



# Civil Resolution Tribunal

Date Issued: October 11, 2023

File: ST-2022-004107

Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan NES2613 v. Ramsay*, 2023 BCCRT 863

**B E T W E E N :**

The Owners, Strata Plan NES2613

**APPLICANT**

**A N D :**

RICHARD RAMSAY and SYLVIA RAMSAY

**RESPONDENTS**

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## REASONS FOR DECISION

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Tribunal Member:

Eric Regehr, Vice Chair

## INTRODUCTION

1. Mr. Richard Ramsay and Mrs. Sylvia Ramsay are tenants in a strata lot in the strata corporation, The Owners, Strata Plan NES2613 (strata). The strata alleges that the Ramsays have smoked inside and outside their apartment, contrary to the strata's bylaws. The strata claims \$400 for 2 unpaid bylaw fines. The strata also asks for an

order that the Ramsays stop smoking in their apartment and on their deck. A strata council member represents the strata.

2. The Ramsays say they have lived in the strata for over 15 years, long before the strata had a smoking bylaw. They also say their tenancy agreement allows them to smoke. Finally, they say that Mrs. Ramsay cannot smoke outside because of mobility issues. They ask me to dismiss the strata's claims. Mrs. Ramsay represents the Ramsays.

## **JURISDICTION AND PROCEDURE**

3. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.
4. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.
5. The CRT may accept as evidence information that it considers relevant, necessary, and appropriate, whether or not the information would be admissible in court.
6. Under section 123 of the CRTA and the CRT rules, in resolving this dispute the tribunal may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.
7. The Ramsays requested that this decision be anonymized. When CRT staff asked them to explain why, they acknowledged that there would be no harm in publishing their names but thought "it was an available option". The strata did not oppose the request. The CRTA does allow the CRT to anonymize decisions, but there is a strong

presumption of openness of CRT proceedings, which includes publishing party names. Privacy may justify anonymization when it protects parties from “an affront to a person’s dignity”. See *LaFreniere v. Dekock-Kruger*, 2022 BCCRT 414. I find that there is nothing in this decision that has the potential to affront anyone’s dignity. I find that it is appropriate to use the parties’ names in this decision.

## ISSUES

8. The issues in this dispute are:
  - a. Does the strata’s bylaw against smoking apply to the Ramsays?
  - b. Must the Ramsays pay the fines?

## EVIDENCE AND ANALYSIS

9. In a civil claim such as this, the strata as the applicant must prove its case on a balance of probabilities. While I have read all the parties’ evidence and submissions, I only refer to what is necessary to explain my decision.
10. The strata consists of 60 residential strata lots in 2 apartment buildings. It was created in 2004. The Ramsays have been tenants in the building since 2008 and moved apartments in 2011.
11. The strata passed a new bylaw against smoking in 2018. The strata filed it with the Land Title Office on June 13, 2018. The new bylaw 31.2 said, in relevant part, that a resident must not smoke in any interior space, including strata lots and common property, on a balcony, patio, or deck, or on exterior common property within 3 meters of a door, window, or air intake. Bylaw 31.2 contains no provisions about exempting current residents.

### **Does the strata’s bylaw against smoking apply to the Ramsays?**

12. The Ramsays do not deny smoking in their strata lot or on their patio. They make several arguments about why the smoking bylaw should not apply to them.

