

Headline: What Laws Regulate Smoking in British Columbia Strata Corporations?

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Smoking in British Columbia strata complexes is governed mainly by the Tobacco Control Act, the Schedule of Standard Bylaws in the Strata Property Act, the common law of nuisance, and the Human Rights Code. Increasingly, strata councils are also considering proposing amendments to the bylaws regarding smoking for the consideration of the owners in their complexes. Before proposing a bylaw, it is important to consider the physical layout of the complex, the characteristics of the residents, and the common law and statute law that govern smoking in strata complexes. This article will be published in two parts. This first part will focus on the current statutory limitations on smoking in strata complexes located in British Columbia. The second part will discuss drafting, passing, registering and enforcing non-smoking bylaws and possible human rights challenges to those bylaws, and will be published in the next *CHOA Journal*.

The Tobacco Control Act

Pursuant to Section 2.3 of British Columbia's newly amended Tobacco Control Act, R.S.B.C. 1996, c. 451 ("Tobacco Control Act"), smoking is prohibited in or near certain places to which the public is ordinarily invited or permitted access. This legislation came into force and effect on March 31, 2008. Pursuant to this legislation, smoking is prohibited in places customarily available to the public. These places will likely be found to include the common property areas of a strata complex including elevators, hallways, parking garages, party or entertainment rooms, laundry facilities, lobbies, exercise areas, and in the buffer zones around public areas.

Section 2.3 of the Tobacco Control Act provides as follows:

No smoking in or near certain places

2.3 (1) Subject to subsection (2), a person must not smoke tobacco, or hold lighted tobacco,

(a) in any building, structure, vehicle or any other place that is fully or substantially enclosed and

(i) is a place to which the public is ordinarily invited or permitted access, either expressly or by implication, whether or not a fee is charged for entry,

(ii) is a workplace, or

(iii) is a prescribed place, or

(b) within a prescribed distance from a doorway, window or air intake of a place described in paragraph (a).

(2) Subsection (1) does not apply to the ceremonial use of tobacco

(a) in relation to a traditional aboriginal cultural activity, or

(b) by a prescribed group for a prescribed purpose.

(3) Subject to subsection (5), if any person contravenes subsection (1) in respect of a place described under subsection (1) (a) (i) or (iii), each manager, owner and lessee of the place is deemed to have contravened that subsection and each is liable for the contravention.

(4) Subject to subsection (5), if any person contravenes subsection (1) in respect of a workplace, the employer is deemed to have contravened that subsection and is liable for the contravention.

(5) It is a defence to a charge under Subsection (3) or (4) if the manager, owner, lessee or employer, as applicable, demonstrates that he or she exercised reasonable care and diligence to prevent the contravention.

(6) Subsections (3) and (4) apply whether or not the person who smoked tobacco, or held lighted tobacco, or any other person, is charged with contravening subsection (1).

Section 4.22(1) of the Tobacco Control Regulation provides as follows:

No smoking near doorways, windows or air intakes

4.22 (1) For the purposes of Section 2.3 (1) (b) of the Act, the prescribed distance from a doorway, window or air intake in which a person must not smoke tobacco, or hold lighted tobacco, is 3 metres.

Of special concern is Section 2.3 (3), which makes managers, owners, and lessees of a place liable for contraventions. As a result, a strata corporation and its manager are theoretically liable for breaches of the Tobacco Control Act by individuals while they are on the common property, whether the person smoking is an owner, tenant, occupant, or visitor. The legislation will be enforced by Tobacco Enforcement Officers through the various health authorities. Our office spoke to an Officer who characterized his role as predominantly one of facilitation. He advised that he had the power to enforce the Tobacco Control Act through ticketing, but that he is reluctant to do so. He has not as of yet ticketed someone for smoking in the common area of a strata or an apartment. He further mentioned that while they generally give a warning before ticketing someone they are not obliged to do so and have given tickets without warning for especially blatant offences. Fine amounts are \$58.00 for the smoker, or \$575.00 for the manager, owner, or lessee. These fines could be issued every day.

