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

IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

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

B E T W E E N:

Rose Marie Borutski and Linda Chandler and Rosemary Hancock

COMPLAINANTS

A N D:

Crescent Housing Society and Janet Furcht

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:	Enid Marion
On their own behalf:	Rose Marie Borutski, Linda Chandler, Rosemary Hancock
Counsel for the Respondents:	Vanessa Reakes
Hearing Dates:	October 1-4, 10-12, 18, 23, November 6, December 18, 21, 2012, January 8, 11, February 1, 14, 22, 25 and April 11, 2013
Hearing Location:	Vancouver, B.C.
Written Submissions:	April 11 and 25, 2013

COMPLAINT

[1] The Complainants allege that Crescent Housing Society (the “Society”) and Janet Furcht, its general manager (collectively “the Respondents”), discriminated against them with respect to tenancy on the basis of physical disability and/or mental disability, contrary to s. 10 of the *Human Rights Code*.

[2] Each Complainant has multiple disabilities, Person with Disability (“PWD”) status and either resides or did reside in subsidized housing at Kiwanis Park Place (“Kiwanis”), which is located in White Rock, B.C. Ms. Borutski moved out of Kiwanis on July 31, 2012.

[3] The Society is a not-for-profit society whose purpose is to maintain and manage low-cost housing for seniors, disabled persons and persons with low incomes. It owns and operates Kiwanis.

[4] There are two primary buildings on the Kiwanis premises. This Complaint concerns building one (the “Building”), which offers subsidized housing for seniors (over the age of 55) and persons with disabilities. There are various wings in the Building, several floors and approximately 146 units (either bachelor or one-bedroom).

[5] Each tenant in the Building receives a subsidy from BC Housing and there is a specific operating agreement between the Society and BC Housing.

[6] Each Complainant alleges that they were subjected to second-hand smoke (“SHS”) while living at Kiwanis, and that exposure to SHS exacerbated their existing disabilities and had an adverse impact on their health and well-being. They each say that they asked the Society to limit their exposure to SHS, and that the Society failed to reasonably accommodate their physical or mental disabilities by allowing them to be exposed to SHS while resident at Kiwanis.

[7] Ms. Furcht was General Manager (“GM”) of Kiwanis from December 2006 to September 2011. There was an Acting GM for a period of time and then Mr. Quentin Wright became the GM in July 2012.

[8] The Respondents do not dispute that exposure to SHS can have deleterious health effects, including on asthma and other medical conditions. However, they say that they

took reasonable steps to reduce exposure to SHS, and to reasonably accommodate the Complainants in accordance with its legal obligations. They also dispute the impact of SHS exposure on the Complainants' health as asserted by them.

[9] In *Borutski and others v. Kiwanis Club of White Rock and others*, 2009 BCHRT 46, the Tribunal joined two complaints, which, at that time, named additional complainants, some of whom withdrew their complaints or otherwise ceased to participate in the complaint, and additional respondents, against whom the complaints have since been withdrawn or settled.

[10] As well, at the start of the hearing, Mr. Herb Watson, Ms. Dorothy Watson, Ms. Trudy Thompson, Mr. Ted Kopp and Mr. Joan Murphy were still named as Complainants. They did not attend the hearing despite having notice of the date, time and location. At the close of the Complainants' case, the Respondents applied to have the complaints filed by these individuals dismissed. These individuals led no evidence and failed to prove a breach of the *Code*. Therefore, I dismissed the complaints filed by these individuals.

[11] The style of cause has been amended to reflect the current Complainants and Respondents.

[12] I also note that the original complaint alleged discrimination contrary to both ss. 8 and 10 of the *Code*. However, by letters dated October 23 and November 28, 2008, the Tribunal only accepted the complaints against the current Respondents which were filed pursuant to s. 10 of the *Code*. There was, therefore, no complaint alleging discrimination contrary to s. 8 that was properly before the Tribunal in this case. Such a decision was consistent with the Tribunal's decision in *Tenant A v. Landlord and Manager (No. 2)*, 2007 BCHRT 321, where it stated the following regarding complaints of discrimination related to tenancy:

In my view, it would be contrary to the intention of the Legislature, as expressed in ss. 8 and 10, to superimpose s. 8 as an additional prohibition on discrimination in relation to tenancy: see *Dow v. Summit Logistics and RWU Local 580*, 2006 BCHRT 158, where analogous reasoning was employed in respect of a union's obligations under ss. 8 and 14 of the *Code*. Where a landlord or other person is alleged to discriminate against a

person in relation to tenancy, that complaint is properly brought pursuant to s. 10, and not s. 8.

Discrimination proscribed under s. 10 will include discrimination in respect of services rendered by a landlord as an incident of the landlord – tenant relationship. For example, it is common for landlords to provide services to tenants such as maintenance, security or garbage removal. The provision of such services is a term or condition of the tenancy, and any discrimination in respect of them would be caught by s. 10(1)(b).

That is not to say that a landlord could not also discriminate in respect of a service contrary to s. 8, in circumstances where the landlord provides services other than as a term or condition of tenancy. For example, a landlord might provide services to persons other than its tenants. In those cases, s. 8 would apply.

In the present case, Tenant A is a tenant of the Landlord, and any services provided to her by the Landlord or the Manager were provided to her as an incident of the landlord – tenant relationship. Therefore, Tenant A's complaint falls within s. 10 of the *Code*, not s. 8. I therefore dismiss the part of her complaint under s. 8, as it fails to allege acts or omissions which could contravene that section of the *Code*. (paras. 10 – 15)

[13] While the Complainants say that the complaint does encompass allegations contrary to s. 8 of the *Code*, the complaint is against the landlord, and not against a non-landlord service provider such as in *Abraham v. Greater Vancouver Housing Corporation and others*, 2008 BCHRT 41. To the extent there may have been any complaint alleging discrimination contrary to s. 8 of the *Code* before me, I would have dismissed it based on the reasoning in *Tenant A*.

DECISION

[14] I have no doubt that the Complainants experienced significant distress at being exposed to SHS and not being able to move to a comfortable and preferred housing situation due to their limited financial means. I am also satisfied that, to varying degrees, exposure to SHS had an adverse impact on their physical and mental health.

[15] 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 that the Complainants required accommodation and, when they did become aware, took

reasonable 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 toward a smoke-free environment by 2018, maintaining and inspecting the ventilation system, moving a “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.

[16] Given the number of tenants who were requesting accommodation due to SHS at the time, I find that the steps taken were reasonable, in the context in which the complaints arose, and to implement the measures requested by the Complainants would have constituted undue hardship.

[17] The Complaint is dismissed against the Respondents.

WITNESSES AND CREDIBILITY

[18] Where it has been necessary to assess credibility, I have had particular regard to the test set out by the B.C. Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354:

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[19] I have also considered that I can accept some, all or none of the evidence of a witness.

[20] Each Complainant testified on her own behalf. They were each thorough, sincere and passionate in the presentation of their evidence. However, much of their evidence on material issues was speculative and based on their personal interpretation rather than the objective recitation of incidents. For example, they all speculated on the origin and amount of smoke in hallways and inside their units. I have taken this into consideration in assessing their evidence. I also found Ms. Borutski to exaggerate or overdramatize her experience in her evidence. The result has been that I find her evidence about the amount and source of SHS in her unit and throughout the Building to be unreliable.

[21] None of the Complainants called a physician to testify about their medical conditions and the impact of SHS on their health. This was due, in part, to the prohibitive cost of obtaining a medical opinion, given that they were all of limited financial means. They were all advised, however, that the Tribunal could issue an Order to Attend to the physicians if they wished to obtain their evidence in that manner. Despite this, no physician gave evidence in these proceedings.

[22] Accordingly, while letters and forms signed by various physicians have been entered into evidence, I have taken into account that none of the physicians were available for cross-examination. I have also considered that some of the factual underpinning to the medical documentation submitted by the Complainants was based on information provided by the Complainants about the volume and frequency of SHS to which they stated they were subjected to in their homes. As noted later in this decision, I have not accepted their evidence about the amount and frequency of SHS to which they were each exposed, and to the extent a medical opinion was based on such accounts, it has diminished the weight of that opinion.

[23] Each Complainant submitted evidence in support of numerous expense claims. I have not considered it necessary to detail this evidence given my decision in this case.

[24] Both Ms. Furcht and Mr. Wright gave evidence. I found each of them to be straightforward, professional and consistent in their evidence. I found them to be reliable and credible and where there has been a discrepancy between their evidence and that of the Complainants, for the reasons set out later in this decision, I have accepted their evidence.

[25] Other witnesses called by the parties included:

- a) Ms. Janet Horbas, a tenant in the Building.

Ms. Horbas testified that a smoker had previously lived a unit that Ms. Hancock moved into in 2010. She also testified about a problem she had had with SHS. I have not found it necessary to review her evidence in detail in this decision, but accept that a smoker previously lived in Ms. Hancock's unit and that she was exposed to SHS while residing in the Building.

- b) Mr. Darin Froese, a BC Housing representative.

Mr. Froese described BC Housing's efforts to identify housing providers who could provide smoke-free housing and its efforts to identify opportunities to provide smoke-free pilot projects in buildings that BC Housing owned and operated. Mr. Froese testified that there are not many BC Housing or non-profit buildings that are completely smoke-free. He stated that BC Housing had run pilots but found that they started to suffer a vacancy loss when a building was made completely smoke-free. He said that while there is a demand for smoke-free housing, it is not overwhelming.

Mr. Froese explained that, in 2008, Ms. Borutski requested smoke-free housing but that there was no available building where smoking was not allowed. He stated that BC Housing would have attempted to move her to a building where there was a floor that had no smokers, but could not guarantee that people might move in around her who smoked. He said BC Housing made an offer to move her, but he recalled that Ms. Borutski refused that offer as she wanted to stay in the South Surrey/White Rock area.

Mr. Froese also recalled receiving letters of complaint about exposure to SHS from Ms. Borutski. He explained that usually they advise tenants to contact the Residential Tenancy Branch ("RTB") for dispute resolution. He stated that he might also call the housing provider to make them aware that they had received a complaint and to talk about potential remedies. He recalled that he did this after Ms. Borutski complained and inquired about such things as whether the Society could provide a smoke-free floor and whether it had checked the ventilation system. He noted, however, that BC Housing has no authority to dictate to non-profit service providers how to manage their tenant relations.

I accept that BC Housing made an offer of relocation to Ms. Borutski, and that she declined the offer. I also accept that BC Housing advised Ms. Borutski to contact the RTB and that BC Housing advised the Society to consider certain remedial solutions.

c) Tenant A, a Kiwanis tenant.

Tenant A testified about her observations of the impact of SHS on Ms. Borutski while residing at Kiwanis. It was evident that Tenant A was very supportive of Ms. Borutski's efforts to create a smoke-free environment at Kiwanis, and I have considered that her evidence in many instances was conjecture and anecdotal.

Tenant A described observing Ms. Borutski coughing and experiencing incontinence when there was smoke coming into her unit. She testified there were periods where she observed Ms. Borutski being unable to talk and her face going red when walking through smoke-filled areas. She felt that the Society's smoking policy was ineffective, and that the number of smokers resident at Kiwanis actually increased over time rather than decreased. She is aware that the lease agreements now prohibit new tenants from smoking, but believes that tenants smoke regardless of the agreement.

Tenant A described how she and Ms. Borutski decided to create a petition to request the Society to address the issue. She also testified about being offered, and accepting, a move to a different unit to reduce her exposure to SHS, but said that she was still affected by SHS despite the move. She described reporting problems with SHS and marijuana smoke numerous times without, in her view, effective resolution.

Tenant A acknowledged in cross-examination that, while she could smell smoke, she did not see SHS in her unit and did not have any measurement made of the amount of smoke, if any, actually coming into her residence. She acknowledged that the Building rooftop has been designated no-smoking since February 2012, and that after she complained about a particular tenant smoking, the smoking stopped for a period of time.

While I accept that Tenant A observed certain physical reactions by Ms. Borutski, I am unable, based on her observations, to conclude that those reactions were due to SHS. Ms. Borutski has numerous disabilities, including incontinence. I cannot, based on the scant evidence, conclude that SHS caused the incontinence observed by Tenant A.

I also find the evidence about the number of smokers increasing over time to be speculative and unreliable.

I accept that the Society offered to move Tenant A as an accommodation to reduce her exposure to SHS and that Tenant A accepted that accommodation. I also accept that there is still SHS present, to some degree, at Kiwanis.

d) Ms. Rose Naylor, a Kiwanis tenant.

Ms. Naylor described requesting a move to a new unit to reduce her exposure to SHS and how she was offered a unit within one month. She stated she was a very long-time resident and felt she would have priority to move. She described how a tenant moved across the hallway, after her move, who was a heavy smoker and that the hallway condition deteriorated. She spoke to the tenant about his smoking. She believed that the tenant was asked by the Society to leave and that he moved some time later.

I accept that Ms. Naylor was offered a new unit as an accommodation to reduce her exposure to SHS. I also accept that, after she complained about a tenant smoking, the tenant later vacated his unit.

e) Mr. Saied Al-Emam, a Kiwanis tenant and Society employee.

Mr. Al-Emam moved into Kiwanis on January 1, 2009. He was advised at the time that new tenants must sign a no-smoking addendum to their lease and that they could not smoke in the Building. He was shown the Society's smoking Policy, it was explained to him and he understood that if it was violated he could be asked to leave. In January 2010, he became employed with the Society as a

technician. He was advised to report smoking infractions if he observed them. He said that he had no authority to do anything in respect of any violation as that was the responsibility of management.

Mr. Al-Emam recalled going to Mr. M's unit with Ms. Hancock, who accused Mr. M of smoking, and that Mr. M slammed the door in her face. Mr. Al-Emam said that he walked away and later reported it to management. Ms. Furcht recalled Mr. Al-Emam reporting the incident to her, and advising her that Ms. Hancock requested she come with him to Mr. M's apartment, that there was a smell of smoke in the hallway, but people in the immediate area were entitled to smoke in their units and he was unable to say that it was Mr. M.'s unit that was the source of the smoke.

I accept that Ms. Hancock was concerned about Mr. M smoking in his unit, that she tried to confront Mr. M with Mr. Al-Emam present, and that the tenant was uncooperative.

- f) Mr. Gordon Wedman, Branch Manager, Pacific Environmental Consulting and Occupational Hygiene Services.

Mr. Wedman testified about an expert report regarding measurements taken by his firm at Kiwanis on February 13, 2009. He testified about the preparation of the report and its conclusions.

I found that his evidence did not add to, or detract from, the conclusions set out in the Report which, generally, indicated that there is no known safe exposure level to SHS, but that the level of nicotine present in the areas tested at Kiwanis was below WorkSafeBC exposure levels for workers.

- g) Mr. Reinhard Kohls, the Chairman and President of the Society.

Mr. Kohls described the Society's purpose, the steps it took in response to the complaints of SHS and its financial circumstances. He testified that the Society obtained an evaluation of the Building's ventilation system and was advised it was operating as designed and it was not necessary to replace it. He also said that the Society installed a security system, primarily for security reasons, but which was also used to monitor smoking in no-smoking areas. He further stated that it was the Board's understanding that smoking on patios and balconies was prohibited once a City of Surrey Bylaw came into force.

Mr. Kohls testified in cross-examination that the Society does not advertise for no-smoking tenants as it casts a wide net to ensure sufficient tenants to meet large mortgage obligations. He said it has, however, since September 2008, required all tenants to sign a no-smoking addendum and not to smoke in units, patios, balconies or within the areas restricted by legislation. He further stated that the Society cannot discriminate against persons who smoke, but can require them to agree to not smoke in suites and areas prohibited by legislation under their tenancy agreement.

Mr. Kohls said that the Society is moving toward being smoke-free by 2018. He said the Society is optimistic that, by that time, there will be no grandfathered tenants residing at Kiwanis, though he was not certain this would be the case.