13. First, the Ramsays argue that they are exempt from the smoking bylaw because they already lived in the strata when the bylaw passed. However, the SPA only creates retroactive exemptions of bylaws in very limited circumstances, which do not include smoking bylaws. Also, the bylaw itself does not include exemptions for existing smokers like the smoking bylaw did in *Ueda v. Dogaru*, 2023 BCCRT 696.
14. In the absence of an explicit exemption for existing smokers, I find that the smoking bylaw became effective on the day the strata filed it the Land Title Office based on section 128 of the SPA. I find that it has applied to all strata residents since then, including the Ramsays.
15. Next, the Ramsays argue that their tenancy agreement with their landlord permits them to smoke. I note that the tenancy agreement in evidence does not appear to explicitly permit smoking, although I recognize the copy in evidence is somewhat faded. In any event, I find that the tenancy agreement governs the Ramsays' legal relationship with their landlord, not with the strata. I find that the landlord has no authority to exempt the Ramsays from valid strata bylaws. So, I find that the tenancy agreement is irrelevant to the question of whether the smoking bylaw applies to the Ramsays.
16. Finally, the Ramsays say that Mrs. Ramsay has mobility issues and cannot independently come and go from their apartment, which is on the second floor. They say that she is unable to easily access an outdoor place to smoke in compliance with bylaw 31.2. While the Ramsays do not specifically refer to it, I find this raises the issue of whether the strata must accommodate a disability under the *Human Rights Code* (Code) because of a combination of a nicotine addiction and mobility issue, both of which are physical disabilities. There is no suggestion that Mr. Ramsay has any mobility or other medical conditions that prevent him from smoking outside.
17. Section 121(1)(a) of the SPA says that a bylaw is not enforceable to the extent it contravenes the Code. Section 8 of the Code prohibits discrimination on the basis of physical disability. In the context of strata corporations, section 8 of the Code means that when a neutral bylaw has an adverse effect on a resident because of their

disabilities, enforcement of that bylaw may be discriminatory. See *Konieczna v. The Owners, Strata Plan NW2489*, 2003 BCHRT 38. An addiction to nicotine may be a disability under the Code. See *Bowker v. Strata Plan NWS 2539*, 2019 BCHRT 43.

18. The first part of the test under the Code is whether the person has proven that they have a disability that requires accommodation. If they do, the strata corporation must reasonably accommodate the disability. Here, the Ramsays provided a doctor's note that Mrs. Ramsay must use either a walker or wheelchair, which is clearly a physical disability. However, there is no evidence about whether she is addicted to nicotine. I am not prepared to assume that anyone who smokes habitually has a nicotine addiction that requires accommodation under the Code. I therefore find that the Ramsays have not proven that Mrs. Ramsay has a nicotine addiction that requires accommodation.
19. Even if I did accept that Mrs. Ramsay is addicted to nicotine, I would still find that the Ramsays have not proven that the strata must allow her to smoke inside, contrary to bylaw 31.2. This is because there is no evidence that Mrs. Ramsay must smoke to manage any nicotine addiction. Under the Code, disabled persons are not entitled to perfect accommodation. The strata must only provide a reasonable accommodation that balances Mrs. Ramsay's interests with the interests of other residents. Here, there is evidence that second-hand smoke from the Ramsays' apartment has had a detrimental impact on other residents, including one with a physical disability that made them particularly sensitive to second-hand smoke. I find that the Ramsays have not proven that Mrs. Ramsay cannot manage any nicotine addiction in ways that do not involve smoking, such as by using nicotine replacements like patches or gum. In that sense, this dispute is similar to *The Owners, Strata Plan LMS 2900 v. Mathew Hardy*, 2016 BCCRT 1. There, the CRT found that the strata corporation did not need to allow a resident to smoke marijuana indoors to accommodate his disability because he had not proven that edible marijuana would not work. See also *The Owners, Strata Plan NW 1815 v. Aradi*, 2016 BCSC 105.
20. With that, I find that the strata's smoking bylaw applies to the Ramsays and they must comply with it. I order them to do so immediately.

