

Age is Not Just a Number

Age Bylaws in British Columbia

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Sometimes I am asked by council members or owners whether age bylaws are enforceable in British Columbia. The answer is more complicated than a yes or a no. The British Columbia Supreme Court has found age bylaws to be enforceable in certain instances. However, each decision of the Court deals with a particular fact pattern and there are still many questions about age bylaws that have not been answered by the Courts yet.

A. Statutory Law

Age bylaws are a great example of how the law is developing in British Columbia regarding bylaw enforcement. When enforcing bylaws, it is important to consider whether or not the bylaw contravenes any statute. Like other bylaws, not only are age bylaws subject to Court challenges, by owners, tenants and occupants they are also subject to challenges brought on by those individuals with the British Columbia Human Rights Tribunal.

The provisions of the *Strata Property Act* are of little assistance in helping us determine what types of age bylaws will likely be found to be enforceable. The only mention of age bylaws in the *Strata Property Act* is in section 123. According to that section, an age bylaw does not apply to a person who resides in the strata lot at the time the bylaw is passed and who continues to reside there after the bylaw is passed. This section assists us by advising that an age bylaw cannot be applied to individuals who already reside in a strata lot at the time the bylaw is passed and continue to reside there. It also lends some support to the idea that at least some age bylaws are enforceable.

Sections 8, 9 and 10 of the *Human Rights Code* deal with prohibited grounds of discrimination for certain activities. In my view, these sections will be the major discussion points over the years regarding whether age bylaws with certain provisions are enforceable. The *Human Rights Code* can be relied on by owners, tenants and occupants in both Court and in front of the Human Rights Tribunal. Sections 8, 9 and 10 of the *Human Rights Code* provide as follows:

Discrimination in accommodation, service and facility

8 (1) A person must not, without a bona fide and reasonable justification,

(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or

(b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation of that person or class of persons.

(2) A person does not contravene this section by discriminating

(a) on the basis of sex, if the discrimination relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of life or health insurance, or

(b) on the basis of physical or mental disability, if the discrimination relates to the determination of premiums or benefits under contracts of life or health insurance.

Discrimination in purchase of property

9 A person must not

(a) deny to a person or class of persons the opportunity to purchase a commercial unit or dwelling unit that is in any way represented as being available for sale,

(b) deny to a person or class of persons the opportunity to acquire land or an interest in land, or

(c) discriminate against a person or class of persons regarding a term or condition of the purchase or other acquisition of a commercial unit, dwelling unit, 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.

Discrimination in tenancy premises

10 (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.

(2) Subsection (1) does not apply in the following circumstances:

(a) if the space is to be occupied by another person who is to share, with the person making the representation, the use of any sleeping, bathroom or cooking facilities in the space;

(b) as it relates to family status or age,

(i) if the space is a rental unit in residential premises in which every rental unit is reserved for rental to a person who has reached 55 years of age or to 2 or more persons, at least one of whom has reached 55 years of age, or

(ii) a rental unit in a prescribed class of residential premises;

(c) as it relates to physical or mental disability, if

(i) the space is a rental unit in residential premises,

(ii) the rental unit and the residential premises of which the rental unit forms part,

(A) are designed to accommodate persons with disabilities, and

(B) conform to the prescribed standards, and

(iii) the rental unit is offered for rent exclusively to a person with a disability or to 2 or more persons, at least one of whom has a physical or mental disability.

You will note that the sections of the *Human Rights Code* quoted above deal with discrimination involving:

(a) section 8 – providing accommodation, service or facility customarily available to the public;

(b) section 9 – purchasing real estate; and

(c) section 10 – tenants.

Previous Human Rights Tribunal cases regarding bylaws provide that Strata Corporations are governed by section 8. The Court has considered the application of all three sections regarding age bylaws. Each section lists prohibited grounds of discrimination. It is not against the *Human Rights Code* to discriminate against someone, unless the discrimination is for a purpose listed under the act and fits within one of the various prohibited grounds of discrimination. You will note that age is not a prohibited ground of discrimination under sections 8 and 9, but is a prohibited ground of discrimination under section 10. Conversely, family status is a prohibited ground of discrimination under sections 8 and 10 and discrimination on the basis of family status may be used as a basis to challenge the validity of an age bylaw.