Mr. Kohls did not believe that the Society asked all grandfathered tenants to agree to sign a no-smoking addendum and voluntarily change the terms of their tenancy when it was implemented in September 2008, though he recalled that, sometime later, it did. Mr. Kohls described a divisive atmosphere at Kiwanis and said there was a lot of opposition to the smoking policy initially. He thinks the environment became more conducive over time and it was decided to approach grandfathered tenants to see if they would agree to a change. Some tenants would not agree to change.

I find that the Society did consider replacing the ventilation system but, based on advice from its contractor, concluded it was not necessary to do so at the time. I also accept that the Society installed a security system which, to some extent, assisted in the enforcement of the smoking regulations.

[26] I will now briefly review some general information about Kiwanis, the Society's smoking policy (the "Policy"), and the Complainants and their specific circumstances. I will then provide a more detailed chronology of events at Kiwanis giving rise to this Complaint.

Smoking Regulations

[27] Prior to September 2008, Kiwanis tenants were prohibited from smoking in hallways and interior common areas of the Building. The tenancy agreement and Society policies did not prohibit tenants from smoking in their suites or on their patios or outdoor areas of the premises.

[28] On March 31, 2008, the *Tobacco Control Act* ("TCA") came into force which prohibited smoking within three metres of a doorway, window or air intake.

[29] On July 31, 2008, a City of Surrey municipal Bylaw came into force which prohibited smoking within seven and one-half metres of any opening into a building, including a door, window or air intake.

[30] In or about September 2008, the Society posted notices about the Bylaw restrictions and, in response to a tenant petition, developed and posted a smoking Policy and required new tenants to execute a no-smoking tenancy agreement which precluded smoking in units or on private patios. The Society does not preclude persons who smoke

from becoming tenants but, since September 2008, has required new tenants to agree to abide by the no-smoking covenant in the tenancy agreement and the applicable municipal and provincial smoking regulations.

[31] The new tenancy agreements also contained a stipulation that the Society could rely on a breach of the smoking rules to issue a Notice to End Tenancy.

[32] Existing tenants were “grandfathered” which meant that they could continue to smoke in their units if they were smokers. Smoking was not prohibited on outdoor premises, except within the “buffer zone”, which was the smoke-free zone created by the Bylaw.

[33] The notice stated that the no-smoking tenancy clause that banned smoking by tenants in their unit and on balconies and patios only applied to new tenants, but also stated that the Bylaw prohibited any smoking within seven and one-half metres of openings to the Building. Regardless, I am satisfied that complaints about Bylaw violations that were made to the Fraser Health Tobacco Enforcement Officer (“TEO”) (which was responsible for Bylaw enforcement), were investigated and the TEO concluded that the Society was in compliance with the Bylaws which precluded any smoking by any person in the defined areas.

Indoor Ventilation and Air Quality Testing

[34] There are several fresh air intakes located on the roof of the Building which bring fresh air into the Building hallways. The air passes through air filters which are replaced every three months. The ventilation grates are cleaned annually. Mr. Wright testified that the Building was well ventilated by the roof fans.

[35] Fresh air may enter suites through open windows or patio doors.

[36] In 2011, the Society replaced five roof air intake units. The new units bring increased fresh air into the Building.

[37] In February 2009, the Society retained Pacific Environmental Testing (“PET”) to conduct air sampling at Kiwanis. On February 13, 2009, PET obtained six air samples from various locations at Kiwanis, including near Ms. Borutski’s unit. PET’s report indicated that the samples contained nicotine in concentrations ranging between 0.0002

and 0.0006 mg/m³. The Report stated that these concentrations are less than WorkSafeBC's exposure limit which is 0.5 mg/m³ and below those levels found to be associated with health effects (0.001 to 0.01 mg/m³).

[38] The Report describes the site assessment as follows:

The site is a 32 year old apartment complex. The individual suites and common areas are heated by a hot water radiator system. A fresh air take up system was present in the hallways. It is our understanding that occupants have reported a tobacco smoke odour in some hallways. The general manager informed us that occupants have been concerned with smoke in these areas. Sampling was conducted in 6 locations, specified by the client where occupant concerns have arisen.

At the time of our visit, a sweet tobacco-like smell was noted upon entering the hallway corridor for rooms 112 to 108. The tobacco smell was not noted in any of the other locations where sampling was conducted.

[39] The Report's conclusions and recommendations were as follows:

Air sampling did identify nicotine, an indicator of environmental tobacco smoke, in the hallway samples; however, the concentrations were less than the WorkSafeBC exposure limit and less than the World Health Organization guideline. ETS is considered a carcinogen and the World Health Organization advises that there is no known safe exposure level. The indicator compounds indicate the presence of tobacco smoke, and other compounds in tobacco smoke may be present at low concentrations.

If odours persist in the hallways, consideration should be given to review the ventilation system by a heating, ventilating and air conditioning contractor. Another recommendation is to place the common areas under positive pressure. Positive pressure will prevent the infiltration of ETS from other parts of the complex. A re-circulating type air filtration unit equipped with high efficiency particulate air (HEPA) filters and activated carbon/charcoal may also be used to improve indoor air quality.

[40] Ms. Furcht testified that, upon receipt of the Report, she provided it to the Board and staff. She noted that she had requested tests be conducted near Ms. Borutski's unit and the main entry level. Based on the report, she said the Board concluded that it would continue with the measures it had already implemented to reduce smoke in the Building over time.

[41] Ms. Furcht also testified that she obtained quotes from a contractor about upgrades to the existing ventilation system and that it was in the 50-70K range, and that a

necessary roof replacement at 100K was coming up, as well as scheduled cupboard replacements. The contractor had not indicated that the upgraded system was necessary at that time, and the system was not installed.

[42] Ms. Borutski acknowledged that the ventilation system brought in fresh air from the roof to the hallways and said that there were no fresh air vents in the units, only heat registers. She also acknowledged that the Society replaced ventilation system filters every three months, and that it upgraded the system in 2011. She was unaware that it had also been upgraded in 2007.

[43] I accept that the presence of nicotine was identified in the Report. I also accept that there is no known safe level of exposure to SHS and that steps were recommended to reduce any exposure to SHS. I further accept that the Society undertook some, but not all, of the steps recommended in the Report, and that it performed regular maintenance on its ventilation system.

Grandfathered Tenants

[44] Grandfathered tenants (persons who signed tenancy agreements before September 1, 2008) could continue to smoke in their units at Kiwanis as it was not precluded under the terms of their lease.

[45] Ms. Furcht testified that, after reviewing existing tenancy agreements in 2009, she determined that there were 35 units occupied by grandfathered tenants who were known smokers. She prepared a 2009 map which identified each unit that housed a smoker, to her knowledge.

[46] She again undertook a review in May 2011, and determined that there were 26 known smokers who were grandfathered.

[47] Ms. Furcht testified that the number of grandfathered smokers has decreased over time and that this, coupled with the introduction of municipal and provincial regulation, has resulted in a reduction in the volume of SHS at Kiwanis.

[48] Mr. Wright testified that, at the date of hearing, there were 18 grandfathered smokers. The goal was to make Kiwanis smoke-free by 2018. He testified that he does

not smell smoke in the Building and is not aware of a smoke problem in the hallways or common areas.

[49] The Complainants dispute that the number of smokers has decreased over time at Kiwanis. They prepared detailed maps of the Building highlighting the various units where they believed smokers and non-smokers resided, as well as “grandfathered” tenants who may or may not smoke, but who were able to smoke in their units under the terms of their lease.

[50] Ms. Borutski testified that she was a Block Watch Captain and, as a result, was able to get the map information. She believed that the number of smokers at Kiwanis actually increased between 2008 and 2012, and that smokers would smoke near a grandfathered unit or make an agreement with a grandfathered smoker to smoke there. Apart from her expressed belief, there was no reliable evidence of this occurring, however.

[51] Ms. Borutski testified that, in 2009, she concluded there were 29 to 30 grandfathered smokers residing in the Building. She said that, at the time she left in July 2012, she believed there were 26 grandfathered smokers remaining in the Building. She acknowledged she had not seen the lease agreements of the tenants. Ms. Borutski also testified that she believed there were an additional 28 persons who smoked residing in no-smoking units, who had signed no-smoking agreements.

[52] While I appreciate the effort that went into preparing the Complainants’ maps, I accept the evidence of Ms. Furcht about the number of tenants entitled to smoke in their units. This number was arrived at through a review of existing tenancy agreements and, in my view, is more reliable than speculation about who or who is not smoking in their unit.

[53] I find that it is more probable that, over time, SHS and the number of grandfathered smokers and persons who smoked has decreased in the Building. This is consistent with the implementation and enforcement of municipal and provincial regulations, the new tenancy agreements, the report of a TEO which concluded the Society was compliant with smoking regulations, the measurement recorded by PET and the evidence of Ms. Furcht and Mr. Wright.

The Courtyard and Rooftop

[54] One of the outdoor areas at Kiwanis where persons gathered to smoke is referred to as the courtyard. It is approximately 15,000 square feet in area, including a gazebo, seating area, gardens and pathways.

[55] Tenants would often gather to smoke at a table located in the courtyard. The table was originally located near the Building, but has been moved on more than one occasion to comply with smoking regulations. It is currently located approximately 80 feet from tenant patios/balconies.

[56] Ms. Borutski and others testified that there was regular and heavy smoking in the courtyard. Ms. Borutski said that smokers “rule it” and that she did not use it because of SHS. She said that, when employees were part of the smoking group, there were regular congregation times in the courtyard centered around break times. She said sometimes people would only gather for 20 minutes, but other times would be there all afternoon smoking.

[57] Ms. Borutski acknowledged that Ms. Furcht moved the “smoke pit” in March 2008 and that it was well beyond the seven and one-half metre buffer zone. However, Ms. Borutski testified that she advised Ms. Furcht that, while SHS from the smoke pit had decreased, it had not been eliminated. She also felt that, at times, smokers were upset at her efforts to create a smoke-free environment and would increase the amount they were smoking outside.

[58] Ms. Hancock testified that people smoke in the courtyard area outside the buffer zone which precluded her from utilizing it, and that it was rare for there not to be persons smoking in the courtyard area. She agreed in cross-examination that Ms. Furcht had moved a barbeque and outdoor patio furniture away from the buffer zone and out from under tenant windows.

[59] Ms. Chandler testified that the number of persons she observed smoking outside would vary. She said that, in the evening, she would often see at least two people and sometimes three. She said it was not possible to observe the areas all the time and so she

was unable to provide precise information about the number of people actually smoking and at what times.

[60] Ms. Furcht testified that, during her tenure, there was generally smoking in the courtyard area for an hour in the morning, during the lunch hour and for a couple of hours after dinner. She said that there was a core number of three to four people, and sometimes more. She stated that there was often no one there smoking, and that there were predictable hours when people would tend to gather in the morning, lunch and after dinner. She also said that, when smoking was permitted on the rooftop deck, persons would smoke there when there was inclement weather because it was covered.

[61] Mr. Wright testified that, in his experience, most of the day, the courtyard was free from smokers. He also testified that the area is huge and people can go to other locations to avoid smoke from someone smoking. He said he has not seen anyone smoking near the waterfall during the last two months. He described the property as large, the amount of outdoor smoking that he observed to be small and that a non-smoker could enjoy outdoor areas away from anyone smoking.

[62] The rooftop area was designated as a no-smoking area in early 2012.

[63] I find that the evidence established that persons who smoked would congregate in outdoor areas and smoke at various times during the day and evening. I accept that there were times when no one was smoking there and other times when there were numerous people smoking. The number of people smoking and amount of smoke varied and was larger when employees were permitted to smoke on the Society's property. While I accept that the Complainants may have continued to smell smoke from time to time, I am unable to determine, based on the evidence, the volume of smoke emanating from this area and how much smoke infiltrated, if any, the Building units once the smoking area was moved further from the Building.

Enforcement in General

[64] Ms. Furcht and Mr. Wright both testified that Society employees monitor outdoor areas of the property to ensure persons are complying with the provincial and municipal

statutory requirements. They stated that the staff walk around the property approximately three times per day.

[65] They each also testified that Kiwanis utilizes breach letters if there is evidence a tenant has breached the Policy and that these serve as the basis for further action, if required. The tenant is advised of the violation of the tenancy agreement, asked to stop and if the violation does not, then a Notice to End Tenancy may be issued.

[66] As well, they testified that they provide the Policy to all tenants and that there are signs posted about the Policy and regulations.

[67] Mr. Wright testified that it is his practice, if he receives a complaint, to investigate it. If he smells smoke, he speaks to the tenant about the requirements of the tenancy agreement. He testified that he did not smell smoke in regard to the any of the complaints that he investigated, though, in one case, he believed the tenant had been smoking, but had lit incense to cover the smell of smoke in his unit. He testified that he advised the tenant about the Society's smoking prohibition. He said that he generally tries to resolve a complaint either through a warning or Notice to End Tenancy if there is sufficient evidence to support such an action.

[68] There were several documents entered demonstrating that the Society had issued breach letters, and evidence of RTB proceedings regarding one or more infractions.

[69] To assist in enforcing smoking rules, Ms. Furcht testified that, shortly after starting as GM, she hired Canadian K-9 to do random searches for the presence of marijuana smoke. She also reminded tenants in writing of the policy against illegal activity and that breach of tenancy proceedings would be commenced if there was evidence of marijuana smoking on the premises.

[70] Mr. Wright testified that Kiwanis currently has a contract with Canadian K-9 to do random checks at least twice a month, and that the company was retained primarily to address complaints about marijuana smoking.

Commencement of Tenancies and Advising Society of Need for Accommodation

Ms. Borutski

[71] Ms. Borutski commenced her tenancy at Kiwanis on June 25, 2007 and lived there until July 31, 2012. She testified that she has multiple disabilities. She described her disabilities in an amendment to her complaint as including chronic pain from vertebral and pelvic malalignment, pelvic floor dysfunction/incontinence, chronic fibromyalgia and myofascial, cervical disc disease, glaucoma, insomnia, fatigue, chronic asthma and chronic anxiety. She believes that the Society was aware of her sensitivity to SHS prior to her moving in, and that, once she moved in and experienced the level of SHS, she could not afford to find alternate housing.

[72] Ms. Borutski testified that she had been seeking a no-smoking living environment and, while she was aware that Kiwanis was not a no-smoking environment, she had been unaware of the level of SHS she would experience there. She does not recall whether Ms. Furcht advised her prior to moving in that there would be smokers residing near her.

[73] Ms. Furcht testified that she did not recall Ms. Borutski raising the issue of SHS during her interview for tenancy at Kiwanis. She did recall Ms. Borutski having to stand and pace during the interview due to back pain and that she described her spine disability and its impact on her during the interview. She did receive and review a letter from Ms. Borutski's doctor dated December 10, 2006 at the time of the interview. The letter did not refer to SHS.

[74] Ms. Furcht further explained that, if requests were received during the application process for smoke-free housing, that she would advise that Kiwanis does not offer a smoke-free building or premise, and that there are tenants who have lived there for decades who smoke. She also said that they would recommend a prospective tenant look elsewhere if they had a problem with SHS.

[75] I accept that the Society and Ms. Furcht were unaware of Ms. Borutski's sensitivity to SHS at the commencement of her tenancy. Ms. Furcht was clear and consistent about her interview practice, there was no documentation provided to the Society during the application process which stipulated that Ms. Borutski required

smoke-free accommodation, and Ms. Borutski was unclear in her recollection of whether or not she advised Ms. Furcht during their interview.

[76] Ms. Borutski moved into Kiwanis and testified that a grandfathered smoker lived under and to the south of her until March 2011. She believed that smoke from that unit came up through the floor and walls.

[77] Ms. Borutski also testified that a grandfathered smoker lived next door to her from March 2008 until she moved out of Kiwanis, and that she also experienced SHS coming into her unit from the hallways. As well, she believed that SHS emanated from a tenant smoking in a no-smoking unit from June 2011 until around April 2012. Ms. Borutski further said that she experienced SHS in the courtyard where she said smokers congregated and the wind carried the smoke to her unit, and in the hallways and lobby of the Building.

