

Case Name:

**Drummond v. Strata Plan NW2654**

Between

Dawn Drummond, petitioner, and  
The Owners, Strata Plan NW2654, respondent

[2004] B.C.J. No. 2280

2004 BCSC 1405

New Westminster Registry No. SO86186

**British Columbia Supreme Court  
New Westminster, British Columbia  
McKinnon J.**

Heard: September 27 and 28, 2004.

Judgment: November 1, 2004.

(43 paras.)

*Real property law — Condominiums — Bylaws — Human rights law — Discrimination — Grounds — Age.*

Petition by Drummond, owner of a strata unit, challenging an age restriction bylaw and seeking relief of fines levied against her in the amount of \$16,400. The age restriction bylaw prohibited persons less than 19 years of age from residing in a strata lot for longer than 30 days. Drummond came to live in a strata unit with her partner who owned a unit. Their 13-year-old son joined them. Ownership of the unit was then transferred to Drummond. Correspondence between the strata council and Drummond indicated that according to strata regulations and council decision, Drummond would be fined \$200 per week, the maximum allowed by the regulations, until the son moved out. Drummond sought Human Rights Code relief as a tenant subject to age discrimination.

**HELD:** Petition allowed in part. Human Rights legislation was not applicable because Drummond was not a tenant. The age bylaw was a legitimate and justifiable restriction on the use of strata units which was demonstrated to be in the interests of majority owners. The council's refusal to grant an exemption was not significantly oppressive as to be unfair under the Act. The fine was not justified because Drummond had a reasonable argument to advance concerning the effect of the bylaw and its enforcement. The council imposed on her the maximum fine permitted, which was not necessary. She should not have been fined for the period during which she waited for the case to come to court. The fine was reduced to \$1,000.

**Statutes, Regulations and Rules Cited:**

Human Rights Code, ss. 9(c), 10.

Law & Equity Act, s. 24.

Strata Property Act, ss. 121, 130, 164.

**Counsel:**

Counsel for the Petitioner: S.M. Smith

Counsel for the Respondent: E.T. McCormack and M. Fischer

¶ 1 **McKINNON J.**— This is a petition filed by the owner of a strata unit challenging an age restriction bylaw. The petitioner also seeks relief against fines levied against her which, at the date of this hearing, totalled \$16,400.

¶ 2 The respondent is a Strata Corporation governing a complex at 16350 14th Avenue, Surrey, B.C..

¶ 3 There does not appear to be any dispute that the focus of the development, when first marketed in the late 1980s, was adult oriented and that this theme has continued throughout. Indeed, signs posted at the entrance specifically refer to it as "adult oriented".

¶ 4 I accept that my assessment should include references in the evidence to the wishes of other owners. In *Gentis v. Strata Plan VR 368*, [2003] B.C.J. No. 140, Masuhara J. at [paragraph] 24 stated:

In carrying out this mandate, [enforcement of a bylaw] the Corporation must consider, and act in, the best interests of all the owners. Put differently, the Corporation "must endeavour to accomplish the greatest good for the greatest number": *Sterloff v. Strata Plan No. VR 2613* (1994), 38 R.P.R. (2d) 102 at [paragraph] 35 (B.C.S.C.).

#### THE FACTS

¶ 5 The first age restriction bylaw was registered October 26, 1987, which prohibited residency for persons under the age of 40 years. Some time later and after receiving opinions that suggested such a restriction might not be enforceable, a new bylaw (hereinafter referred to as the 19 bylaw) was duly passed November 26, 2001, and registered on January 15, 2002, under No. DT014296. This bylaw states:

#### (38) Adult Occupancy

The exclusive use, occupation and enjoyment of the strata lots are restricted to persons over the age of 19 years. No person under (19) years of age is permitted to reside in or occupy or visit any strata lot for a period of time greater than (30) consecutive days during each calendar year unless specific approval in writing has been given by the council; Any such approval shall not be deemed to be setting a precedent. Each approval will be considered individually on its own merits.

¶ 6 Dr. Robert Fletcher became the owner of Strata lot 28 in September, 2001. One year later, in September, 2002, the petitioner and her son Nick, then 13 years of age, came to live with Dr. Fletcher.

¶ 7 In October, alerted to this fact, council had its manager send a letter to Dr. Fletcher advising of the 19 bylaw terms and stating that Council now had "notification as to this violation". Dr. Fletcher responded on October 29, advising that the boy had resided with him and the petitioner since September 2, 2002, and requested that the council "... allow our son to reside with us". No reply was received.

