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Smoking issues plague condo corporations

Condominium corporations have a duty to accommodate residents who have sensitivity to second-hand cigarette smoke, according to a recent decision of the British Columbia Human Rights Tribunal. Corporations who fail in their duty may well be subject to penalties.

The case involved Melanie and Matthew McDaniel, who lived in a 39-unit condominium in Langley, B.C. Shortly after the McDaniels took possession in March 2008, they experienced second-hand smoke entering their unit as a result of other residents smoking tobacco and marijuana on the patios and decks below their unit.

For the next three years, the McDaniels were involved in lengthy ongoing communications with the board and property manager. Melanie suffers from severe allergic reactions to all types of smoke and perfumes. She was pregnant when she moved in and claims her health was being seriously affected by the smoke fumes.

Melanie kept a two-year log in which she documented some 175 incidents of smoke infiltration into her unit.

Matthew also suffers from chronic health issues, including diabetes and hypoglycemia, making it important that he avoid exposure to second-hand smoke.

The condominium corporation suggested that the McDaniels install an air conditioner, and that they attempt to get 25 per cent of the owners to petition for a no-smoking bylaw. It asked residents who smoke to be respectful of others, it wrote the owners below the McDaniel unit asking them not to smoke on their patios, and it considered imposing a total smoking ban.

Nothing worked. Eventually, the McDaniels took the matter to the B.C. Human Rights Tribunal, alleging that the condo corporation failed to accommodate their complaints adequately or appropriately.

To its credit, the condominium corporation conceded during the hearing that it failed to accommodate the McDaniels, and did not oppose their claim for expenses for items such as the air conditioner. It suggested that the tribunal did not have the authority to impose a non-smoking bylaw on the corporation, and that the smoking issue was already covered by the condominium's nuisance bylaw.

In the end, the tribunal sided with the McDaniels. It acknowledged that the McDaniels were physically and psychologically vulnerable and that they were treated by the condominium and the property managers with "what can best be termed a patronizing or benign neglect for a period of almost three years."

"I accept that the (corporation's) conduct severely diminished the McDaniels' enjoyment of the property and had a physical as well as significant emotional impact on them," tribunal chair Bernd Walter wrote in his decision.

Walter ordered that the corporation refrain from committing a similar contravention in the future (even though the McDaniels had lost their unit to foreclosure and had moved out), but declined to order that they pass a non-smoking bylaw.

The condominium was ordered to pay the McDaniels \$1,118.88 for an air conditioner and to reimburse them for naturopathic consultations.

The tribunal also ordered the condominium to pay Matthew \$2,000, and Melanie \$4,500, as compensation for injury to their dignity, feelings and self-respect.

Bradley Chaplick is a Vaughan lawyer who commented on the McDaniel case in his law firm's blog at finedeo.com/blog.

Since the B.C. Human Rights Code — like that of Ontario — prevails over other provincial legislation, Chaplick suggests that condominium corporations in similar circumstances obtain medical evidence from complainants to verify that they suffer from a disability-related need. He also recommends that discussions be held with owners to explore potential solutions, and that the corporation ensures that the smoke infiltration is not being caused by a common element deficiency.

While much of the case law relating to smoking in residential units has arisen in the human rights context, Chaplick writes, the fact that there may be a human rights aspect does very little to change the condominium corporation's obligations.

His opinion is that corporations should diligently ensure that common element deficiencies are corrected, and that reasonable steps are taken to enforce provisions in declarations, bylaws and rules prohibiting residents from creating a nuisance.

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