[78] Ms. Borutski acknowledged in her evidence that she did not obtain any expert evidence as to the source or quantity of SHS in her unit or hallways of the Building, and explained that she was unable to do so, given her limited financial resources.

[79] Ms. Borutski testified that, in late March and early April 2008, when she first advised Ms. Furcht of the SHS issue and how it was affecting her, Ms. Furcht offered to move her but that there were no available units at the time. Ms. Borutski said that she would have moved if the move offered her improved circumstances.

[80] Ms. Furcht recalled Ms. Borutski coming to the office and advising her that she had never lived in a building with so much SHS and that it was a problem for her. Ms. Furcht said that she advised Ms. Borutski that she could consider moving, and Ms. Borutski advised her that she did not want to move and Ms. Furcht replied that she understood, since Ms. Borutski had a very nice unit. Ms. Furcht also recalled offering to weather-strip and to facilitate a meeting with the tenants Ms. Borutski identified as the source of the SHS, which Ms. Borutski declined.

[81] Ms. Borutski testified that exposure to SHS exacerbated her pre-existing medical conditions in numerous ways. She did not call a physician to give evidence to this effect, but did submit a letter from her physician, dated June 20, 2008, which was prepared to

support her application for a portable housing subsidy to move to a smoke-free environment.

[82] The letter stated that Ms. Borutski suffered from several chronic medical conditions which were significantly negatively impacted by exposure to SHS, and described her exposure to SHS in her current living situation as pervasive. Ms. Borutski agreed that her physician obtained the information about her exposure to SHS from her.

[83] I accept that Ms. Borutski suffered from numerous disabilities and that, in general and from time to time, her overall health was negatively impacted to some degree by exposure to SHS. I find the evidence insufficient, however, to support a conclusion that all of the specific impacts described in the letter are causally related to exposure to SHS, or to assess the actual level of the impact. The physician was unavailable for cross-examination, and the impact on her medical conditions was based on her description of exposure to SHS which I have concluded is too subjective (and often exaggerated) to form a reliable foundation as to quantity.

[84] I accept that the Society and Ms. Furcht were not aware of Ms. Borutski's sensitivity to SHS until Ms. Furcht was advised in March 2008, and that the Society and Ms. Furcht offered to weatherstrip and facilitate a meeting with tenants to negotiate smoke-free hours, both of which were declined by Ms. Borutski.

Ms. Chandler

[85] Ms. Chandler entered into a tenancy agreement with the Society on May 15, 2007. She provided oral evidence about her multiple disabilities, and described her disabilities in an amendment to her complaint as including fibromyalgia, chronic fatigue, environmental sensitivities, non-restorative sleep, C7/L5 vertebra deformity, TMJ, pain and fatigue which creates cognitive and emotional impairment, reactive depression and anxiety. These conditions were supported by her physician's statement attached to her application for PWD Designation dated November 18, 2003.

[86] Ms. Chandler provided a letter from her physician, dated March 25, 2008, advising that she required access to fresh air during the day and night. Her physician requested that the Society assist in whatever way possible to minimize her exposure to

SHS. Ms. Chandler described how she now coughs when she is in an elevator with someone who just had a cigarette.

[87] Ms. Chandler described how, due to her disabilities, she required a home environment that was “trigger-free” where she could recover from chronic flare-ups of her many health conditions. She testified that she is often home-bound as a result of her medical conditions, and cannot escape from SHS that comes into her home. She has been diagnosed with an environmental illness and, since she feels better when she is away from Kiwanis, she makes a correlation between SHS and her health.

[88] Ms. Chandler said that exposure to SHS not only affected her physical health, but impacted her psychological health, as she was unable to move away from it and create what she considered to be a safe and comfortable living environment for herself.

[89] She testified that the primary source of smoke when she is in her suite is from the courtyard gazebo area. She needs to keep her window open for the fresh air, so said that closing it was not an option for her as her doctor recommended she keep it open at all times.

[90] Ms. Chandler recalled that, prior to moving to Kiwanis, she had an interview with Ms. Furcht and others during which she asked about smoking at Kiwanis and was advised that the Society did not support smoking, would prefer no-smoking tenants, that there were not many smokers residing there and that smoking was not permitted in the common areas. She said she did not smell smoke when visiting the premises prior to moving in.

[91] Ms. Chandler testified that, to get off the property from her suite, she had to walk by tobacco and marijuana smokers. She noted that, while people might be smoking outside the buffer zone, smoke drifted and she was affected by it even while waiting for the bus. She described observing smoke clouds around the gazebo area and watching it drift toward her balcony. She said that, shortly after moving into her suite, she began to experience smoke coming into her suite from the outside several times a day and discovered it was coming from smokers congregating in the courtyard.

[92] Ms. Chandler said that she has tried to cope with the situation by utilizing a variety of strategies, including contacting numerous agencies, wearing a mask, putting foam stripping around her door entry, avoiding certain hallways and stair wells and even sleeping on the roof deck. She acknowledged that she also adopted some of these strategies, in part, to deal with emissions from other chemicals such as from the laundry room. She said she felt like she was living in a prison and became isolated socially.

[93] Ms. Chandler testified that smoke-free housing is not available through BC Housing and that she does not qualify for a certain subsidy for another four years due to her age. While she is on a waiting list, she has not yet been approved for a private market supplement.

[94] Ms. Chandler said that, since 2007, she has endeavoured to identify a unit at Kiwanis that would improve her circumstances and concluded that there was no unit. She noted that, in 2007, her unit was located in the block where there were the most non-smokers and fresh air ventilation that was larger than most areas. She felt that moving would not benefit her, and that the courtyard and sound of the water were spiritually important to her.

[95] Ms. Chandler said that what she is looking for in accommodation is a smoke-free environment.

[96] Ms. Chandler impressed me as a dignified individual who is committed to doing all she can to maintain and improve her health and to manage her disabilities as effectively and responsibly as she is able to. She testified that she is disciplined and committed toward managing her disabilities and maintaining her health.

[97] I find that, while Ms. Chandler asked about smoking in the Building at the time of her interview, she did not specifically advise the Respondents of the impact of SHS on her health and her need for accommodation until March 2008. I also find that she declined to consider a move to another unit to reduce her exposure to SHS for a variety of reasons, including that she liked her unit's current location and view.

Ms. Hancock

[98] Ms. Hancock commenced her tenancy at Kiwanis in October 2002, in a bachelor unit on the ground floor of the Building. She described her disability in an amendment to her complaint as being affected by SHS with periods of asthma, plugged sinuses, and eye infections and that she has sleep apnea. She submitted a letter from her physician, dated September 9, 2012, which stated that she has several medical illnesses, suffers from depression and anxiety and should not be near smokers or live in a stressful environment. Another letter dated the same date stated that she should not be exposed to SHS due to asthma and that any exposure to SHS adversely affects her health. A letter from her psychiatrist noted that there were numerous living stressors affecting her health, and that she attended therapy to help her cope better.

[99] Ms. Hancock testified that, when she first moved into Kiwanis, she had asthma and chronic lung conditions that dust aggravated and for which she required air purifiers. She does not recall advising the Society that she had asthma when she commenced her tenancy.

[100] Ms. Hancock testified that the first time she specifically advised the Society of her health conditions and her need to move units was on December 5, 2008. Ms. Furcht requested medical documentation and she provided the Society with a physician's note on January 14, 2009. She testified that she advised her physician that she believed her asthma was affected by SHS, and that he advised her that, both, SHS as well as the older condition of the building and its building materials might be aggravating her asthma. She testified in cross-examination that she requested a note from him advising that she required a move to minimize the impact on her from SHS. She also stated in cross-examination that her asthma was being managed with inhalers at the time.

[101] Ms. Hancock testified that she provided the note to Ms. Furcht and waited for a reply. She recalled receiving one about three months later when Ms. Furcht advised her that no suitable unit was available. Ms. Hancock did not recall there being any vacancies in the Building at that time. She also was aware that numerous tenants had earlier signed a petition seeking to be relocated due to exposure to SHS. Several of those persons were ultimately successful in obtaining new units.

[102] Ms. Hancock recalled that a one-bedroom unit did become available in May 2009 that had smokers in units near it and under it. Regardless, she testified that she considered it to be a preferable unit than her currently-situated bachelor unit and she believed her exposure to SHS would be less in that unit.

[103] Ms. Furcht testified that the unit was located directly above a known smoker and there were also two neighbours across the hallway who used tobacco products. It was decided that this was not an appropriate unit for Ms. Hancock given her complaints about SHS exposure. As soon as a suitable one-bedroom unit became available, Ms. Furcht testified that it was offered to Ms. Hancock. Ms. Hancock testified that she was not aware of any vacancies in the Building between May 2009 and February 2010, when she was offered another one-bedroom unit.

[104] While Ms. Hancock ultimately moved to another unit within the Building in 2010, she testified that she believes she continues to be impacted by SHS from a smoker who lives two floors below her in the Building. She believes that, in addition to the buffer zone created by the municipal Bylaw and the indoor common areas which are no-smoking, there should be designated no-smoking areas. She said that, because the hallways were full of smoke and there were smokers outside on the property, she could not exit nor enter the building without smelling, or being exposed to, SHS.

[105] Ms. Hancock entered into a new tenancy agreement with the Society on May 19, 2010 when she voluntarily moved into a new one-bedroom unit, where she continues to reside. Ms. Hancock said that, in addition to getting away from SHS, she wanted to move to a one-bedroom unit for safety reasons as her prior bachelor unit was on the lower floor, and also for additional space.

[106] I note that, in an amendment to her complaint dated November 10, 2008, Ms. Hancock stated that she did not “live” at Kiwanis and that neighbours were surprised when they saw her there. While she attributed her absence to the presence of SHS, she also testified she was living with her boyfriend at the time, and I find that was the reason she was residing elsewhere during this period.

[107] I find that the Society and Ms. Furcht were not aware of Ms. Hancock’s sensitivity to SHS at the time she commenced her tenancy in 2002, and that Ms. Hancock

did not specifically advise the Society and Ms. Furcht of her medical situation as it related to smoke until late November/December 2008 and early 2009. I also find that the Society considered Ms. Hancock's request for a move to a more suitable location and that, when a suitable unit became available which offered less exposure to SHS, it was offered to Ms. Hancock. It was clear that Ms. Hancock wanted to move to a one-bedroom unit for a variety of reasons, including safety, more space and less exposure to SHS. I was not persuaded that the unit which Ms. Hancock identified in 2008 offered less exposure due to its location and proximity to persons who smoked and who lived in the immediate vicinity.

[108] I will now provide a more detailed chronology of events at Kiwanis regarding SHS.

2006-2007

[109] While Ms. Hancock had been resident at Kiwanis well prior to the filing of the complaint, there was no evidence of her making a specific complaint about SHS exposure prior to mid-2008. She did make a report of suspected drug dealing in 2006. The Society was aware there were allegations of the use of illegal drugs and trafficking on-site, and it posted a notice and reminded tenants that any tenant or their guest engaging in such activities could have their tenancy terminated in accordance with the terms of their Tenancy Agreement and the *Residential Tenancy Act*.

[110] As well, on January 16, 2007, Ms. Furcht sent out a notice to Kiwanis tenants that she had retained the services of a canine detection firm to conduct regular rounds in the complex.

[111] I find that there were issues related to marijuana smoking at Kiwanis, and that the Society and Ms. Furcht endeavoured to address those through retaining investigation services to identify the source and secure evidence to take effective measures to reduce such activity.

[112] Ms. Chandler described that in mid-2007, the boyfriend of a tenant who lived below her would often smoke on the balcony and the smoke drifted up to her unit. She

said by the Fall he was out there “day and night” and she was constantly threatened with smoke.

[113] I find that, from mid-2007, Ms. Chandler was bothered by SHS from a balcony below her.

2008

[114] In March, 2008, Ms. Borutski began to advise the Society in writing about her concerns regarding SHS exposure. She expressed concern about drifting smoke from the courtyard, the tenant below her and a new tenant who had moved to a unit near her.

[115] A general meeting was scheduled for March 13, 2008 to discuss resident questions and provide information about Kiwanis, and on March 12, 2008, Ms. Borutski sent Ms. Furcht information about SHS, and stated, in part:

The drifting smoke issue, and the board working towards a no-smoking policy..to that extent I’ve attached current research on the topic which you may have already, and having the smoking area which mainly employees and a few tenants use – moved, relocated, reassigned..[as written]

[116] Ms. Borutski recalled that the issue of SHS was brought up at the tenant-wide meeting, and that there was a group of smokers who took exception to a smoke-free housing initiative. She recalled that Ms. Furcht was supportive of a meeting with the Clean Air Coalition and while Ms. Borutski contacted that Association to arrange a meeting, it did not occur through no fault of either the Respondents or Complainants.

[117] At around the same time, Ms. Chandler was raising concerns with Kiwanis about exposure to SHS and its impact on her. She said she complained to the Society and they advised her to utilize the inter-tenant dispute mechanism. She said she tried to resolve it reasonably, but that it did not work and things got worse. She described a hostile reaction to her efforts to minimize smoking. She said she considered moving, but there were special features in her unit that assisted her with her disabilities that were not present in other units, such as a non-standard toilet. She also said that she was in a section of the building where there were mostly non-smokers, the suites were kept clean (i.e., no bedbugs or other infestations) and there was a view of nature and a waterfall that was

important to her. She also said that she did not have the finances to move elsewhere unless she could obtain a private market rental subsidy.

[118] On March 24, 2008, Ms. Chandler sent a letter to Ms. Furcht regarding a meeting they had on March 20. She noted that she had advised Ms. Furcht that she had been medically advised to avoid smoke and to sleep with the window open to obtain fresh air. However, she said that a smoking tenant's guest's drifting SHS caused her coughing and other negative physical reactions if she kept the window open. She also said the SHS entered her suite even if she kept the windows closed. She advised Ms. Furcht that she had been trying since the prior summer to resolve the situation on a tenant-to-tenant basis, but that no workable solution had resulted. She expressed her willingness to attend a facilitated meeting with a Society representative.

[119] Ms. Chandler also advised Ms. Furcht about a problem of drifting SHS from the exterior courtyards and provided her with written information from a variety of sources about strategies to reduce exposure to SHS. She testified that she had taken proactive measures to minimize the intrusion of smoke into her unit, such as weatherstripping her front entry door.

[120] As well, Ms. Chandler included a letter from her physician stating that Ms. Chandler required access to fresh air during the day and night, and encouraging the Society to apply whatever mechanisms were available to it to ensure she had such access. Ms. Chandler did not recall providing any further medical documentation to the Respondents beyond this letter.

[121] Ms. Furcht recalled meeting with Ms. Chandler in March 2008 about her concerns regarding the tenant's guest and requesting medical documentation. She acknowledged receiving Ms. Chandler's March 24, 2008 letter and the attached letter from Ms. Chandler's physician dated March 25, 2008.

[122] Ms. Furcht contacted the tenant and asked if she would be willing to have a facilitated meeting to address limiting the SHS. The tenant agreed and a meeting was scheduled for early April.

[123] On March 26, 2008, Ms. Borutski sent an email to the Society complaining about SHS. In particular, she stated:

I am [s]till recovering from what was a week-end of way too much drifting second hand smoke, despite I was away for most of the days Friday, Sat and Sund...it is in my suite, and its waking me up in the morning about 4:20 and 5:20 for a whole wee[k], and coming in late at night...so I'm sleep deprived...and therefore my immune system is cascading...

It's not so much people smoking, but people recognizing that second hand smoke exi[s]ts and that it contaminates the air and wherever they sit, and so it would help that after people smoke to wash their hands and remove the jacket..such little things..yada yada yada, old worn out conversations.

[124] In response, Ms. Borutski was advised that Ms. Furcht was looking into options that respected the rights of all tenants to address the issue of SHS.