## Must the Ramsays pay the fines?

21. The strata seeks an order for the payment of 2 fines, each for \$200. The Ramsays argue that the strata did not follow the proper process before fining them.
22. Section 135 of the SPA sets out the procedural requirements a strata corporation must follow before enforcing a bylaw or rule infraction, such as by imposing a fine. Section 135 says that the strata cannot impose a fine unless it has first:
  - a. Received a complaint,
  - b. Given the owner the details of the complaint, in writing, and
  - c. Given the owner a reasonable opportunity to answer the complaint, including a hearing if requested.
23. These procedural requirements are strict, with no leeway. See *Terry v. The Owners, Strata Plan NW 309*, 2016 BCCA 449, and *The Owners, Strata Plan NW 307 v. Desaulniers*, 2019 BCCA 343. With that, I turn to the relevant chronology.
24. On January 30, 2022, the strata received an email complaint about cigarette smoke from the resident below the Ramsays. The resident said the Ramsays were smoking on their patio.
25. The next day, the strata manager sent a letter to the Ramsays advising that they had received a complaint about smoking, which was a bylaw breach. The letter warned of fines if the bylaw breach continued. The letter did not tell the Ramsays they had a right to respond to the complaint.
26. On February 22, 2022, the strata manager wrote to the Ramsays that the strata had received more reports of smoking, so it had imposed a \$200 fine. The strata manager said the Ramsays could request a hearing “to discuss this matter”. However, based on the records before me, I find that the strata did not impose a fine at this time. The strata does not explain why.

27. On March 7, 2022, the strata manager wrote to the Ramsays again. This letter was essentially identical to the February 22 letter. This time, however, the strata did impose a \$200 fine.
28. On March 21, 2022, the strata manager wrote to the Ramsays that the strata had imposed another \$200 fine after receiving more complaints about smoking. It is the March 7 and 22 fines that the strata wants an order for the Ramsays to pay.
29. The problem with the strata's approach described above is that it treated the Ramsays smoking as a continuing bylaw contravention. In *Strata Plan VR 2000 v. Grabarczyk*, 2006 BCSC 1960, the court found that instances of nuisance are each individual bylaw contraventions even if they take place every day. That case was about noise, but I find the reasoning applies equally to smoking. That means the strata must complete the section 135 process for each alleged infraction before imposing a fine.
30. Here, the strata gave the Ramsays the particulars of the January 30, 2022 complaint, but then fined them for later instances of smoking. I find that to comply with section 135, the strata needed to complete the enforcement process about the January 30 complaint, and start a new enforcement process about any later smoking complaints. In other words, the strata needed to inform the Ramsays about the January 30 complaint, give them an opportunity to respond to that complaint, and then fine them for contravening the smoking bylaw on January 30. I find that the strata did not comply with section 135, and so the 2 fines are invalid.
31. I note that the strata sent the Ramsays an email on May 5, 2022, that informed them about complaints about smoking on January 30, March 6, and March 20. That email told the Ramsays they had the right to answer the complaints. The strata also said it may impose fines. In *Cheung v. Strata Plan VR 1902*, 2004 BCSC 1750, the court found that a strata corporation can remedy flaws in its enforcement process by starting over. However, unlike in *Cheung*, there is no evidence the strata rescinded the initial fines and restarted the process. So, I find that the May 5 email did not fix the problems in the strata's enforcement process.

32. For this reason, I dismiss the strata's claim for payment of the 2 fines. Given my conclusion, I find it unnecessary to address the Ramsays' allegation that their landlord has already paid the fines, although I note there is no evidence to support the allegation.

## **TRIBUNAL FEES AND EXPENSES**

33. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. The strata was partially successful so I find it is entitled to reimbursement of half of its \$225 in CRT fees, which is \$112.50.

34. The strata claimed \$42.66 in courier fees to serve the Ramsays with the Dispute Notice. I find that this is a reasonable expense. I order the Ramsays to pay half the claimed amount. This equals \$21.33.

35. The strata also claims \$6,000, which it paid to settle a BC Provincial Court case other strata residents brought against the strata about second-hand smoke from the Ramsays. A dispute-related expense is an expense that relates to the CRT proceeding itself, which can include things like expert reports or courier fees. I find that the settlement amount from a court action is not a dispute-related expense. I dismiss this claim.

## **DECISION AND ORDERS**

36. I order the Ramsays

- a. To immediately comply with bylaw 31.2 by refraining from smoking in prohibited areas of the strata.
- b. Within 15 days of this order, to pay the strata \$133.83 in CRT fees and dispute-related expenses.

37. The strata is entitled to post judgement interest under the *Court Order Interest Act*, as applicable.



38. I dismiss the strata's remaining claims.

39. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court if it is an order for financial compensation or return of personal property under \$35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

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Eric Regehr, Vice Chair