Let's see how age restriction bylaws have been handled by the Courts thus far.

B. 55 Years and Over Bylaws

In the case of *Marshall v. Owners, Strata Plan NW 2584 (1996)*, 27 BCLR (3D) 70, the Supreme Court of British Columbia found a bylaw to be enforceable that restricted the age of residents to 55 years of age and

over, with an exception being made for spouses. The Judge found that James Marshall, who was an adult living with his parents in a strata lot at the time the bylaw was passed, could continue to stay in the strata lot and was not subject to the age bylaw. The idea that an age bylaw should not effect those who are already residing in the premises now has statutory support under section 123 of the *Strata Property Act* but at the time of this case, the *Condominium Act* was still in effect.

The Court considered the *Human Rights Act*, as it then was, including the provision dealing with tenants, which was similar to the present section 10 of the *Human Rights Code*. The Judge found that:

...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 year of age or older. Clearly, the legislature recognizes the legitimacy of retirement communities where people of advancing years may live together with other members of their own generation.

The conclusion that can be drawn from the Marshall decision is that the Court seems sympathetic to an age restriction bylaw of 55 years of age and over. However, it is possible that if different arguments were made in the *Human Rights Code*, a different outcome could result.

C. 19 Years and Over Bylaws

When considering 19 years of age and over bylaws, it is important to consider the definition of Age under the *Human Rights Code* which is “an age of 19 years or more and less than 65 years”.

In October 2004, in the case of *Drummond v. The Owners, Strata Plan NW 2654* ([2004] B.C.J. No.1405), the Supreme Court of British Columbia found a bylaw to be enforceable that restricts the age of residents to 19 years of age and over.

In that case, the Strata Corporation was built in the late 1980’s and marketed as an adults-only complex. The first age restriction bylaw was registered in 1987 and it prohibited residency for persons under the age of 40 years. A new bylaw was passed in November 2001 that prohibited residents under the age of 19 years.

In September 2002 Drummond and her son, who was then 13 years of age, came to live with a resident who had moved in during September 2001. That fall she purchased the townhouse. The Strata Corporation corresponded with Drummond about the bylaw violation and in February 2003 a bylaw enforcement hearing was held. Ms. Drummond commenced a Petition in the Supreme Court of British Columbia alleging that the bylaw was void and that she had been treated in a substantially unfair manner.

The solicitor for Drummond argued in Court that any breach of the *Human Rights Code*, whether or not it would apply to Drummond, would make the bylaw void. He relied on section 10 of the *Human Rights Code*, which sets out prohibited grounds of discrimination involving tenancies. He argued that a tenant would be able to rely on section 10 of the *Human Rights Code* because it prohibits discrimination on the basis of family status and age and so his client should also be able to rely on this protection.

The judge did not accept that Drummond, as an owner, should be able to rely on the provision in the *Human Rights Code* that deals with discrimination against tenants. He accepted the argument that section 10 of the *Human Rights Code* has no application to Drummond’s situation. He did not decide the question of whether the bylaw would be enforceable against a tenant.

The judge considered the wording of the bylaw and found that it affects only those under 19 years. He found that section 9, and in particular, section 9(c) of the *Human Rights Code* was relevant. The judge noted that there is no reference to family status or age in section 9 as prohibited grounds of discrimination. He found that the bylaw was a legitimate and justifiable restriction on the use of the townhouses and found the bylaw to be enforceable.

D. Tenants

The issue of whether a 19 years of age and older bylaw can legally be applied to a tenant and the tenant's family members is one that has not yet been decided by the Courts or the Human Rights Tribunal. Prohibiting a tenant from living with his or her minor children in a complex could be interpreted as a violation of section 10 of the *Human Rights Code*. A judgment by the Supreme Court of British Columbia or a ruling by the Human Rights Tribunal that a tenant does not have to comply with a 19 years of age and older bylaw because it amounts to discrimination regarding a tenancy on the basis of family status would create an aberration in that a 19 years of age and older bylaw would be enforceable against an owner with a child who is a minor but not a tenant in the same situation.

E. Conclusion

Like many other bylaws, it is important for council members and all owners to carefully consider whether an age bylaw is right for your community. It is also important for the council to have the age bylaw reviewed by a lawyer from time to time to see if it is consistent with the case law as it develops.

First published: CHOA Journal – September 2006
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