[125] On March 31, 2008, Ms. Borutski wrote to two tenants, and copied Ms. Furcht, about her concerns of SHS drifting from their suites into hers. In particular, she stated that:

Your second-hand smoke greatly aggravates my immune system resulting in crashing and cascading health matters. In my case, it triggers nausea and vomiting. My thyroid swells and pushes against my windpipe. My eyes swell aggravating my glaucoma and headaches. If sleeping, I am shocked awake, have fallen out of bed, gasping for air.

[126] Ms. Borutski added a note to Ms. Furcht in the letter that she had documented the times that SHS drifted into her suite. She believed that, given the times, someone must have been smoking in their suite. She testified that, at this time, she was spending three or four hours at a time "in the bush", which referred to a park outside the complex, and that she would then come back to her suite, shower, and go out again to avoid the smoke. She also believed that another smoker had just moved in beside her unit. As well, she testified that she tried duct taping exhaust fans but that this was not effective in reducing SHS coming into her unit. She believed that the ventilation system was dirty and not properly maintained. As a result, she felt that smoke came out of the ventilation system.

[127] Ms. Borutski testified that she smelled smoke coming from pipes on the roof and that the smoke filtered into her kitchen and bathroom through the exhaust fans. She

explained that, as a result, some tenants covered up the exhaust fans in their kitchen and bathrooms.

[128] Ms. Borutski submitted several pictures of the ventilation system, but in the absence of any evidence from a qualified individual, I am unable to assess what type of circulation it provided throughout the building, and am also unable to conclude that SHS entered units through exhaust fans or the ventilation system.

[129] As well, Ms. Borutski testified that, up until March 31, 2008, there was a covered smoking area below her unit where smokers would congregate, as well as a barbeque area, both of which were later moved. She believed that winds would blow the smoke up towards her unit, which is one reason why she experienced such a high exposure level. She described efforts to resolve the situation directly with certain tenants, but said that these had been unsuccessful.

[130] Ms. Furcht recalled receiving the March 31 letter from Ms. Borutski and spoke to a tenant about smoking. The tenant advised her that she only had one cigarette after dinner and was allowed to smoke in her suite. Another tenant she spoke with agreed to only smoke inside if the smoke from the balcony bothered Ms. Borutski. Ms. Furcht testified that it was not until late March that she became aware that SHS worsened Ms. Borutski's asthma.

[131] Ms. Borutski testified that, around this time, a tenant knocked on her door and complained that Ms. Borutski was smoking. Ms. Borutski said that she explained to the tenant that it was not her, but the woman who lived next to her. In my view, this incident demonstrated how difficult it was to pinpoint exactly where the smoke was emanating from based solely on smell.

[132] By the end of March 2008, tenants had begun to coordinate their efforts to address the SHS situation.

[133] In early April, Ms. Furcht advised Ms. Borutski that she would like to facilitate a discussion with the tenants Ms. Borutski had identified and asked her for suggestions on how to do so.

[134] Ms. Borutski suggested that Ms. Furcht use “shuttle diplomacy” but indicated that she would not be involved in direct discussions. Ms. Borutski told Ms. Furcht that she was “held hostage and bound by two chain smokers, in denial, and vituperative, who refuse to admit their smoking is a problem to themselves and others.” She also advised that she believed the exposure to SHS was having a very adverse effect on her health, and that it was causing her to spend extended periods of time away from her unit.

[135] Ms. Furcht responded that she was aware that SHS was causing a problem for Ms. Borutski, and that she would facilitate a discussion between involved tenants. She also noted that, at Kiwanis, smoking was allowed in the units, and that it was not illegal to smoke outside. She indicated she was without “legal tools” to restrict smoking in those areas.

[136] In mid-April, Ms. Furcht advised Ms. Borutski that moving units was an option, but that no unit was available that would give her a guarantee of “improved circumstances.” She also said that Ms. Borutski would be considered for any upcoming vacancy that offered a better situation if she wished, but that, until the Society implemented a no-smoking policy for incoming tenants, or designated a no-smoking section of the Building, there was no guarantee that neighbours would be non-smokers. As well, in response to the posting of notices by Ms. Borutski about the Clean Air Coalition, Ms. Furcht advised her that working with the Coalition was a good approach, and if bylaws were passed that limited smoking on patios or decks, then the Society would enforce them.

[137] Ms. Furcht also advised Ms. Borutski that she could weather strip her suite door and maintenance would do so if she wished. She further indicated that she would have staff ensure that the air exchange fans were working properly and that she would facilitate a discussion with neighbours to set hours as “smoke-free” to assist her. She noted that, if it was agreed that there would be no-smoking after 11 p.m., Ms. Borutski might be able to use a fan to get fresh air.

[138] In response, Ms. Borutski advised that she felt there should be a building-wide meeting to discuss the situation as it was not her individual problem. She also advised that, at the very least, she wanted “smoke-free” hours from 10 p.m. to 8 a.m. As well, she

said that, during the day, there should be pockets of smoke-free time and suggested a schedule. Ms. Borutski testified that she received no response to this email and that, as a result, tenants submitted a petition to the Society regarding smoking.

[139] Ms. Borutski acknowledged that Ms. Furcht offered, on a few occasions, to facilitate meetings between Ms. Borutski and tenants, but that she refused to participate. She felt the issue of SHS should be addressed on a tenant-wide basis, and not just as an inter-tenant issue. She testified that she was not willing to partition time between smoking and smoke-free hours because it would not give her relief from SHS and did not deal with smoke rising from the courtyards and hallways. She acknowledged that, while she had specified certain smoke-free hours in her letter, she said that she did not feel those hours were a sufficient solution to the issue.

[140] Also in early April, Ms. Chandler attended a facilitated meeting with Ms. Furcht, the tenant whose boyfriend was smoking outside, and another Society representative. She did not consider that Ms. Furcht created a climate of understanding and mutual respect and felt the tenant was allowed to demean her character. There was a suggestion that smoke-free hours be implemented and Ms. Chandler said she felt blindsided by the idea. She said she expected a more professional handling of the situation. She said she was not asked for any input into the smoke-free times but that they were set by the boyfriend's schedule. She said that there was an unwillingness to look at whether being smoke-free had a reasonable expectation of success, or whether smoking could occur inside with the door closed rather than outside.

[141] Ms. Chandler said that the experience was demeaning and that she experienced hostility from other tenants afterwards. She said that, when she read a letter from Ms. Furcht to the Board stating that smoke-free hours was a successful resolution, she was shocked. She did not consider smoke-free hours to be a reasonable solution and considered that it was untenable to ask someone to put themselves in harm's way 50% of the time. She acknowledged, in her evidence, that she did not take up the issue further with Ms. Furcht because she felt it was pointless and that Ms. Furcht would not resolve it in a professional way. She also said that smoke-free hours from 11 p.m. to 7 a.m. were

not adhered to, but could not recall whether she advised Ms. Furcht after the implementation of smoke-free hours that the hours were not being respected.

[142] Ms. Furcht recalled that it was agreed at the meeting that the guest was smoking, that the tenant was understanding of Ms. Chandler's need for open windows at night for fresh air and that SHS disturbed her sleep. The tenant agreed to no-smoking hours that would assist Ms. Chandler to know when she could comfortably open her windows. Ms. Furcht recalled the agreement was to be smoke-free from 11 p.m. to 7 a.m., no-smoking during the day and that, on weekends from 5:30 to 11 p.m., the guest could smoke. She recalled that Ms. Chandler wanted an absolute ban on smoking but, in the end, a compromise resolution was reached. Ms. Furcht did not recall any heated discussion during the meeting, and did not recall any significant complaint about SHS being received from Ms. Chandler after this resolution. Ms. Furcht believed the situation had improved for her. I accept that Ms. Furcht thought the smoke-free hours had resolved the situation and that she did not receive a further complaint from Ms. Chandler that the smoke-free hours were not being adhered to.

[143] Ms. Chandler noted that, on March 31, 2008, smoking legislation came into force which required smokers to move to the centre of the courtyard. In particular, she recalled that a "smoker's corner" table was moved at that time. She said that the impact of the Bylaw resulted in her being woken up every morning around 6:30 by the sounds of coughing outside her window from people gathered there, followed by smoke coming in through her window. She was not sure how far away the table was from her suite, but agreed it was outside the buffer zone. She believed she mentioned to someone in the Society that it should still be moved elsewhere.

[144] Ms. Chandler testified that, in April and July, she believed that smokers moved into units near her and increased her exposure to SHS.

[145] On April 21, 2008, over 40 Kiwanis tenants, including Ms. Borutski and Ms. Chandler, submitted a detailed request or petition to the Society to implement constructive solutions to the problems of SHS throughout the Building. They stated that they believed exposure to SHS was having deleterious effects on their health and that a

failure to take appropriate action to address the issue constituted discrimination. The letter stated, in part:

Most of us are in receipt of subsidized rental accommodation specifically because we have a disability. We do not have the financial or physical resources to easily and readily remediate the problems confronting us in this crisis.

We do not accept that breathing other people's smoke must be tolerated or endured in communal complexes, and the situation of high-density, publicly-funded multi-unit complexes exacerbates the problem.

We no longer accept that because we live in public housing, that we must put up with a known toxic substance, as if the knowledge on the hazards does not apply to us.

...

The drifting second-hand smoke problem has become intolerable for many of us, and for some it has become life threatening. We request your help to resolve this problem immediately, so that we are no longer expected to endure the impact on our health, our quality of life, or resolve the problem.

[146] The tenants advised the Society that they considered sensitivity to SHS to constitute a disability and that the Society needed to take reasonable steps to accommodate this disability. They suggested several options including conducting a survey to identify where smokers reside, to consider designating one building or a wing as smoke-free and ensuring a reasonable time to implement the smoke-free environment, designating current vacant suites as no-smoking by amending the current lease or developing a new lease, organizing community meetings to discuss the issue and how it could be resolved between the smokers and non-smokers, and offering support to smokers who would like to quit.

[147] The tenants also advised that, if the Society did not respond in writing to their request within ten days, they would pursue a human rights complaint.

[148] Ms. Furcht testified that she brought the petition to the Board's attention and had discussions with BC Housing about possible options for resolution. She said that she and the Board were aware that there was SHS in the Building and that there had been for years. They wanted to take some action to improve the situation. Ms. Furcht testified that

she sought advice from the Health Authority, BC Housing and a professional housing organization as to what could be done regarding smoking and buffer zones.

[149] On April 29, 2008, the Society responded in writing to the tenants. The letter noted that the Society had been providing housing for seniors since 1959, and that its mandate was to provide affordable independent living accommodation for seniors. It also noted that it was privately operated, and did not constitute public housing.

[150] The Society indicated that, since its opening, it had not imposed a smoking limitation on tenants, and that tenants knew upon resuming their tenancy that personal smoking was permitted at Kiwanis. It advised the tenants that it adhered to all federal, provincial and local legal requirements regarding the use of tobacco products in common areas, and has also made efforts to assist tenants to mitigate exposure to SHS. It indicated that it would continue to seek cooperative measures between tenants to address the situation.

[151] In regard to designating part of the property as a no-smoking area, the Society stated that this could only be effective if all tenants within the designated area agreed to it in writing and that it could be accommodated without major expenditure.

[152] The Society also advised the tenants that it may, subject to a legal review, institute a strategy that would permit only non-smokers to be considered for future tenancies at Kiwanis, and that it could potentially result in Kiwanis becoming smoke-free in 15 years or less.

[153] The Society further advised that, for non-smokers seeking to reduce their exposure to SHS, relocation to a unit on a lower floor was recommended, and that anyone wishing to do so should submit a request in writing and they would be contacted when a suitable unit became available. Subsequently, the Society did relocate numerous tenants to other locations in an effort to minimize exposure to SHS.

[154] Ms. Borutski testified that she was disappointed in the Society's response because she had hoped there would be all-tenant meetings about how to resolve the situation with the Society. She testified that there were areas of the building where there were no

smokers, such as the fourth floor and that, if a floor or wing could be designated as no-smoking, this might assist in addressing the situation.

[155] On May 6, 2008, Ms. Borutski and other tenants wrote to Ms. Furcht requesting a meeting pursuant to Kiwanis' policy on conflict resolution. They also provided names of four mediators, and requested Ms. Furcht to submit the name of an independent mediator.

[156] As well, on May 12, 2008, unbeknownst to the Society or Ms. Furcht, Ms. Borutski filed a human rights complaint. On May 13, 2008, multiple tenants, including Ms. Borutski, Ms. Hancock and Ms. Chandler, filed a complaint with the Tribunal. These complaints were joined for hearing by the Tribunal. Ms. Chandler testified that, after she filed her human rights complaint, she did not complain personally to Ms. Furcht or the Society about smoking until the late summer of 2012.

[157] In response to the May 6th letter, on May 16, 2008, Ms. Furcht advised that, after consulting with the Society's Board, it was determined the conflict resolution policy referred to inter-tenant conflict resolution and not tenant-landlord disputes which were governed by the RTB. The Society declined to participate in a mediation as proposed by the tenants, but did advise the tenants to avail themselves of the RTB processes.

[158] Ms. Borutski had written to BC Housing in April about her concerns regarding smoking. On May 16, 2008, BC Housing referred her to the RTB, and also provided her with information regarding transferring to alternate accommodation.

[159] On May 22, 2008, Ms. Borutski wrote to Mr. Froese at BC Housing regarding the response from the Society. Mr. Froese replied on May 23 that BC Housing was not able to mediate the situation at Kiwanis, and that she could pursue the matter at the RTB if she felt that the landlord was unresponsive to her concerns. He also advised her how to apply to be placed on the waitlist for a rent supplement to obtain alternate accommodation. To support her application in this regard, Ms. Borutski was advised to provide medical documentation as to how SHS at Kiwanis was detrimental to her health condition.

[160] On May 26, 2008, Ms. Borutski and others, including Ms. Chandler, wrote to Ms. Furcht accepting her offer to meet with tenants to work out cooperative arrangements to address the smoking issue. While they understood that a mediator would not be present,

they continued to request a mediator to facilitate discussions. Ms. Borutski testified, however, that she still refused to attend any meetings because she felt they were coercive and abusive.

[161] Ms. Borutski also sent Ms. Furcht an email requesting information about what steps the Society had taken in response to the SHS concerns since March, and whether the tenants could request internal moves within Kiwanis.

[162] Ms. Furcht responded to Ms. Borutski's email on June 5, advising that the Society would consider a strategy that would "probably" provide a section of the premises to be designated a no-smoking area. Only new tenants who were non-smokers would be considered for those units. She also advised that no tenants would be asked to relocate and no one would be put on a priority list for vacancies. As well, all relocation costs of existing tenants would be borne by the relocating tenants and all rent would be at the prevailing economic rent for the designated unit.

[163] On June 6, 2008, Ms. Furcht provided a formal response to the May 26 letter. In general, she requested that specific requests for information be put in writing. She also stated that the building-wide presence of SHS was much reduced as compared to the previous year, and that this was due in large measure to upgrades to the fresh air ventilation system. She also noted that one tenant had requested that the fresh air ventilation system be shut down at night as an accommodation and that the Society had complied. She said that such conflicting demands complicated the situation, and that the Society would continue to explore ways to improve indoor air quality and would be implementing measures on a unit-by-unit basis.

[164] Ms. Borutski testified that, in her experience, there was no reduction in SHS or any improvement at this time. She also testified that she was aware that the Society had agreed with a tenant to shut down the ventilation system at night due to noise, but that this compromised the air flow and exposure to SHS during the night.

[165] Ms. Borutski testified that, shortly after Ms Furcht's emails, a unit became available that she considered would be suitable and which was located in what she described as a no-smoking wing, but she was not advised of it and it went to an

employee. Ms. Furcht testified that the unit was provided to the employee as an accommodation.

