



# Civil Resolution Tribunal

Date Issued: August 17, 2023

File: ST-2022-007479

Type: Strata

Civil Resolution Tribunal

Indexed as: *Ueda v. Dogaru*, 2023 BCCRT 696

B E T W E E N :

AI UEDA

**APPLICANT**

A N D :

RALUCA DOGARU, CRISTIAN PADURARU, and The Owners, Strata  
Plan 582

**RESPONDENTS**

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## REASONS FOR DECISION

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Tribunal Member:

Kate Campbell

## INTRODUCTION

1. This dispute is about alleged smoking and vaping in a strata corporation.

2. The applicant, Ai Ueda, owns strata lot 23 (SL23) in the respondent strata corporation, The Owners, Strata Plan 582 (strata). The other respondents, Raluca Dogaru and Cristian Paduraru, own strata lot 22 (SL22). SL22 and SL23 are both townhouse-style strata lots, located next door to each other with an adjoining wall.
3. Ms. Ueda is self-represented in this dispute, as are the SL22 owners. The strata is represented by a strata council member.
4. Ms. Ueda says second-hand smoke from SL22 is a ongoing health hazard and a nuisance, which has aggravated her asthma. She says the smoke is contrary to strata bylaws, and the strata has not taken adequate steps to enforce the bylaws. Ms. Ueda also says the strata has failed to accommodate her disability, contrary to the BC *Human Rights Code* (Code). Ms. Ueda requests the following remedies:
  - An order that the SL22 owners stop smoking and vaping in SL22,
  - An order that the strata enforce its bylaws,
  - \$2,000 in damages for pain, suffering, anxiety, and loss of dignity,
  - Reimbursement of \$463.59 for remediation and cleaning in SL23, a ventilation fan, and a doctor's note.
5. The SL22 owners say they have not smoked or burned tobacco in SL22 since July 2021, have not breached strata bylaws, and have not created a nuisance. The SL22 owners admit to using heated tobacco to create a nicotine-containing aerosol for ingestion (heetsticks), but say this does not create any smoke, odour, or other by-product that enters SL23. They also say they do not use heetsticks within 7 meters of SL23's fence, windows, or vents.
6. The strata says the CRT should dismiss Ms. Ueda's claims. It says that based on the wording of the bylaws, the SL22 owners have a retroactive exemption from the strata's general non-smoking bylaw. The strata also says it has investigated Ms. Ueda's bylaw complaints, and found no evidence of smoke or odour in SL23, even while the SL22 owners were vaping.

## JURISDICTION AND PROCEDURE

7. 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). CRTA section 2 says the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.
8. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate which includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice and fairness.
9. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, even where the information would not be admissible in court. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
10. Under CRTA section 123, in resolving this dispute the CRT 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.

### ***Previous CRT Decision***

11. In February 2022, I issued a prior decision about smoking in SL23, indexed as *The Owners, Strata Plan 582 v. Dogaru*, 2022 BCCRT 169 (Dogaru 2022). In that dispute, the strata requested an order declaring that the SL23 owners were exempt from the strata's non-smoking bylaw, and an order that the SL23 owners stop permitting smoke, odour, or vapour to escape from SL23.
12. Ms. Ueda was not a party to Dogaru 2022.

13. In my decision in Dogaru 2022, I refused to resolve the strata's claim for a declaratory order about bylaw exemption, finding it was outside the CRT's jurisdiction to grant. I dismissed the strata's claim for an order to stop permitting smoke, odour, or vapour to escape. This dismissal was based on my finding that the strata had taken no formal action to investigate or enforce its bylaws before filing the CRT dispute, so the dispute was premature.

## **ISSUES**

14. The issues in this dispute are:

- a. Did the strata fail to enforce its bylaws?
- b. Did the strata fail to accommodate Ms. Ueda's disability, contrary to the Code?
- c. What remedies are appropriate, if any?

