. to assist them with the second-hand smoke issue and provided a letter from their physician in support of their request. Ideally, the Kabatoffs want the Strata Corp. to adopt a no smoking by-law.
- [3] The Kabatoffs allege that the Strata Corp. has refused to do anything about the second-hand smoke issue and that they were generally told that if they had a problem with people smoking they should move.
- [4] The Strata Corp. denies that it has discriminated against the Kabatoffs. Agnes Janzen, the president of the Strata Corp. council ( Council ) states that the Strata Corp. does not have a no-smoking by-law , therefore; it has no authority or ability to respond to the Kabatoff's complaint. The Strata Corp. says that the Kabatoffs can try to have a no smoking by-law passed by Council in accordance with the normal process for the adoption of by-laws. Ms. Janzen states the Kabatoffs have brought their complaints to Council and have been treated fairly throughout. Ms. Janzen denies that the Kabatoffs were told that if smoking was injurious to their health they should move.
- [5] The Strata Corp. applied to have the complaint dismissed. In their application they referred to s. 27 of the *Code*. I believe the Strata Corp. meant s. 27(1) which provides the Tribunal with authority to dismiss a complaint on a preliminary basis. However, the Strata Corp. did not refer to any of the seven subsections in s. 27 nor did it provide any related submissions.
- [6] The Strata Corp. s sole submission is that the Kabatoff's allegation is not a violation of their by-laws. There is no prohibition of smoking in an owner's private suite or balcony in the Strata Corp. Therefore, there is no basis for the complaint.
- [7] The Kabatoffs have filed a complaint under the *Code*. The Strata Corp. s submission is not relevant to the issue raised and does not provide a basis on which to dismiss the complaint.

[8] If I considered the Strata Corp. s submission under s. 27(1)(b), as this section seems to be the essence of their position, I would arrive at the same result. Section 27(1)(b) allows the Tribunal to dismiss a complaint when, even if the allegation in it were proven, it would not amount to a breach of the *Code*. Section 27(1)(b) reads as follows:

(1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

(b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;

[9] If the Kabatoffs are able to establish that they have disabilities that are exacerbated by second-hand smoke, their complaint that Strata Corp. failed to accommodate their disabilities could amount to discrimination under the *Code*. The Strata Corp. s application would be denied.

[10] In any event, the Strata Corp. made no submissions that were related to the *Code* and have provided no basis for dismissing the complaint against them.

## **II Conclusion**

[11] The application of the Strata Corp. to dismiss the complaint against it is denied.

Marlene Tyshynski, Tribunal Member