How the legislation will actually be applied in the context of strata corporations is uncertain. The legislation does not appear to directly address whether the windows or air intakes for the private areas of a strata complex will be covered by Section 2.3. For instance, if there is an apartment style building, can an owner of a strata lot smoke on the balcony that he uses? Does it matter if the balcony is designated as common property, limited common property, or part of a strata lot? Does it matter if the person smoking

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on the balcony is less than 3 metres away from his neighbour's window? Also, what if someone is smoking in their strata lot within 3 metres of the door that leads to the common hallway?

The Strata Property Act

Section 3 of the Standard Bylaws reads as follows:

Use of property

3 (1) An owner, tenant, occupant or visitor must not use a strata lot, the common property or common assets in a way that

- (a) causes a nuisance or hazard to another person,
- (b) causes unreasonable noise,
- (c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot,
- (d) is illegal, or
- (e) is contrary to a purpose for which the strata lot or common property is intended as shown expressly or by necessary implication on or by the strata plan.

(2) An owner, tenant, occupant or visitor must not cause damage, other than reasonable wear and tear, to the common property, common assets or those parts of a strata lot which the strata corporation must repair and maintain under these bylaws or insure under Section 149 of the Act

(3) An owner, tenant, occupant or visitor must ensure that all animals are leashed or otherwise secured when on the common property or on land that is a common asset.

(4) An owner, tenant or occupant must not keep any pets on a strata lot other than one or more of the following:

- (a) a reasonable number of fish or other small aquarium animals;
- (b) a reasonable number of small caged mammals;
- (c) up to 2 caged birds;
- (d) one dog or one cat.

We note that the Tobacco Control Act limits smoking based on location. In some ways the Schedule of Standard Bylaws is more expansive, in that it prohibits smoking that creates a nuisance or hazard to another person, whether the smoker is in a strata lot, on the common property or on a common asset of the strata corporation. We note that the word "nuisance" is being used as a legal term and is likely to be interpreted in a way similar to the common law action of nuisance discussed below. The Schedule of Standard Bylaws also prohibits illegal behaviour, which means that smoking that is a violation of the Tobacco Control Act would also be a violation of bylaw 3(1)(d) of the Schedule of Standard Bylaws.

Section 26 of the Strata Property Act supports the concept that councils have a positive duty to enforce bylaws, in that it provides that "Subject to this Act, the regulations and the bylaws, the council must exercise the powers and perform the duties of the strata corporation, including the enforcement of bylaws

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and rules." The duty of council to enforce the bylaws of a strata corporation is a complex one and we recommend that legal advice be obtained if a council is asked by a resident to enforce a nuisance bylaw because of smoking.

The Common Law of Nuisance

At common law, a "nuisance" is a condition on a property or some use of a property that interferes with a neighbouring owner's ability to enjoy their property. Nuisances can also arise from intentional acts undertaken for lawful purposes. For example, an industrial plant that otherwise operates lawfully may cause a nuisance if smoke or noise invades the right of enjoyment of neighbouring landowners to an unreasonable degree. As stated by the British Columbia Court of Appeal in *Royal Anne Hotel Co. Ltd. v. Ashcroft et al* (1979), 8 C.C.L.T. 179:

"The test then is, has the defendant's use of this land interfered with the use and enjoyment of the plaintiff's land and is that interference unreasonable? Where . . . actual physical damage occurs it is not difficult to decide that the interference is in fact unreasonable. Greater difficulty will be found where interference results in little or no physical injury but may give offence by reason of smells, noise, vibration or other intangible causes."

The law of nuisance attempts to reconcile competing uses of land. It endeavors to balance the rights of one occupier of land to use his or her property for lawful purposes with another occupier's right to the quiet use and enjoyment of his or her land. The Court can intervene when the interference with the other's use or enjoyment of land is unreasonable.