[166] On June 1, 2008, Ms. Borutski made a complaint about employees smoking while performing work in or around suites. She also requested that “dust” on air vents be analyzed as it may contain nicotine. A Fraser Health TEO attended on premises and issued a warning about an employee using tobacco in the workplace.

[167] As well, on June 16, 2008, a TEO did a site inspection at Kiwanis to determine if there were any violations of the *TCA*, which restricted smoking in indoor common areas and in outdoor locations within a specified distance from a window, doorway or fresh air intake. Ms. Chandler described how she was with the TEO when he visited the site and how they smelled smoke on the rooftop coming from smoke drifting up from below. She testified it would be helpful to her to have the courtyard and gazebo designated as a no-smoking area.

[168] The results of the inspection were communicated by letter to the tenants on July 22, 2008. At that time, the tenants were advised that the TEO did not observe any violations of the *TCA* during the site inspection. However, the TEO did experience a strong smell of smoke in the units he visited and suggested several actions to help reduce tobacco smoke entering the units. These suggestions included relocating outdoor smoking areas and inspecting the ventilation system for proper functioning. The letter was also sent to the Society. As noted earlier, the outdoor “smoke pit” was relocated and the ventilation system was inspected.

[169] The Fraser Health TEO and Medical Officer also wrote a letter of support for Kiwanis tenants to encourage stakeholders, including the Society, to work with tenants to reduce exposure to SHS. In addition, the tenants obtained letters of support from other organizations, including Vancouver Health, which were sent to the Society.

[170] The letter from Fraser Health stated, in part, that:

Separating smokers from non-smokers, “cleaning” the air and ventilating buildings do not eliminate exposure to second hand smoke. Current heating, ventilation and air conditioning systems do not eliminate exposure to second hand smoke. Rather, the operation of these systems can distribute second-hand smoke throughout a building. Those exposures can

be eliminated by allowing individuals to live in smoke-free buildings. Considering portable subsidies and support for moving expenses may be an option. The Ministry of Housing and Social Development may consider (under the Employment and Assistance Regulation and Employment and Assistance for Persons with Disabilities Regulation) offering a supplement to cover necessary moving expenses to recipients of income assistance, hardship assistance, or disability assistance who have no other resources and who must move because of threats to their physical safety.

[171] The letter from the Vancouver Health Chief Medical Officer stated, in part:

It is incumbent on landlords to address any tenant exposure to SHS, particularly in social housing units where tenants may have few options available to avoid personal exposure. There are a number of options available to landlords in BC, including banning smoking in all or part of a building, including inside the unit, on patios and on balconies. Landlords can include a no-smoking clause in all new tenancy agreements. There are examples in North America where landlords have successfully taken these steps to prevent exposure to SHS, even in social housing units.

[172] On July 14, 2008, Ms. Chandler applied for a portable rent subsidy to assist in finding smoke-free accommodation. She stated in her application that her physician had advised her to move to a smoke-free environment. She was placed on a waitlist for a private market rent subsidy.

[173] On July 15, 2008, Ms. Borutski submitted an application for a portable rent subsidy to obtain what she described as smoke-free housing. She attached to the application information from her physician stating that she had asthma, urinary stress incontinence, chronic fibromyalgia and depression. She further stated that exposure to high levels of SHS was causing severe worsening of her asthma. She said that increased coughing, worsened her bladder pressure and stress incontinence and that these conditions aggravated her chronic pain/fibromyalgia and depression. Ms. Borutski was subsequently advised that she had been placed on the waitlist for a private market rent subsidy.

[174] On July 31, 2008, the City of Surrey Bylaw came into force which prohibited smoking within seven and one-half metres of any opening into a building, including a door, window or air intake.

[175] On August 19, 2008, the Society passed the Policy, which was subsequently posted in the Building. In the Policy, the Society acknowledged that SHS may be harmful to individuals who are exposed to it. The Policy set out the Society's commitment to establish a smoke-free environment by 2018. Amongst other things, the Policy also prohibited smoking on the premises or property by employees or contractors and implemented a new tenancy agreement, effective September 1, 2008, that contained a no-smoking clause.

[176] The Society also committed to put no-smoking decals on units that became vacant and were then no-smoking, but this practice was inconsistent.

[177] Ms. Furcht testified that she advised staff and contractors about the smoking prohibition and that she posted the Policy throughout the Building at the time it was adopted. She was advised many of the postings went missing and, as the Society became aware that the Policy had been taken down, another copy of it would be posted. Eventually, the Society reposted the Policy in a glass enclosure to preclude tampering.

[178] Ms. Furcht also said that, in addition to regular maintenance of the Building's HVAC system, she advised the Society's contractor about the concern with SHS being circulated throughout the building and asked that the best filters be used to make sure the equipment was functioning optimally. She testified that the contractor did so, but also advised her about the system's limitations, given that it was 30 years old. Ms. Furcht investigated the cost of new equipment and obtained quotes in the \$50-70 thousand dollar range. She presented this to the Board and it was determined that, given other major renovations that the Building required, including a necessary roof replacement at a \$100 thousand dollar cost, it was not realistic to replace the system at this time. She also said that the contractor did not indicate that the equipment required replacement at that time.

[179] On August 5, 2008, Ms. Borutski filed an application for dispute resolution with the RTB regarding drifting SHS on the basis that it constituted a health hazard and was a breach of her right to the quiet enjoyment of her suite. Ms. Furcht made a written submission to the RTB stating that Ms. Borutski had not advised the Society prior to her tenancy that she was sensitive to SHS and that, had she done so, the Society would have advised her that smoking has been allowed in the building for over 30 years and that it

could not guarantee a smoke-free environment. She further stated that there was no medical information submitted with Ms. Borutski's application that indicated that she required housing with no exposure to SHS or had any respiratory issues. She also felt that Ms. Borutski was uncooperative with tenants in trying to resolve the situation.

[180] The RTB held a hearing and, on October 19, 2008, dismissed Ms. Borutski's application. In particular, it reached the following factual conclusions:

- a) The Society was not aware of Ms. Borutski's medical condition until after she moved into her unit;
- b) Almost half of the tenants are smokers;
- c) Both the Society and Ms. Borutski have a duty to make sure that smoke does not negatively affect non-smokers, and need to work together to resolve the situation;
- d) The Society has tried to accommodate Ms. Borutski, but Ms. Borutski has fought rather than worked cooperatively to resolve the situation.

[181] The parties were encouraged to take steps to address the situation.

[182] Ms. Borutski wrote to Ms. Furcht after receiving the decision and requested a meeting to discuss possible accommodation, including either a move to a new unit or moving other tenants. She wrote a further request for a meeting on November 5, 2008.

[183] On November 7, 2008, the Society again posted a notice stating that it was moving toward providing a smoke-free building for tenants. In particular, it noted that as of September 1, 2008, all new tenancy agreements with the Society had a no-smoking clause that banned smoking by tenants and guests in their unit and on the balcony or patio.

[184] In response to Ms. Borutski's requests for a meeting, Ms. Furcht wrote to her on November 10, 2008, noting that, shortly after she received the initial request, both Ms. Furcht and the Society had received a copy of Ms. Borutski's human rights complaint and needed time to consider it and obtain legal advice.

[185] On December 2, 2008, Ms. Furcht wrote to Ms. Borutski advising, in part:

You have been told that it is neither physically possible, nor economically possible, to guarantee a completely second-hand smoke-free environment. The age and nature of the premises, its history and more importantly, the

composition of the tenant body, would, unless provincial legislation was changed, make it impossible to force other occupants of the complex to desist from smoking.

The Society will have a suite on a lower floor, Unit No. 110 which from its location should be less prone to second-hand smoke.

You may, if you wish make an application for relocation to Suite #110 within 15 days from receipt of this letter.

[186] Ms. Furcht ended her letter by stating that the Society does not warrant that the offered suite or any portion of its premises is or may be absolutely second-hand smoke-free.

[187] Ms. Borutski responded to the offer on December 12, 2008 stating, in part:

Your offer for relocation to Unit 110 carries within it the necessity to decline. It is therefore null and void, rhetoric.

[188] Ms. Borutski then set out several reasons why the offer was unacceptable to her, including that she believed smokers lived near the unit. She did not offer any other suggestions for addressing the situation.

[189] Ms. Furcht recalled that the unit had been offered to Ms. Borutski because it was not facing the courtyard and was ground floor so no smoke would be drifting up and there would be non-smokers on either side of her.

[190] Ms. Borutski acknowledged in her evidence that she was offered a move to a lower floor on December 2, 2008 that she refused on December 12. She agreed in cross-examination that, since it was on a lower floor there should not have been an issue with smoke drifting up from lower balconies and that the unit did not face the courtyard. However, she said that the unit faced a sidewalk so people could walk by and smoke, though she acknowledged that she would not have the exposure from as many people as she said were meeting in the courtyard to smoke.

[191] Ms. Borutski also stated, however, that the hallway where the unit was located was “full of smoke”. She acknowledged that there was an alternate exit from the building available for her to take, but said that she still would experience smoke in the hallway whichever exit she utilized.

[192] Ms. Hancock testified that, throughout 2008, she experienced exposure to SHS, which she tried initially to resolve through inter-tenant relations by asking the smoker to use a fan and air filter or purifier. She said that, by the end of 2008, there were three chain smokers living on her floor and she requested the Society to allow her to relocate units. Given Ms. Hancock's statement in the amendment to her complaint, and her evidence about living with her boyfriend, I find that Ms. Hancock did experience exposure to SHS when she was at Kiwanis, but that the time spent at Kiwanis was, in fact, limited during 2008.

[193] Ms. Hancock requested to move to a new one-bedroom unit on December 5, 2008. Ms. Furcht recalled receiving that request and that it was the first such request she had received from Ms. Hancock. She recalled that there was a low vacancy rate in the Building at the time and that Ms. Hancock would have been added to a waiting list. She was also aware that Ms. Hancock was looking for a unit with less exposure to SHS.

[194] I find that, by March 2008, the Respondents were aware of tenant concerns that exposure to SHS was negatively affecting their health. I also find that the Respondents reasonably believed that it had resolved Ms. Chandler's complaint of SHS from a balcony below her on the basis of scheduled smoke-free hours and that Ms. Chandler did not advise the Respondents that the schedule was not being adhered to.

[195] As well, I find that Ms. Borutski declined to participate in facilitated discussions suggested by the Respondents, which might have assisted to resolve the situation and that the Respondents offered Ms. Borutski a new unit, which it reasonably believed would provide her with less exposure to SHS, and that Ms. Borutski declined the offer. I also find that the Respondents implemented and advised tenants of the new statutory requirements prohibiting smoking within what has been referred to as the "buffer zone", that it inspected the Building's ventilation system, and that it adopted a no-smoking addendum for new tenants, effective September 1, 2008, in the hope of becoming smoke-free by 2018.

2009

[196] On January 13, 2009, Ms. Hancock's physician wrote a note advising that Ms. Hancock should not be exposed to SHS due to asthma.

[197] On February 2, 2009, the Society posted a notice to all tenants advising that, in accordance with WorkSafeBC and federal occupational health regulations, employees and contractors will not work around tobacco smoke. Tenants were advised that there can be no-smoking in a unit while workers are present.

[198] On February 5, 2009, the Society reposted the Policy that it had adopted effective September 2008.

[199] On May 4, 2009, Ms. Hancock identified a new unit which she wanted to move into, but her request was denied by the Society on the basis that the unit she identified would expose her to potentially more SHS than the unit she currently occupied. On May 7, 2009, Ms. Hancock wrote to the Society explaining her belief about smokers in the Building, the extent of SHS affecting her in her current location, and why she believed a different location would reduce her exposure to SHS.

[200] On June 12, 2009, Ms. Borutski wrote to Ms. Furcht reporting a breach of the Policy. As well, on June 16, 2009, another tenant reported a breach of the Policy and on June 16 was advised that the reported tenant had been given a breach letter by the Society.

[201] On August 7, 2009, Ms. Borutski wrote to Ms. Furcht requesting a move into one of several suites that she believed were coming available on the fourth floor of the building and which she believed would minimize her exposure to SHS. She acknowledged in her evidence that one of the units was occupied at that time by a smoker, but that she expected the Society to clean it prior to her occupancy. Ms. Furcht testified that one available unit on that floor had been given to another tenant who requested a move due to SHS exposure, and the other unit had already been given as an accommodation to a staff member who had to live on-site.

[202] Ms. Borutski testified that she was aware that one of those units was given to one of the original complainants in this case who had requested to move to that unit in 2007. Ms. Borutski stated that she was aware that the unit had windows and a patio that opened onto the courtyard.

[203] Ms. Borutski did not recall making any other written requests for an internal move during 2009. She said that she expected the Society to advise her when units became available.

[204] In October 2009, there were RTB proceedings to evict a tenant who had breached the no-smoking provision of the tenancy agreement, and it was resolved by moving the tenant to a different unit to reduce exposure to SHS.

[205] Ms. Borutski acknowledged the Society's efforts in moving a smoking tenant in an effort to make the ground floor smoke-free.

[206] I find that, during 2009, the Society investigated and took action where it had evidence of a breach of the Policy or tenancy agreement. I also find that, while there were at least two vacancies during this period that may have resulted in less exposure to SHS, the units were reasonably offered to other persons requiring accommodation. I am also persuaded, based on the information provided by both the Respondents and Ms. Hancock, that the Respondents reasonably believed that the unit identified by Ms. Hancock would not have alleviated her exposure to SHS.

[207] I also note that Ms. Hancock testified that, between 2005 and 2009, she spent a lot of time at her boyfriend's home until they broke up. I accept that Ms. Hancock was not residing full-time at Kiwanis during 2008 and part of 2009.

2010

[208] On February 24, 2010, the Society offered Ms. Hancock relocation to a new unit. She submitted a doctor's note in support of her request to move, which indicated that she suffered from depression and anxiety, as well as several medical illnesses, that she should not be near smokers and that she needed to be in a less stressful environment.

[209] Ms. Hancock accepted the move, provided the Society agreed to numerous renovation requests and also agreed to hold the unit for a delayed move in order to accommodate her obtaining support funds to assist with the move. In mid to late May 2010, Ms. Hancock moved units and entered into a new tenancy agreement with the Society. The Society approved her request for several renovations to the unit. Ms. Hancock testified that she has not requested the Society to relocate her since this move.

[210] Ms. Hancock testified that she felt Ms. Furcht's approach to resolving the SHS situation was simply to enforce the Bylaw and that this was insufficient. She also testified that the unit she moved into was an ex-smoker's suite and that there was a smoker across the hall from her. She asked that individual if he would smoke out an open window and he agreed. She described him as accommodating and she appreciated his willingness to try to minimize her exposure to SHS.

[211] Ms. Hancock further testified that, after she moved into her new unit, she noticed that her bathroom would fill with SHS and believed there was a chain-smoker living right under her. She said she reported this to the Society but received no response, and was not aware of any steps taken by the Society to speak to the tenant below her.

[212] Ms. Furcht testified that she did not receive a specific complaint from Ms. Hancock about SHS since she moved into the new unit. There was no formal documentation of a complaint being filed by Ms. Hancock about the tenant. While I accept the possibility that Ms. Hancock may have informally mentioned her belief about the tenant smoking to a Society employee, I accept Ms. Furcht's evidence that she was not aware of the complaint and there was no evidence of any formal complaint being filed by Ms. Hancock.

[213] On May 31, 2010, the Society, in an effort to resolve the human rights complaints, offered, on a with prejudice basis, to create a no-smoking floor if enough vacancies arose to do so. This offer was rejected for a variety of reasons by the Complainants. For example, Ms. Hancock testified that the proposed wing was near the parking lot on the ground floor and she felt she would be exposed to carbon monoxide from car exhaust. Ms. Hancock felt that her current unit was more suitable, even though she still experienced SHS, than the wing proposed by the Society. Ms. Hancock also testified that there was no wing which had not been "contaminated" by grandfathered smokers and that this was an issue.