## **REASONS AND ANALYSIS**

15. In a civil claim like this one, Ms. Ueda, as applicant, must prove her claims on a balance of probabilities (meaning "more likely than not"). I have read all the parties' evidence and submissions, but below I only refer to what is necessary to explain my decision. I note that the strata provided no evidence in this dispute, although given an opportunity to do so.

16. The strata repealed and replaced all of its bylaws by filing new bylaws with the Land Title Office (LTO) in March 2020. The following bylaws, as summarized below, are relevant to this dispute:

- Bylaw 3(1) – an owner, occupant, tenant or visitor must not use a strata lot or common property in a way that causes a nuisance or hazard to another person, or unreasonably interferes with the rights of other persons to use and enjoy the common property or another strata lot.

- Bylaw 4(1) – an owner, tenant, occupant or visitor must not smoke or vape tobacco, marijuana or any similar organic substances nor use an e-cigarette or vapourizer in a strata lot, on a patio, balcony or carport, or on the exterior common property within 7 meters of any window, entrance door, or air intake vent.
- Bylaw 4(3) – A person who registered with the strata as a smoker under the prior bylaw 1.3(5)(9) may continue to smoke in their strata lot for as long as they reside in it. However, they must take reasonable efforts to seal their strata lot and not permit the smoke, odour or vapours to escape their strata lot such that it can be smelled by another resident.

17. Prior bylaw 1.3(5)(9) (now repealed) was filed with the LTO in June 2018, when the strata first brought in its non-smoking bylaw. Bylaw 1.3(5)(9) said the new smoking prohibition would not apply to any owners, occupants or tenants who currently smoked within their strata lots at the time the bylaw was passed and who registered as smokers with the strata council within 90 days of the non-smoking bylaw's passage.

18. The evidence before me confirms that the SL22 owners registered SL22 as a "smoking unit" under bylaw 1.3(5)(9). Ms. Ueda bought SL23 after that, on June 22, 2021. On June 26, 2021, Ms. Ueda began emailing the strata, complaining about smoke from SL22. She said they were smoking cigarettes on SL22's back patio, and the smoke was entering SL23 through the open windows.

19. The strata corresponded with Ms. Ueda, and eventually filed the dispute leading to my decision in Dogaru 2022. After I issued that decision in February 2022, Ms. Ueda continued to complain to the strata about smoke and odour from SL22. Ms. Ueda filed this dispute in October 2022.

***Did the strata fail to enforce its bylaws?***

20. For the following reasons, I find the strata failed to enforce bylaw 4(3).

21. As explained above, bylaw 4(3) says an owner who is registered with the strata as a smoker under prior bylaw 1.3(5)(9) may continue to smoke in their strata lot, but must make reasonable efforts to seal their strata lot and not permit the smoke, odour or vapours to escape their strata lot such that it can be smelled by another resident.
22. The strata says this means that since SL22 is registered as a “smoking” strata lot, the SL22 owners may use heetsticks on their back patio. For the following reasons, I disagree.
23. The strata says SL22’s patio is part of the SL22, and not common property. Based on the strata plan, I agree. However, the photos in evidence show that the patio is fully outdoors and unenclosed. Ms. Ueda provided many photos showing the SL22 owners smoking and using heetsticks on their patio. The SL22 owners do not dispute this, although they say they used only heetsticks after July 2022.
24. I find that since the patio is outdoors, bylaw 4(3) means the SL22 owners may not smoke or use heetsticks on it. Bylaw 4(3) requires the SL22 owners to make “reasonable efforts” to seal their strata lot and not permit smoke, odour, or vapours that can be smelled by another resident to escape.
25. The SL22 owners say heetsticks produce no smoke, odour, or vapours. However, I find the evidence provided by the SL22 owners does not support that assertion. In particular, they provided a document titled “Heated Tobacco Products (HTPS) Information Sheet”, produced by the World Health Organization (WHO). The WHO document includes the following information:
- The iQOS [brand] device used to consume heetsticks is an example of an HTPS.
  - HTPS works by heating tobacco “to produce the nicotine-infused vapor”.
  - There is currently insufficient evidence on the potential effects of second-hand emissions produced by HTPS. Independent studies are needed to assess the risk posed to bystanders exposed to emissions released from HTPS.