The courts in British Columbia have adopted an objective test for nuisance, which applies the standards of an ordinary reasonable person. In *Popoff v. Krafczyk*, [1990] B.C.J. No. 1935 (Q.L.), the British Columbia Supreme Court approved the objective test as follows:

"In every case it is not whether the individual plaintiff suffers what he regards as substantial discomfort or inconvenience, but whether the average man who resides in that locality would take the same view of the matter. The law of nuisance does not guarantee for any man a higher immunity from discomfort or inconvenience than that which prevails generally in the locality in which he lives."

Where the nuisance complaint involves individuals living in a strata complex governed by legislation and the bylaws of a strata corporation, the courts have recognized that there are additional factors to consider when determining whether there is an actionable case of nuisance. In this type of communal living arrangement, the residents of a strata complex are required to exhibit more cooperation and respect for others to ensure that each occupier is able to enjoy their property to the fullest extent. As stated by the British Columbia Supreme Court in *The Owners, Strata Plan NW 87 v. Karamanian*, [1989] B.C.J. No. 629 (Q.L.) ("*Karamanian*");

"While the courts are reluctant to interfere with how persons live in their own homes, there are some activities which may not be done particularly when the home is regulated by the *Condominium Act* and the bylaws of a Strata Council. This is the communal type of living which often requires a tremendous amount of co-operation and consideration from each other, for all residents to enjoy the lifestyle to its maximum."

In *Karamanian*, the plaintiff strata corporation sought an order restraining the defendant, a strata lot owner, from breaching the bylaws of the strata corporation or continuing to create a nuisance. The defendant had installed an air conditioning unit and a Jacuzzi tub on his property. The air conditioner and Jacuzzi tub created excessive noise and vibrations. Noise could be heard and the vibrations felt in the

strata lot directly below the defendant's strata lot. The owners of the strata lot directly below the defendant's suite complained that the noise and vibrations interfered with their quiet enjoyment of their strata lot. At trial, the plaintiff asked the Court to limit the operation of the defendant's air conditioner and Jacuzzi to specific periods during the day. The Court granted the strata corporation's application and ordered that operation of the air conditioner and Jacuzzi be limited to specific hours during the day. This case illustrates that a strata corporation can obtain relief from a court to ensure that a behavior that is creating a nuisance to certain residents be limited so that it does not continue to create a nuisance. The case illustrates that an order may be granted restraining a resident from creating a nuisance even when it has not been proven that the behavior is creating a health problem for others in the complex.

In the British Columbia Supreme Court case of *Raith v. Coles*, [1984] B.C.J. No. 772 (Q.L.), owners of a strata lot applied for an injunction to stop their downstairs neighbours from "emitting and discharging noxious substances, or specifically cigar smoke and odour, from their premises . . ." The plaintiffs alleged that the smoke and odour from cigars smoked by the defendants infiltrated their apartment and led to health problems. The plaintiffs provided evidence that the cigar smoke caused them to suffer from indigestion, nausea, sore throats, and emotional anxiety. When considering the matter of nuisance the Court stated:

The standard of comfortable living which is thus to be taken as the test of a nuisance is not a single universal standard for all times and places, but a variable standard differing in different localities. The question in every case is not whether the individual plaintiff suffers what he regards as substantial discomfort or inconvenience, but whether the reasonable man who resides in that locality would take the same view of the matter. The result is that he who dislikes the noise of traffic must not set up his abode in the heart of a great city. He who loves peace and quiet must not live in a locality devoted to the business of making boilers or steamships.

The Court ultimately granted the injunction, which prohibited the defendants from emitting cigar smoke from their strata lot until the final disposition of the dispute. As illustrated in this case, no matter what bylaws are in place, the common law of nuisance allows a resident bothered by smoke to take another resident of the complex to court to request an order that the smoking cease.

Left with the Tobacco Control Act, which has yet to be interpreted, the uncertain protection offered in the Schedule of Standard Bylaws, and the common law of nuisance, many councils are now considering proposing bylaws that limit or prohibit smoking. Smoking bylaws will be the focus of an article in the next *CHOA Journal*.