[214] On July 26, 2010, the Society made a revised with prejudice settlement offer which again included the creation of a no-smoking floor. Ms. Furcht testified that she was optimistic she could create such a floor as she had discussed moves with existing tenants

and was satisfied that the location offered diminished exposure to SHS. The offer was not accepted and no response was received by the Society.

[215] Ms. Chandler testified that she was aware that on May 31, 2010, and again on July 26, 2010, the Society offered to create a no-smoking wing. She testified that she was not asked to participate with the Society in creating a plan. She thought her legal counsel had sent a letter requesting clarification of an issue, but was unable to locate a letter.

[216] Ms. Borutski testified that, in response to the Society's March 31 and July 26, 2010 offers to create a no-smoking floor, the Complainants made inquiries as to which wing and were advised which units it would encompass and that the offer was contingent on the Complainants agreeing to move to those units. She criticized the units, amongst other things, as being at the front of the building and subject to noise and emissions from cars. She testified that she was not going to accept the offer on the basis it was presented, but that she was not aware of further discussions between the parties or any formal response to the July 26 offer. She was aware that some of the units were currently occupied by smokers, but expected the Society to "detox" the units prior to occupancy.

[217] On August 19, 2010, Ms. Furcht wrote to Ms. Borutski in response to a request she made for relocation to the fourth floor, east wing of the building to reduce her exposure to SHS. Ms. Furcht advised her that the Society could offer her either unit 407 or 231, and that she could make application within seven days if she was interested in either unit. There was no guarantee, however, that there would not be any smokers living near her.

[218] On August 28, 2010, Ms. Borutski wrote to Ms. Furcht in response to the offer of two units for her to relocate to in order to minimize exposure to SHS. Ms. Borutski did not accept the offer, in part, as she felt that the location of the suites may not reduce her exposure. She advised Ms. Furcht that she had mapped out the areas of smokers, ventilation and smoke in the building, and indicated an interest in relocating to two specific units, both of which were occupied at the time. She requested that Ms. Furcht approach the tenants to determine if they were willing to relocate so she could move into their unit. She also indicated that either unit would need to be "completely cleaned and renovated" before she would move in.

[219] Ms. Furcht testified that one of the tenants was not interested in moving and the other was undergoing treatment for a serious medical condition and was not up for moving.

[220] On September 15, 2010, Ms. Borutski sent a letter of complaint to Ms. Furcht about smoking inside the buffer zone and requested that the individuals involved get a breach letter.

[221] On September 20, 2010, Ms. Borutski wrote Ms. Furcht again about observing another violation of smoking within the buffer zone.

[222] Ms. Furcht testified that she spoke to the tenant identified by Ms. Borutski. She stated that, at the time, there was increased hostility between smoking and no-smoking tenants and asked him to ensure he was respectful in his dealings with other tenants and compliant with smoking regulations. In general, Ms. Furcht testified that, when complaints were brought to her or staff, an investigation was conducted, and appropriate action taken in response to the complaint.

[223] Ms. Furcht testified, in particular, that with one tenant, Mr. M., Ms. Hancock and others made repeated complaints about him smoking and he was spoken to about the regulations. She also noted that the landlord did not have the right to enter a unit without a tenant's permission or 24 hours notice and that this limited the ability to confirm a breach of the Policy or tenancy agreement.

[224] Ms. Furcht testified that staff, or she, would investigate complaints about SHS in the hallways, but it would be hard to determine which unit was the source of SHS. In at least one case, in July 2010, the Society sought the eviction of a tenant for breaching the Policy and it resulted in an agreement that the tenant would move to a different unit.

[225] Ms. Borutski testified that, in 2010, she spent considerable time away from Kiwanis and that, in particular, she was absent for at least one month in the Spring. She said that she actively looked for house-sitting arrangements and did all she could to avoid Kiwanis due to the SHS situation and its negative impact on her health.

[226] In the Fall of 2010, Ms. Borutski requested permission to host a public meeting regarding SHS in Kiwanis' recreation room. On October 14, 2010, Ms. Furcht denied her

permission to do so, given how SHS had become an inflammatory topic at Kiwanis amongst the tenants. She mentioned that some tenants had been verbally aggressive to smokers in their quest to minimize smoking on the premises and that, given the current climate, she could not authorize the meeting.

[227] Ms. Furcht added that a number of tenants were very vigilant about smoking and had been targeting people to watch. She described them as taking on the role of “smoking sheriff” and testified that relations were very tense between smokers and non-smokers in the Building.

[228] In October 2010, Ms. Borutski complained about a tenant smoking while performing what she believed to be work for the Society. She was unaware that the tenant also did work for tenants in the Building and was not working for the Society at the time.

[229] On November 9, 2010, representatives from the Fraser Health TEO and WorkSafeBC visited Kiwanis. Ms. Furcht testified that they visited the rooftop patio, courtyard and gazebo areas, amongst other places. The Society was found to be in full compliance with smoking-related bylaws and WorkSafeBC regulations.

[230] On December 1, 2010, Ms. Borutski wrote to the Society complaining that nothing had been done about SHS since she had moved in three years prior. She complained about the ventilation system, and the level of smoke that continued to permeate the building. She again requested action as soon as possible to address the situation.

[231] Ms. Furcht testified that, from the time she started until 2010, the level of SHS in hallways markedly decreased. She also described the steps taken to ensure the proper functioning of the ventilation system and other positive measures to reduce exposure to SHS.

[232] As noted earlier, I find it more probable, given the measures taken by the Society in implementing the Policy, a new tenancy agreement and buffer zones, that SHS did, in fact, decrease over this period, though the potential for exposure was not eliminated.

[233] In or about December 2010, Ms. Borutski complained about an incident of harassment by a tenant at a public meeting of the Tenant Advisory Committee. In

particular, she said a tenant came into the meeting room with an unlit cigarette in his mouth and said he had “only two words for her.” Ms. Borutski considered this to constitute a threat and reported him to the RCMP.

[234] The Acting General Manager replied to Ms. Borutski that the tenant had not breached any rules since the cigarette was unlit and therefore the tenant could not be given a breach letter.

[235] On December 30, 2010, Ms. Borutski wrote to the Society and Ms. Furcht complaining about the lack of action against the tenant for what she considered to constitute a breach of rules and an act of contempt and violence against her. She described it as a breach of her right to quiet enjoyment and requested a response to her report. She testified she did not receive a response to this letter.

[236] Ms. Borutski said that, at the end of 2010 and early 2011, she started to look for accommodation elsewhere due to tobacco and marijuana smoke permeating the Building.

[237] I find that, throughout 2010, the Respondents were responsive to tenant complaints about SHS and took steps to enforce the Policy. I also find that the Respondents offered Ms. Hancock a unit that offered her less exposure to SHS and that Ms. Hancock accepted this unit, though she continued to experience some exposure to SHS. I find that the Respondents offered units to Ms. Borutski, which she declined, and that, while Ms. Borutski identified two units for possible relocation, those units were not vacant at the time and there was no evidence of any other available units.

[238] I also find that the Respondents made two offers to create a no-smoking wing which were rejected by the Complainants and that the Complainants did not respond to the last offer.

2011

[239] On January 7, 2011, Ms. Furcht sent a letter to all tenants reminding them about the prohibited smoking areas on the premises and that any tenants who smoked in prohibited areas would receive a breach letter which could affect their tenancy. As well, she noted that certain areas were “safe” for smoking use and these were the courtyard and patio table, the gazebo and the fourth floor roof deck. She explained that smokers had

expressed confusion over where they could smoke without violating the Policy and that she was explaining these areas were outside the buffer zone.

[240] Ms. Borutski testified that these areas encompassed most of the common ground areas of the complex, and that there were no designated no-smoking areas. She felt that this excluded non-smokers from utilizing and enjoying the public areas. She noted that the Society adhered to the City Bylaw boundaries, but felt that this was insufficient to address the situation.

[241] On January 10, 2011, Ms. Borutski wrote to Ms. Furcht requesting suite maintenance, including painting walls, changing her flooring and replacing cupboards. She premised this request primarily on the accumulation of SHS on the floor, walls and cupboards.

[242] On February 3, 2011, Ms. Hancock wrote to the Society requesting new kitchen cupboards as her cupboards were in a state of disrepair.

[243] On May 9, 2011, Ms. Borutski submitted a request to relocate to certain preferred units. She acknowledged in her evidence that the units were not vacant at the time and ultimately did not become available. She did not recall any suitable units being available between August 2007 and May 2011.

[244] On May 15, 2011, Ms. Borutski wrote a letter of complaint to Ms. Furcht and the Society about smoke inside the Building and outside in the buffer zone and requested appropriate action be taken in response to her report. She noted that she had observed a particular individual smoking in the buffer zone on three occasions. In June 2011, she also reported smoking violations to Ms. Furcht.

[245] On May 17, 2011, Ms. Hancock wrote to Ms. Furcht reporting that she had smelled smoke emanating from a suite which she believed was a no-smoking suite. She noted that she had previously complained several times about this tenant smoking in his suite, as had other tenants and requested enforcement of the no-smoking rules.

[246] On May 30, 2011, Ms. Furcht wrote to Ms. Hancock about her recent complaint against a tenant smoking in violation of the Policy. She noted that Ms. Hancock had been making numerous complaints about this individual and that, each time the Society had

followed up and found no evidence, except for a single incident, that the tenant was in breach of the Policy. She requested Ms. Hancock to provide photographic evidence or call while the infraction was occurring so that management could investigate promptly.

[247] Ms. Furcht also testified that, on June 15, 2011, she issued a breach notice to a tenant who had breached the smoking rules and that, on August 17, 2011, he was given a one-month Notice to End Tenancy.

[248] Also on June 15, 2011, Ms. Borutski wrote to Ms. Furcht reporting that she had observed an individual light a cigarette in the buffer zone and then continue walking out of it and away from the building. She also reported that, on June 12, 2011, she had observed a person smoking while performing work for the Society in violation of WorkSafeBC regulations and the Society's Policy.

[249] On June 17, 2011, Ms. Furcht responded to Ms. Borutski and advised her that, upon investigation, it was determined that there were no violations as reported by Ms. Borutski.

[250] On June 23, 2011, Ms. Borutski photographed an individual she says was smoking on the building grounds.

[251] On June 27, 2011, Ms. Hancock wrote to Ms. Furcht about a tenant smoking in violation of the Policy and her displeasure with Ms. Furcht's May 30th response to her complaint.

[252] On September 3, 2011, Ms. Borutski reported a smoking violation in the buffer zone to the Society. She testified that she was living on-site at the time. On September 14, 2011, Ms. Borutski reported further violations of the Policy.

[253] On October 11, 2011, Ms. Borutski reported marijuana smoke to the Society and suggested that it again utilize sniffer dogs to help address the problem. She testified that she was living off-site most of the time at this point. She said that she would come back every third or fourth day to check on her unit, and that she observed a "growing amount of exposure to marijuana smoke" that was constant and in a "huge amount." She was not staying overnight in her unit at this time.

[254] At or about this time, Ms. Borutski again requested certain maintenance and new cabinets. The Society advised her that it was in the midst of replacing all cabinets, and would schedule her unit for December 2011. She was also advised she could paint at her own cost. Ms. Borutski testified that she decided not to paint her unit, and advised the Society of her displeasure with the Society's advice to her that repainting was at her own cost. She also requested modifications to the new cabinets as an accommodation for physical disabilities and the Society indicated it required further details about the requested cabinets and that it was seeking advice from its cabinet company about the cost of the requested modifications.

[255] In late September and October, 2011, Ms. Hancock testified that her vehicle was vandalized while in the Kiwanis parking lot. She believes this had to do with her efforts to create a smoke-free living environment. She agreed in cross-examination that the Society installed a special video camera to focus on her car.

[256] On October 21, 2011, the Acting GM advised Ms. Hancock that she had reviewed video of her vehicle and that the only person that appeared on the video near her vehicle was Ms. Hancock. She mentioned to Ms. Hancock that she should consider the possibility that damage to her vehicle was caused elsewhere than the Society premises. The Acting GM also advised Ms. Hancock by different letter of that same date that her cabinets would be replaced sometime in December 2011. Ms. Hancock believes that other tenants automatically got the privilege of new cabinets while she had to submit proof that she required them.

[257] On November 15, 2011, Ms. Hancock was advised that her kitchen cupboards would be replaced on December 7, 2011. Sometime later, she had an altercation with the maintenance individual. She complained to the Society about this and provided written details in early January 2012. She does not recall receiving a response to her letter.

[258] Ms. Borutski testified that, in December 2011, she reported marijuana smoke in her suite to the Acting Manager. She said that the Acting Manager came to her suite in response to her complaint, but could not smell anything. Ms. Borutski attributes this to the amount of perfume that the Acting General Manager was wearing at the time.

[259] I find that the Respondents received and investigated complaints about violations of the Policy during 2012 and took steps to enforce the Policy and tenancy agreements where there was evidence to do so.

[260] I concur with Ms. Borutski that, apart from the buffer zone, there was no designated no-smoking area on the Society's property. Having said that, there was also no specifically-designated smoking area. I accept Ms. Furcht's evidence that she was attempting to explain which areas were outside the buffer zone and would not violate the statutory prohibition against smoking.

[261] I accept that both Ms. Hancock and Ms. Borutski requested new cabinets and that the Society agreed to replace the cabinets in December 2011. I am not persuaded, however, that the evidence was sufficient to conclude that the cabinet replacement was necessary to reduce exposure to SHS. I accept that Ms. Borutski requested modifications to her cabinetry for reasons unrelated to this complaint and this resulted in a delay to the replacement of her cabinets.

2012

[262] Ms. Borutski testified that, on January 10, 2012, she tried to enter the Building quickly and unobserved and to bypass smoke as quickly as possible. However, a tenant came into the building and she said he "reeked" of marijuana. She said there was marijuana in the hallways, and he slipped into an elevator she was taking. She excused herself to get away from the marijuana, and went to the recreation room where another tenant was speaking to people about the marijuana smoke in the building. She went with that tenant to her unit, where she prepared a letter for her addressed to the Acting General Manager. The letter stated, in part:

We are aware that cigarette smoking is an issue that is impossible to deal with, however since the use of drugs is still illegal, it should be easier to deal with those who are using it, in a corrective manner (ie. eviction).

[263] Ms. Borutski said that she had to leave the unit after typing the letter because of SHS in the room. She was not sure where the smoke came from, though suggested it could have come from the next door tenant or from outside.

[264] Ms. Borutski said that, on January 11, 2012, she went to the RCMP to report marijuana smoke in the Building. She said that there was no place she could go in the hallways or her unit where there was no smoke. She said that she would try to find the fastest and quickest route out of the Building, but that she could not escape the smoke. She says that she was told by the RCMP that she needed to contact the City of Surrey and that she did so, as well as contacting the Fraser Health Authority.

[265] On January 12, 2012, the Acting General Manager responded to the earlier letter of complaint. She stated, in part:

I certainly understand your concern and appreciate you bringing this to our attention. Other than tenants who are legally permitted to possess and use marijuana for medicinal purposes Crescent Housing Society considers the use of illegal drugs a breach of tenancy.

I am considering a couple of options regarding dealing with this situation and hopefully it will be resolved soon. Please do not hesitate to contact me if you have any further concerns.

[266] Ms. Borutski felt that this was an insufficient response and that the Society was essentially saying that they would not do anything about the situation. She said she was spending spend less and less time in her home, and a lot of time outside or at friend's homes.

[267] Ms. Borutski also sent a detailed letter to the RCMP on January 12, 2012, outlining her complaint about marijuana smoke at Kiwanis.

[268] On January 13, 2012, the Acting General Manager sent a notice to all tenants regarding complaints about illegal drug use in the building. It stated, in part:

Over the past number of months there have been many complaints regarding the smell of illegal drugs in the building. I would remind tenants that any illegal activity in the suite is considered a breach of the tenancy agreement and could result in a Notice to End Tenancy.