¶ 8 On November 21, the petitioner became the owner of the unit. The Strata Council became aware of this change of ownership and directed their manager to send a letter to Ms. Drummond, similar in content to that sent earlier to Dr. Fletcher.

¶ 9 No response was sent by Ms. Drummond because she deposed that she considered the request of Dr. Fletcher for "consideration" to have adequately covered the situation.

¶ 10 On January 28, 2003, Council had its manager send a letter to the petitioner in which he stated:

As you are no doubt aware, the Strata Corporation has adopted a bylaw restricting residency to persons over 19 years of age. As we have had no reply to our letter of November 27, 2002, we have been instructed by the Strata Council to commence action to enforce this bylaw and are assessing a fine of \$200.00 against your unit pursuant to Division 4, section 23.

If you wish to appeal this fine or this enforcement to your Strata Council, a written request must be sent to our office - attention: "Accounts Receivable" and it will be forwarded from that point. Your appeal must be received within two weeks from the date of this letter.

¶ 11 The petitioner responded with a letter to Council on or about February 5 in which she expressed surprise at the January 28th letter as she said she had been awaiting a response to the letter that Dr. Fletcher sent in October.

¶ 12 A meeting of the Council of Owners was held February 24, 2003, and the following are minutes of that meeting:

Ms. Dawn Drummond addressed the Council concerning her having a minor person in residence in her unit contrary to Council Bylaws. Ms. Drummond acknowledged that she was aware that Westwinds was an adult orientated complex before residing there, but that she had seen other children in the area when visiting the complex. She advised Council that nobody had advised her of the Adult Occupancy Bylaw prior to taking up residence in the complex. In discussion of the matter, Council pointed out to Ms. Drummond that as part of the conveyancing of a strata property, she would have been required to acknowledge that she had received a copy of the Council Bylaws, and that she was familiar with their content.

Ms. Drummond advised Council that her 13 year old son is a quiet computer orientated individual, and that the only noise complaint received to date was related to a guest of her son and not her son himself.

The Property manager asked Ms. Drummond what form of consideration she was asking from Council in her appeal. Ms. Drummond indicated she simply wanted permission from Council for her son to remain in residence. A general discussion of the history of this bylaw and related issues ensued.

Council strongly emphasized its' legal obligation to enforce the Bylaws to Ms. Drummond, and that doing so was not reflective of any personal feelings on their part in the matter.

¶ 13 In a letter to Ms. Drummond dated February 26, the manager indicated that Council had met "last night" and discussed her appeal at some length. He advised that the "general agreement" of the facts by those members were:

Your resident son is under the age of 19;

The Strata Corporation bylaws restrict residency to persons over 19 years of age;

The Strata Property Act (Part 4 Division 1, Section 26) instructs that a Council must enforce the bylaws of the Corporation;

The Strata Corporation at its General Meeting held in November of 2001 adopted bylaw 38 giving the mandate to the Council such authority to enforce this age restriction; and

There has been no dispute expressed as to these facts.

As such, the Strata Council has instructed us to continue to enforce the bylaw until such time as an alternative can be considered. The fine for a continuing contravention of a bylaw is \$200 per week that the owner(s) remain in violation.

The Strata Corporation will therefore assess \$200.00 per week commencing from the week of this meeting.

We trust a more reasonable solution can be found to address this situation."

¶ 14 The bylaws provide under Division 4, [paragraph]23(1) that "the strata corporation may fine an owner or tenant a maximum [my emphasis] of: (a) \$200 for each contravention of a bylaw, and, (2) The strata corporation may [my emphasis] impose a fine on an owner or tenant for a continuing contravention of a bylaw ... every 7 days."

¶ 15 It seems to me, after reviewing the correspondence directed to the petitioner on this issue of the fine and minutes of the various meetings in that regard, that the Council has erroneously concluded they were obliged to impose a fine of \$200 per week. No consideration seems to have been given to the fact that this is a maximum sum and that therefore it was open to the Council to impose something less.

¶ 16 Nothing much seems to have happened for some time. The petitioner continued living in her unit with her son and the manager continued to advise her from time to time of the accrued penalties.

¶ 17 An Annual General Meeting was held October 23, 2003, at which three resolutions were considered: a resolution to approve Nick's residency was tabled, a vote to repeal the 19 bylaw was defeated and a resolution to enforce the 19 bylaw against the petitioner and approving a special levy to fund legal expenses was tabled.

¶ 18 At a Special General Meeting held on February 23, 2004, at which a 3/4 vote was required for approval, three more resolutions were considered:

A resolution to repeal the 19 Bylaw and replace it, thereby grandfathering all children currently living in the complex, was defeated.

A resolution to grant Nick Drummond a specific exemption was defeated.

A resolution to commence Court Proceedings to enforce the 19 bylaw against the Petitioner and approving a special levy to fund legal expenses was defeated.

## THE ARGUMENT

1. Does the Human Rights Code apply to the petitioner's situation?

¶ 19 The petitioner contends that any breach of the Human Rights Code, R.S.B.C. 1996, c. 210, by these bylaws, regardless of whether it has any effect upon her, makes the provision "unenforceable". In this respect she relies upon s. 10 of that Code which states:

- (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 .... age  
....

[Emphasis added]

¶ 20 The petitioner claims that since a tenant would be protected by the Human Rights Code because the 19 bylaw affects "family status" and "age", she should be entitled to the same protection. I do not agree. The legislation is rife with instances of exceptions to the general rule prohibiting discrimination. Essentially, the petitioner's position is that while she is not a "tenant", nevertheless she is entitled to benefit from the provisions of s. 10 because a tenant could invoke those provisions and have the bylaw rendered ineffective against him/her.

¶ 21 Clearly the petitioner is not a tenant. I am unable to accept that a bylaw which possibly is unenforceable against one class of persons (e.g. a tenant) can be said to be unenforceable against all classes.

¶ 22 It seems to me that such an argument would render strata bylaws impossible of enforcement. Issues arising from time to time involving strata matters must be case/fact specific. I am only entitled to invoke the Code as it impacts the specifics of this petitioner's situation.

¶ 23 The petitioner is an "owner". She has a (now) fifteen year old son residing with her in her strata unit. This offends the bylaws. The petitioner submits that, because the bylaw refers to "over 19" (which is permissible), there is an ambiguity, when read in its entirety. However, I find that the bylaw prohibits residency for persons under the age of 19. The bylaw states as follows:

The exclusive use, occupation and enjoyment of the strata lots are restricted to persons over the age of 19 years [my emphasis]. No person under (19) years of age is permitted to reside in or occupy or visit any strata lot. ... [again my emphasis]

¶ 24 It seems to me that the reference to persons entitled to exclusive occupancy as being those "over the age of 19 years" simply states the converse of the prohibition, that is that no persons "under the age of 19" may occupy premises etc. The bylaw affects only those under 19 years.

¶ 25 The Code does not prohibit discrimination against a person in the petitioner's situation in respect to family status or age. Thus the Code has no application to the petitioner's situation and s. 121 of the Strata Property Act, S.B.C. 1998, c. 43, which stipulates that any bylaw that offends the Code is unenforceable, need not be considered.

¶ 26 The 19 bylaw does not violate s. 9(c) of the Code insofar as the petitioner's purchase of her unit is

concerned. That section stipulates that:

A person must not discriminate against a person or class of persons regarding a term or condition of the purchase or other acquisition of a commercial unit, dwelling, land or interest in land because of the race, colour, ancestry, place of origin, religion, marital status, physical or mental disability, sexual orientation or sex of that person or class of persons.

There is no reference to family status or age in that description.

¶ 27 In *Marshall v. Strata Plan No. NW2584*, [1996] B.C.J. No. 1716 (B.C.S.C.), Henderson J. considered the issue of an age restriction of 55 years. He cited certain provisions of the Human Rights Act, S.B.C. 1984, c. 22, which provisions are incorporated in the Code. He noted that in terms of tenancies, the Act permitted discrimination where every rental unit was designated for people 55 years of age or older. He also noted at [paragraph]24 (as I have in the case at bar) that "the Human Rights Act contains no prohibition on age discrimination in the purchase of strata lots at all".

¶ 28 In the view of Henderson J., it was appropriate to infer from the tenancy age discrimination and the absence of any discrimination restrictions respecting sale, the right of a Strata Corporation to impose such restrictions generally. In [paragraph]23 he commented about the intent of the legislation respecting rental exceptions; these comments, in my view, apply equally to adult oriented freehold developments:

¶ 23 As far as rental accommodation is concerned, the Legislature has prohibited discrimination against tenants on the basis of age, but has made an express exception for premises in which every rental unit is designed for people 55 years of age or older. Clearly, the legislation recognizes the legitimacy of retirement communities where people of advancing years may live together with other members of their own generation. The Legislature has made a policy choice to permit this differentiation, based upon age, to exclude younger tenants. The benefits resulting from permitting older people to band together in retirement communities must be taken to outweigh the adverse consequence of placing some rental accommodation beyond the reach of younger people.