Crescent Housing Society has hired Canadian K9 Detection Security & Investigations Ltd. to conduct regular and random narcotic checks of the buildings. Any reports of drugs will be investigated thoroughly, which may include a search of individual apartments where drug use is suspected.

....Please do not hesitate to call the office during regular office hours if you have any questions or concerns.

[269] On January 26, 2012, the Acting General Manager posted a Notice to all Tenants stating that, pursuant to the City Bylaw, smoking was prohibited on balconies and patios assigned exclusively to a unit if the area was within seven and one-half metres of the building. The Society prohibited smoking on all private patios and on the common rooftop patio at Kiwanis.

[270] Ms. Borutski testified that she felt the notice to be contemptuous since the Bylaw had been in force since July 31, 2008. She said she felt insulted by the notice. She recalled that the notice was placed in all of the tenants' mailboxes.

[271] I concur with Ms. Borutski that the Bylaw had been in force for some time at the date of this notice. I note, however, that it was the Acting General Manager who posted the notice and that prior to that date, the TEO had visited the premises and concluded that the Society was in compliance with the Bylaw. While I accept there appears to be confusion as to the applicability of the Bylaw to grandfathered tenants, there was no evidence of any violation of the Bylaw by a specific grandfathered tenant prior to this date.

[272] On January 27, 2012, the Acting GM wrote to Ms. Hancock about a complaint Ms. Hancock had made about marijuana smoke and advised her that she had contacted the RCMP and that the RCMP told her that tenants should call the RCMP directly. She indicated that she appreciated being advised of the issue and that the Society had hired Canadian K9 to do random sweeps for narcotics in the Building.

[273] In February, Ms. Borutski complained to the police about a tenant, who subsequently left a note in her mailbox advising that if she did that again he would lay a harassment charge against her. She complained to the Society who indicated the note from the tenant contained no threat of harm or harassment, but that the tenant was asking her to stop harassing him. Regardless, the Society spoke to the tenant and requested that he refrain from contact with Ms. Borutski.

[274] In late February 2012, Ms. Borutski wrote BC Housing asking to access a portable market rent subsidy which she said had been granted to her in 2008 and which would

allow her to find alternate accommodation elsewhere. In her request, she noted that she had lived off-site for several months in 2011, but became sick when she returned to Kiwanis in December 2011. Ms. Borutski testified that she had spent periods of time living away from Kiwanis in order to avoid what she considered to be the toxic living environment at Kiwanis and, in March, was living off-site.

[275] On April 6, 2012, Ms. Borutski observed two persons smoking near an entrance to the Building. She said she smelled both marijuana and smoke. She observed them for some time and they continued to smoke. She subsequently sent a letter of complaint to the Society.

[276] Ms. Borutski had been requesting that the Society replace her kitchen cupboards. Despite washing them, she said they retained the smell of smoke. The Society advised Ms. Borutski on May 7, 2012 that her cabinets should be installed in September 2012. Ms. Borutski was upset about this decision. However, as noted above, I found any delay in replacing the cabinets was for reasons unrelated to SHS.

[277] On May 23, 2012, Ms. Hancock made one of numerous complaints against a tenant who allegedly was smoking in a no-smoking suite. She was advised at that time that there was no evidence that could be used to evict the tenant, and that management had inspected his suite. She was also advised that he lived next to a grandfathered smoker and that perhaps the smell of smoke was emanating from that unit.

[278] Ms. Hancock testified that the Society ultimately was able to evict him on other grounds.

[279] On May 24, 2012, Ms. Hancock complained about vandalism to her vehicle and the Society advised her in early June that surveillance footage of the area was not available for tenants to view and she should contact the RCMP who could contact the office to access the footage. Ms. Hancock subsequently did contact the RCMP.

[280] On June 6, 2012, the Acting GM wrote Ms. Hancock about a complaint it had received from a tenant regarding her attending at the tenant's suite to inquire about whether his neighbour was smoking in his no-smoking unit and his views on smoking

issues involving the building. The tenant did not welcome the visit, and Ms. Hancock was advised that any further contact with the tenant would be viewed as harassment.

[281] Ms. Borutski and other tenants continued to be vigilant about observing and reporting smokers, and there was tension amongst the Kiwanis residents in this regard.

[282] On June 21, 2012, Ms. Hancock wrote the Acting GM a letter in response to the incident involving herself and the other tenant which resulted in the advice that any further contact with the tenant could be viewed as harassment. She gave her side of the incident and stated that any further threatening correspondence from the Society would be addressed in a human rights complaint. She also complained about smoking by a tenant in a no-smoking unit.

[283] On June 25, 2012, Ms. Hancock wrote to the Acting GM regarding a tenant smoking in his no-smoking unit and requested that the Society take action against the tenant. She recommended that the Society use canine services or do environmental testing to determine if the tenant was in fact smoking in his unit.

[284] Mr. Wright testified that, when Ms. Hancock complained about another tenant smoking in his unit, he investigated and advised the tenant about the smoking prohibition. He did not issue a breach letter because he did not smell smoke and only if there was sufficient evidence to sustain an eviction before the RTB did he issue such letters. He testified that he observed Ms. Hancock walking down the hallway two floors below her unit sniffing at doors to see if there was a smoke smell emanating from the suite and said she did not have to walk down those hallways to exit the Building.

[285] Ms. Borutski moved out of Kiwanis in July 2012.

[286] On July 23, 2012, Kiwanis' GM posted a notice about what was referred to as a "smoking table" outside of the Building. It advised tenants that the table had been removed and stated, in part:

Crescent Housing Society respects the rights of tenants who smoke and we appreciate the efforts of tenants to observe the city by-laws with regard to smoking. However, we are not obliged to provide designated smoking areas.

Some tenants have the impression that the “Gilligan’s Island” table is a designated smoking area sanctioned by Crescent Housing Society. As a result we are frequently asked to police the behavior of some of the tenants who use the table, which is proving to be a waste of time and resources.

[287] Ms. Chandler testified that, when she encountered smokers after the removal of the table, they yelled at her that she had made the Society take that action.

[288] Ms. Chandler testified that, after the table was removed, smokers would set chairs up outside the buffer zone at night and on the weekend and socialize and smoke. She said that the resulting smoke would drift into her unit.

[289] On August 19, 2012, Ms. Chandler wrote to Kiwanis’ new GM, Mr. Quentin Wright, advising that on August 9 she smelled marijuana that she believed was emanating from tenants in a particular unit and that she had smelled tobacco and marijuana smoke many times in the hallway since the tenants had moved into that unit in July 2012.

[290] She subsequently wrote to K-9 Detection Services regarding her suspicions about marijuana smoke emanating from that unit.

[291] Ms. Chandler testified that, after she filed her human rights complaint, she did not complain personally to Ms. Furcht or the Society about smoking until she wrote to Mr. Wright on August 19, 2012 about smelling smoke in a specific suite. She said that she was aware that Mr. Wright wanted letters from tenants about smoking complaints, at that time, in order for him to be able take action. She did not complain to Mr. Wright or the Society about that suite after this letter.

[292] Mr. Wright recalled receiving both an oral and written complaint from Ms. Chandler about a tenant smoking in their unit. He spoke with the tenant and did not receive a further complaint from Ms. Chandler about that tenant. He understood the issue had been resolved.

[293] On September 23, 2012, Ms. Chandler wrote to Mr. Wright about a tenant/contractor smoking while working on the premises. She asked Mr. Wright to ensure that the Society’s employees and contractors comply with the no-smoking policy, City Bylaw and WorkSafeBC Regulations.

[294] Mr. Wright recalled receiving a complaint from Ms. Chandler about a tenant who allegedly had smoked outside the buffer zone while doing contract work on-site. Mr. Wright met with the individual, who ceased to be a contractor after that incident. Mr. Wright testified that all employees are informed of the no-smoking policy.

[295] Ms. Chandler recalled receiving a letter from Mr. Wright about the tenant in response to her complaint about the tenant/contractor smoking. She believes that the tenant was ultimately evicted.

[296] Ms. Chandler kept a log of her smoking observations for a period in 2012, and testified that between July 14, 2012 to September 27, 2012, there was smoking throughout the day and night and she could not open her window without the threat of smoke coming in. She described the negative impact on her as she was unable to go to sleep with open windows until late in the evening due to the threat of smoke coming in through her window.

[297] Mr. Wright testified that there are no grandfathered smokers residing in the immediate vicinity of Ms. Chandler. He also testified that there were no grandfathered smokers residing in the immediate area around Ms. Hancock's unit, and that he has not received any complaints about grandfathered smokers from Ms. Hancock since he became GM.

[298] I find that, during 2012, the Society designated the rooftop as a no-smoking area, posted the prohibition about smoking on patios and balconies, and investigated and acted upon complaints about tobacco and marijuana smoking. I also accept that Ms. Chandler continued to experience distress at the smell of SHS in her unit at various times. I am unable to reach any conclusions about who vandalized Ms. Hancock's vehicle, where it was vandalized or that it had anything to do with this complaint. There was insufficient evidence to make any factual conclusions in this regard.

ANALYSIS AND DECISION

[299] The Complainants have alleged a violation of s. 10 of the *Code* which provides, in part:

- (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.

[300] The legal burden is on the Complainants to establish, on a balance of probabilities, a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if the allegations are believed, is sufficient to justify a finding in the complainant's favour absent an answer or justification from the respondent: *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited*, [1985] 2 S.C.R. 526, p. 558.

[301] In this case, in order to establish a *prima facie* case, the Complainants each must prove that:

- (a) they are a member of one or more of the protected groups against whom discrimination is prohibited by the *Code*;
- (b) they suffered adverse treatment in regard to their tenancy; and
- (c) it is reasonable to infer from all the circumstances that their membership in the protected group was a factor in the adverse treatment.

Monsson v. Nacel Properties Ltd., 2006 BCHRT 543, para. 25.

[302] It is not necessary the prohibited ground be the sole or primary factor in the adverse treatment, provided it is at least a factor: *O'Connor v. Town Taxi*, 2000 BCHRT 9, para. 55.

[303] Further, the *Code* does not require that there be any intention to discriminate in order for there to be a breach of the *Code* (s. 2).

[304] I note that while there is no specific statutory defence provided in s. 10 of the *Code*, the Tribunal has considered in numerous decisions whether the landlord has presented a *bona fide* and reasonable justification where conduct has been found to be *prima facie* discriminatory. See, for example, *Alexander v. PAL Vancouver*, 2006

BCHRT 461, para. 43 and *Ford v. Lavender Co-operative Housing Association*, 2009 BCHRT 38, para. 38. The latter decision was overturned on judicial review, though not on this point: *Lavender Co-Operative Housing Association v. Ford*, 2009 BCSC 1437 (appeal dismissed 2011 BCCA 114).

[305] I accept that, in this case, if the Complainants succeed in establishing a *prima facie* case against either Respondent, then the Respondent must establish a *bona fide* reasonable justification (“BFRJ”) for the conduct in regard to that complainant: *Alexander v. PAL Vancouver*, 2006 BCHRT 461. If a BFRJ is proven, then there is no breach of the *Code*.

[306] The Complainants focussed on whether a BFRJ had been established in their argument, and did not extensively address whether they had proven a *prima facie* case of discrimination. They proceeded on the basis that they had disabilities, there was smoke in the Building that negatively affected them, and the Respondents had a duty to accommodate them. Implicit in this assumption is their view that they had proven a *prima facie* case. I will, however, analyze each component of the test.

[307] The Complainants also made reference to the provisions of the *Residential Tenancy Act* (“RTA”) and their understanding of what certain terms meant and its impact on their tenancy. The issue before the Tribunal is not whether there was any breach of the *RTA* and I have not considered whether there has been a breach in my decision.

[308] I have, however, considered the impact of the RTB decision regarding Ms. Borutski on this complaint. In that decision, the RTB concluded, amongst other things, that the Society was not aware of Ms. Borutski’s need for accommodation regarding SHS until after she moved into her unit, and that the Society had tried to accommodate Ms. Borutski but Ms. Borutski had not worked cooperatively to resolve the situation. I adopt those factual conclusions as they pertain to the factual circumstances up to the date of that decision.

Disability

[309] The Respondents concede that each of the Complainants suffer from multiple disabilities. The Respondents say, however, that they were not aware of the Complainants' smoke-related disabilities at the outset of the Complainants' tenancy.

[310] I accept that the Respondents were aware that each tenant had a disability at the time they commenced their tenancy. I also conclude, however, that none of the Complainants disclosed to Ms. Furcht or the Society, prior to the commencement of their tenancy, that their disabilities were negatively impacted by exposure to SHS and that they required accommodation in this regard.

[311] Ms. Hancock had lived at Kiwanis for many years before expressing any concern that she required accommodation due to exposure to SHS. It was only after Ms. Borutski organized tenants to speak out against SHS exposure that Ms. Hancock advised Kiwanis that she required accommodation in this regard. She was also living elsewhere during 2008 and part of 2009.

[312] I find that the Respondents knew, from late 2008 onward, that Ms. Hancock had expressed a smoke-related disability and was seeking accommodation in that regard.

[313] In regard to Ms. Borutski and Ms. Chandler, as noted earlier in this decision, I find that the Respondents were not aware of their specific medical need for accommodation related to SHS until March 2008.

Adverse Impact and Nexus

[314] The Complainants each say that there was pervasive SHS inside and outside the Building to which they were exposed and which adversely affected their health.

[315] The Respondents argue that Ms. Hancock's primary complaint relates to smoke emanating from a suite two floors below her. It says that even assuming that tenant is in breach of the tenancy agreement (which it denies), Ms. Hancock has not established that the smoke from that unit exacerbates her physical or mental disabilities. It says that any negative impact to her is the result of her choice to seek out and investigate goings-on in that suite. The Respondents note that, in his January 13, 2009 letter, Ms. Hancock's physician says that any exposure to smoke adversely affects Ms. Hancock's asthma. Yet,

Ms. Hancock also admits that her physician has advised her that her asthmatic symptoms might also be caused by other environmental factors.

[316] The Respondents further say that Ms. Hancock's primary stressor was related to the complaint (as set out in her psychiatrist's report dated March 19, 2010) and that stress, in itself, is not a disability: *Matheson v. School District No. 53*, 2009 BHRT 112, para. 14.

[317] In regard to Ms. Borutski, the Respondents say that there is no reliable evidence of the volume of SHS at Kiwanis and its impact, if any, on Ms. Borutski's disability. Similarly, in regard to Ms. Chandler, they say there is no reliable evidence of the volume of SHS, if any, entering her suite and its impact, if any, on her disabilities.

[318] While none of the Complainants called a physician to testify as to the impact of SHS exposure, I am satisfied, based on their testimony and the written documentation, that exposure to SHS exacerbated, from time to time, such conditions as asthma and environmental sensitivities. In reaching this conclusion, I am mindful that the physician's conclusions are not based on their personal observation of the amount of smoke at Kiwanis, but on the personal accounts of their patient. In this regard, I note that the smoke, in at least one case, was described as "pervasive" and in another case as "day and night".

[319] In my view, each Complainant tended to exaggerate the amount of SHS to which they were exposed. I appreciate that any exposure to SHS was unacceptable to them, and that they found the smell of smoke offensive and uncomfortable. However, the evidence was insufficient to reach any reasonable conclusion as to the ongoing or permanent impact of the SHS on their health (apart from aggravating existing disabilities such as asthma) given the numerous and varied pre-existing disabilities that each Complainant had and the lack of any expert evidence based on proven facts. Rather, I find that exposure to SHS would, from time to time and depending on the amount of exposure, aggravate existing asthma and environmental sensitivities from which it took some time to recover.

[320] I have also been mindful of the testing done by PET and that the measurements indicated levels of nicotine present in the locations tested that were below certain

regulated safety standards. However, the testing was only done on one occasion and I accept that, at other times, there may have been more SHS in those locations. I also accept that any exposure may constitute a health risk.