¶ 29 In the result, I am unable to accept the petitioner's submission that the Human Rights Code has any application to her situation. That determination permits consideration of the comments of Allen C.C.J. in *York Condominium Corp. No. 216 v. Borsodi et al.* (1983), 42 O.R. (2d) 99 (Ont. Co. Ct.). In that case, the learned trial judge determined that an age restriction bylaw prohibiting occupation by persons under the age of 14 years, was not contrary to the Ontario Human Rights Code, and was a reasonably justifiable and legitimate restriction of the use of a condominium suite for the benefit of owners.

¶ 30 I accept that the 19 bylaw likewise is a legitimate and justifiable restriction on the use of the strata units which has been demonstrated to be in the interests of the majority of owners.

2. Was council's refusal to grant an exemption unfair as that term is defined in s. 164 of the Strata Property Act?

¶ 31 Section 164(1)(a) states:

On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly [my emphasis] unfair action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant. ...

¶ 32 Several affidavits were filed stating the deponents were motivated to purchase their units precisely

because it was described as adult oriented: see affidavits of Edward Lindberg and Laurie Wyspinski. I accept that at the time of her purchase, the petitioner was aware of the 19 bylaw but chose to either ignore it, or hoped to rely upon the discretion of Council to grant an exemption. Indeed, her approach to Council seems to suggest that she considered her application to be a mere formality that would receive automatic approval.

¶ 33 The term significantly unfair has been judicially considered and is perhaps best summarized in Reid v. Strata Plan LMS 2503, [2001] B.C.J. No. 2377 and Gentis v. The Owners, Strata Plan VR 368, (supra). In the former, Sinclair Prowse J. stated:

In this hearing, Counsel for both parties submitted that the meaning of "significantly unfair" would, at the very least, encompass oppressive conduct and unfairly prejudicial conduct or resolutions. I agree.

In the case of Blue-Red Holdings Ltd. v. Strata Plan VR 857, [1994] B.C.J. No. 2293 (B.C.S.C.), the court reviewed all of the definitions that had been given to these terms. Specifically, oppressive conduct has been interpreted to mean conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith. "Unfairly prejudicial" conduct has been interpreted to mean conduct that is unjust and inequitable.

¶ 34 In the latter case of Gentis, Masuhara J. commented at [paragraph] 28:

I would add to this definition only by noting that I understand the use of the word 'significantly' to modify unfair in the following manner. Strata Corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the Corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Consequently, the modifying term indicates that courts should only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness.

¶ 35 These comments in Reid and Gentis were approved by the British Columbia Court of Appeal. I accept the respondent's submission that merely because the 19 bylaw might seem "unfair" to the petitioner and perhaps others, the "unfairness" is not demonstrably significant or oppressive. I do find that, given the minutes of the strata council and other evidence respecting their deliberations and considerations, their actions in enforcing the 19 bylaw was "reasonably justified". Indeed, their failure to do so on this occasion might lead to an inability to enforce it in the future.

3. Is the strata corporation entitled to levy and collect the fines imposed pursuant to s. 130?

¶ 36 In an alternative claim, the petitioner seeks relief from fines totalling \$16,400 as at the date of the hearing. This was based upon 82 weeks at \$200 per week and invokes s. 24 of the Law & Equity Act. This states:

The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

¶ 37 The respondent cited several cases respecting the obligation of the petitioner to have "clean hands" in order to qualify for such relief. It argued that her continued refusal to comply with the 19 bylaw disentitled her to any consideration in this regard. I do not agree.

¶ 38 I am unable to conclude that the petitioner lacks "clean hands". This area of the law is not well settled. The petitioner had a reasonable argument to advance respecting both the legal effect of the bylaw and its enforcement, particularly given the issue of discretion.

¶ 39 Also, earlier in this judgment I expressed some concern that the strata council seems to have proceeded on the erroneous assumption that it was obliged to impose the maximum fine. No consideration was given to something less and no discussions seemed to have taken place about the need to have the issue of age restriction bylaws litigated.

¶ 40 Hearing dates are often set many months (and sometimes years) after litigation is commenced simply because of the Court's busy calendar. That delay ought not to be visited upon the petitioner by obliging her to pay a fine even though she might be willing and able to present her case forthwith upon filing.

¶ 41 In all of the circumstances, I reduce the fine to \$1,000 payable forthwith upon the expiration of any appeal period available to the petitioner.

¶ 42 No submissions were made respecting costs. The parties have leave to address this issue. A hearing can be scheduled, or the parties may by agreement, make written submissions.

¶ 43 Judgment accordingly.

McKINNON J.

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