[321] In summary, I accept that, at various times and to varying degrees, there was SHS inside and outside the Building, that each Complainant experienced SHS to varying degrees and, at various times, both inside and outside their units during their tenancies, and that such exposure, to varying degrees, had an adverse impact on their existing medical conditions.

[322] Therefore, I conclude that the exposure to SHS had an adverse impact of each Complainant in various ways, levels and at different times, and that the Complainants have established a *prima face* case of discrimination.

[323] I will now address whether the Respondents have established a BFRJ.

BFRJ

[324] The central issue in this case, in my view, is whether the Respondents took reasonable steps, short of undue hardship, to accommodate the Complainants' SHS-related disabilities: *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*") and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("*Grismer*"). Part of this assessment includes a consideration of the Complainants' participation in the accommodation process.

[325] As stated by the Supreme Court of Canada in *Central Okanagan School District No. 23 v. Renaud* (1992), 16 C.H.R.R. D/425:

The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in *O'Malley*. At p. 555, McIntyre J. stated:

Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.

To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.

... When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged. (at paras. 43-44)

[326] The multi-party process envisioned by the Supreme Court in *Renaud* is a collaborative one. The parties need to work together to determine the physical and mental disabilities that require accommodation, the nature of the accommodation required, and what steps might reasonably be taken to implement that accommodation. This process may take time, particularly when there are multiple persons requesting the same or similar accommodation, and when the accommodation is, to some extent, dependent on vacancies arising within Kiwanis which would offer less exposure to SHS.

[327] The duty of the Respondents is to provide a reasonable, not a perfect, accommodation.

[328] The Respondents say that they offered reasonable accommodation to the Complainants and the Complainants unreasonably rejected such accommodation.

[329] In regard to Ms. Borutski, they say that they offered to facilitate meetings between her and the tenants she identified as the source of the SHS problem in order to create a schedule of smoke-free hours, to install weatherstripping (though Ms. Borutski had already done so herself), to relocate her to various units, and to create a no-smoking wing. Ms. Borutski rejected all of these offers. They say that Ms. Borutski did not participate in the accommodation process, and did not make a counter offer to their offer of a no-smoking wing.

[330] They acknowledge that Ms. Borutski wanted a tenant-wide meeting, but say it was not unreasonable, in the circumstances, to reject a tenant-wide meeting to discuss SHS. They note that it is undisputed that the environment at Kiwanis was very divisive and fractious between smokers and non-smokers and that their conclusion that such a meeting would be unproductive is not unreasonable.

[331] In the circumstances, I concur with the Respondents. There was evidence of militancy and disrespectful encounters between smokers and non-smokers (on both sides). I accept that the Respondents offered to facilitate individual meetings, and that this was reasonable.

[332] As well, the Respondents say that they took the following steps to accommodate Ms. Borutski:

- i) Mapping smokers in the Building to identify suites less prone to SHS;
- ii) Obtaining the agreement of a tenant Ms. Borutski identified as a source of SHS to not smoke on her patio;
- iii) Relocating existing smoking areas away from the Building; and
- iv) Attempting to relocate smokers identified by Ms. Borutski.

[333] The Respondents also say that they were not required, as an accommodation, to force another tenant to move to accommodate Ms. Borutski and could not do so under the *RTA*.

[334] The Respondents say that they implemented the Policy, complied with statutory requirements related to smoking boundaries and took steps identified by the Complainants in the petition it presented to the Society in 2008.

[335] In regard to Ms. Hancock, the Respondents say that they offered to relocate her and its offer was accepted. They also note that she rejected the offer to move to a no-smoking wing and that this represents an acknowledgement that her current living situation is a reasonable accommodation.

[336] In regard to Ms. Chandler they say that, once Ms. Chandler identified her medical need for accommodation, it facilitated a meeting with her and the tenant whom she identified as the source of the SHS. They say they reasonably believed a satisfactory resolution had been achieved during that meeting, which resulted in smoke-free hours and

that Ms. Chandler did not dispute that, after this meeting, there was no further complaint from her about this tenant. They also note that they offered to move Ms. Chandler but that she did not wish to move for a variety of reasons unrelated to SHS, and that Ms. Chandler also rejected the offer of a no-smoking wing. They say that Ms. Chandler did not participate in the accommodation process as she believed her current suite offered a more suitable environmental in which to manage her disabilities.

[337] The Respondents also say that they could not change the terms of the grandfathered tenants' leases without their consent, evict them except in compliance with the *RTA*, or force them to move without their consent. They say that they spoke to certain grandfathered tenants who smoked, to inquire about whether they would change the terms of their lease. Some did, and others did not. While they acknowledge that the *Code* supersedes a contract, they say their actions were reasonable in all the circumstances.

[338] Finally, the Respondents say that they were responsible in investigating and enforcing breaches of the smoking rules.

[339] The Complainants each say that the Respondents failed to reasonably accommodate their disabilities. They say that simply because they cannot afford to move, and must live in subsidized housing, does not mean that they must be exposed to the harmful effects of SHS. They say that SHS is a nuisance, and they should be protected by the laws of nuisance. They also say that it is a breach of their right to the quiet enjoyment of their property under the *RTA*.

[340] I concur with the Complainants that PWD status does not preclude the application of the *Code* and does not imply that they should be unreasonably exposed to substances that can harm their health. Having said that, the issue before me is whether the Respondents reasonably accommodated their disabilities. It is not whether their actions constituted a nuisance, or whether they breached the *RTA*.

[341] The Complainants were free to pursue both a civil claim and a complaint under the *RTA* to resolve those issues. There was evidence that Ms. Borutski had, in fact, done so. There was no evidence that either Ms. Hancock or Ms. Chandler chose to avail themselves of any legal remedies that might be available to them under the *RTA* or in the civil arena. I will restrict my findings to the issue before me arising under the *Code*.

[342] The Complainants say that the Society unreasonably and arbitrarily set 2018 as its target for a smoke-free environment date, and that it should have, in effect, immediately moved to make the entire premises smoke-free. I do not find that the date was arbitrary. There was evidence of consultation with various organizations and that the Society considered the date was reasonably achievable given the age and other factors related to the current tenants. I am satisfied that the date was chosen after due consideration of such factors and that, given the tenant complement, it was reasonable to work towards a smoke-free environment rather than immediately imposing no-smoking restrictions on people whose lease did not restrict smoking inside their home. While an earlier date may also have been achievable, I am persuaded that, in the circumstances, an immediate restriction was unreasonable.

[343] Ms. Borutski says that there should have been consequences for grandfathered smokers. As well, she says that the offers of relocation and creation of a no-smoking wing that were made to her were unreasonable. In particular, she says that the offer of a no-smoking wing was vague and did not contain sufficient particulars, such as timelines. She also says that, if there are no grandfathered smokers, then there would be no smoking in suites and no need to move locations.

[344] Ms. Borutski acknowledged that both smoking and non-smoking tenants at Kiwanis were PWD. However, she said that given the harmful effects of SHS, the accommodation of non-smokers trumps the accommodation of smokers. She also says that there are other ways to deal with a nicotine addiction than through smoking. She says that allowing smoking in one's suite is not a necessary function of a housing provider and should not be sanctioned.

[345] Ms. Borutski notes that discrimination in one's home has been recognized by the Tribunal as particularly egregious: *James obo James v. Silver Campsites and another* (No. 3), 2012 BCHRT 141 and *McDaniel and McDaniel v. Strata Plan LMS 1657* (No. 2), 2012 BCHRT 67.

[346] Ms. Chandler says that it was not unreasonable for her to decline to relocate since tenants might possibly move into suites near her who smoked or have guests who

smoked. She said she was located in a group of long-term non-smokers and felt it was the most appropriate location for her.

[347] Ms. Chandler also says that the Respondents could have asked grandfathered tenants to change the terms of their tenancy. She reiterated her view that Ms. Furcht did not deal appropriately with the situation.

[348] Ms. Hancock says that the Respondents did not reasonably respond to her request to move suites, and that she still is exposed to SHS in her current suite. She says that it is unreasonable for smokers to expect to continue smoking in units which share air with other tenants: *Feaver v. Davidson* (2003), O.R.H.T.D. No. 103 (paras. 20-31).

[349] She says that she was not reasonably accommodated.

[350] The Complainants also say that there is no evidence the volume of smoke decreased over time as there was no further expert report besides the PET. As well, they note that there is no known safe level of exposure to SHS and, therefore, any exposure is harmful. They say that it is unconscionable to require them to consider relocation when there was no guarantee there would be no exposure to SHS. They maintain that SHS has increased over time, not decreased, at Kiwanis.

[351] They say that Ms. Furcht erroneously believed that grandfathered tenants were allowed to smoke on patios, contrary to City Bylaws and that it was not until January 2012 that this erroneous belief was corrected.

[352] The Complainants say that “no guarantee, no reason to move, no secondhand smoke, no reason to move.”

[353] I accept that there is no known safe level of exposure to SHS. I accept that non-smokers may find the smell of smoke disgusting, offensive and distasteful. I also find that exposure to even small levels of SHS may contribute to a negative health reaction. I further accept that persons with PWD designation who require subsidized housing should not have to endure exposure to SHS as a necessary consequence of their income level. However, while I sympathize with the Complainants, I am also cognizant of the reality of the situation facing the Respondents.

[354] The Building units were all occupied, with seniors and/or PWD, and many with persons who had a lease that did not restrict smoking in their homes. There was evidence that existing tenants who smoked were resistant to changing their lease and to moving locations. There was no evidence, and I was not made aware, of any legislative authority that would have allowed the Society to unilaterally change the terms of the existing leases which allowed the grandfathered tenants to smoke in their units.

[355] Having said this, if grandfathered tenants were the source of the SHS, then the Respondents had a responsibility to try to accommodate the Complainants and address that issue, such as through taking steps to minimize, if not eliminate, any SHS emanating from the suite, seeking agreement to amend the lease, and other positive steps.

[356] I accept that the Respondents took the following measures to reasonably accommodate the Complainants:

- a) Implemented a Policy which precluded smoking in buffer zones, smoking by employees on the premises, and which put tenants on notice that the Building was working toward being smoke-free by 2018;
- b) Posted notices about the buffer zones;
- c) Amended its lease to include a no-smoking clause;
- d) Investigated and enforced complaints about breaches of the buffer zone and no-smoking clause and, in some cases, relocated smoking tenants away from no-smoking tenants;
- e) Inspected, cleaned and reasonably maintained the ventilation system;
- f) Obtained quotes about the installation of a new ventilation system. Given the cost of the system and the necessity of a roof replacement, I find it was reasonable that a new system was not installed, particularly since the current system was in good working condition;
- g) Moved the outdoor “smoking pit” and barbeque area to well beyond the buffer zone;
- h) Designated the rooftop deck as no-smoking, though not until 2012;
- i) Mapped out where known smokers resided and endeavoured to relocate tenants to areas where exposure would be minimized;
- j) Offered to weatherstrip units;
- k) Offered to facilitate tenant-to-tenant meetings to negotiate smoke-free hours;

- l) Asked some, if not all, of grandfathered tenants who smoked to sign on to the no-smoking addendum and, in some cases, to relocate;
- m) Advised tenants who wished to relocate to submit a request in writing and that the Society would endeavour to relocate them to suites where there was less exposure to SHS; and
- n) Sought advice from various professional organizations such as the Health Authority, BC Housing and a housing association as to what it could do to address the situation.

[357] I find that all of these steps resulted in reduced SHS exposure for all Complainants. I also note that over 40 people signed the petition, and there were originally a large number of Complainants to this Complaint. There was evidence that many of these persons were relocated to minimize exposure to SHS and I accept that the Society had to balance competing demands for relocation.

[358] As well, in regard to Ms. Borutski, I find that she declined to participate in a facilitated meeting to agree on smoke-free hours since she wanted an “all-tenant” rather than an individual resolution to the problem. I also find that Ms. Furcht spoke to an individual tenant identified by Ms. Borutski and obtained agreement that the tenant would not smoke outside to minimize any SHS experienced by Ms. Borutski.

[359] I find that Ms. Furcht was supportive of Ms. Borutski’s efforts to engage the Clean Air Coalition to assist in moving the Building to a smoke-free environment and that Ms. Furcht was using her best efforts to address the issue within the authority given her by the Society.

[360] I further find that Ms. Borutski was offered, and unreasonably declined, relocation to suites that could have reduced her exposure to SHS. I accept that the units identified by Ms. Borutski for relocation were either occupied or provided to another individual as an accommodation. I do not find it unreasonable for the Society to balance competing requests for accommodations. As well, I note that Ms. Furcht spoke to the tenants in the occupied suites to see if she could secure their agreement to move, but was unable to obtain consent.

[361] Overall, I find that the Society endeavoured to reasonably accommodate Ms. Borutski, but that Ms. Borutski was resistant to anything other than the creation of an

entirely smoke-free environment, both inside and outside the Building. I find that she did not satisfy her obligation to reasonably participate in the accommodation process, and that she sought the perfect, rather than a reasonable, accommodation.

[362] Similarly, I find that Ms. Chandler also refused to consider reasonable accommodation by rejecting any consideration of a move, and that the Respondents reasonably believed they had accommodated her through the negotiation of smoke-free hours and the absence of any complaint from her, after that date, that the hours were not adhered to.

[363] The smoke-free hours were negotiated to allow her to sleep with her windows open at night. As well, shortly after that, statutory regulations came into place which precluded, in any event, smoking on balconies. Ms. Chandler could have complained either to the Society or to Fraser Health to seek enforcement of the Bylaw if it was still causing her concern. She did not do so. She did file this Complaint, but the particulars of her Complaint were not provided to the Respondents until November 2008, by which time the Society had already negotiated the smoke-free hours and the Bylaw had come into effect.

[364] I also note that Ms. Chandler admitted that she would not consider relocation because of the many advantages her current home offered her, including a view of the waterfall and other amenities. This is not to say that, in every case, it is a complainant that must move from their home (or even that a move is the only reasonable way to reduce or eliminate exposure to SHS), but rather that, in this case, the creation of a smoke-free wing was an alternative that might reasonably have been considered and explored, but which was rejected by all Complainants.

[365] In regard to Ms. Hancock, the Society did not approve her original request for relocation, but I accept that the identified suite would not have minimized exposure to SHS, given its location and the nature of Ms. Hancock's complaint. Ms. Hancock was ultimately relocated and I accept that, in the intervening period, there were no suitable and available suites, and that Ms. Hancock was not residing full-time at Kiwanis during at least part of this period. I also find that the Respondents were, during this period, enforcing smoking rules and regulations.

[366] While Ms. Hancock did complain about SHS after her move, I find that the Society investigated and dealt reasonably with the situation. I do not accept that the level of SHS she experienced was as invasive as she described. I find that, while she may have smelled smoke from time to time, it was transitory and that she sought out smoke by walking down hallways she could have avoided and sniffing outside units.

[367] Overall, I find that the Society discharged its duty to reasonably accommodate the Complainants by exploring possible accommodations, offering relocation, implementing restrictions on smoking, moving areas where people tended to smoke well away from openings to the Building, and enforcing the smoking prohibition after investigation provided evidence to do so. I find Ms. Borutski, in particular, acted unreasonably in not availing herself of reasonable accommodations offered to her.

[368] This was a difficult situation for the Complainants and the Respondents. I believe that all parties want a smoke-free environment at Kiwanis, but that the Respondents felt constrained as to how they could legally implement a smoke-free environment, given the terms of existing leases. The Society had more control over common areas and the external environment and implemented several measures to minimize any exposure to SHS for tenants, including moving the “smoking pit” well beyond the buffer zone and minimizing the possibility of drifting SHS going into any suite.

[369] The one thing that the Society did not do, which it could have in my view, is designate a no-smoking area outside for the use of no-smoking tenants earlier than 2012. Having said this, I remain of the view that the Complainants would not have been satisfied with anything other than a complete prohibition on the property.

[370] I am persuaded that the Respondents discharged their duty to accommodate the Complainants. The complaint is dismissed.

Enid Marion, Tribunal Member