26. I find this document establishes that consuming heetsticks produces smoke, odour, or vapour. Since the SL22 owners are not experts, I place no weight on their opinion about emissions from heetsticks. Instead, I rely on the WHO document, which says HTPS produce vapour and release emissions. The SL22 owners produced no technical or expert evidence stating that consuming heetsticks produces no smoke, odour, or vapour.

27. Since I find that heetsticks produce vapour, I find that under bylaw 4(3), they may only be used in an sealed area where smoke, odour, or vapours cannot escape. This does not include the unenclosed patio. So, I find the SL22 owners have breached bylaw 4(3).

28. Since the strata made no attempt to require the SL22 owners to use heetsticks only in a sealed area, I find the strata failed to enforce bylaw 4(3). In making this finding, I note that the strata acknowledged in a September 11, 2022 email to Ms. Ueda that it was aware the SL22 owners were using heetsticks outdoors.

29. For the reasons set out above, I conclude the strata failed to enforce bylaw 4(3).

### ***Bylaw 3(1)***

30. Ms. Ueda also says the strata failed to enforce bylaw 3(1). As explained above, that bylaw says, in part, that an owner must not use a strata lot in a way that causes a nuisance or hazard to another person, or unreasonably interferes with the rights of other persons to use and enjoy another strata lot.

31. In *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.*, 2018 BCSC 1502, the BC Supreme Court defined nuisance in the strata setting as a substantial, non-trivial, and unreasonable interference with use and enjoyment of property (paragraph 33).

32. The test of whether a potential nuisance is unreasonable is objective and is measured with reference to a reasonable person occupying the premises: see

*Sauve v. McKeage et al.*, 2006 BCSC 781. The test for nuisance depends on several factors, such as its nature, severity, duration, and frequency: see *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64.

33. Despite my finding that the SL22 owners' use of heetsticks produced vapour, I find she has not proven that the SL22 owners created a hazard or objective nuisance.
34. The only evidence before me about perceptible odour or smoke from SL22 is from Ms. Ueda and her mother, SU. I find Ms. Ueda's evidence is not objective, as it is based solely on her own perception.
35. In a statement dated April 6, 2023, SU said she lives in SL22. SU says she knows the SL22 owners smoke on their patio every day, and she can smell the tobacco and chemical fumes.
36. I place limited weight on SU's evidence, in part because she lives with Ms. Ueda, and is her mother. Also, video evidence before me shows SU engaging in a disagreement with Ms. Dogaru about the alleged smoke smell.
37. It was open to Ms. Ueda to provide objective evidence, such as statements from non-relative witnesses, or a report from an air quality expert. However, she has not done so. I have also considered the written evidence from MG and HC, who live on the other side of SL22. In a March 14, 2023 letter, MG and HC said they had lived next to the SL22 owners for about 10 years. They said they had not smelled any cigarette smoke for over a year and a half, since Mr. Paduraru switched to heetsticks. They said they often keep their windows open, and had not noticed any smell inside or while in their backyard. This letter is consistent with a July 20, 2021 email from MG to Ms. Dogaru, which said MG had not smelled any smoke for a few weeks.
38. I place significant weight on the evidence from MG and HC, since they live directly next to SL22 (the same distance as Ms. Ueda), and are not related to parties to this dispute.



39. I have also considered the October 5, 2022 note from Dr. Chang provided by Ms. Ueda. In that note, Dr. Chang said she is a telehealth walk-in physician, who spoke to Ms. Ueda for “numerous visits”. Dr. Chang said tobacco smoke has been entering Ms. Ueda’s unit from her neighbour’s unit, triggering her asthma attacks.

40. I place limited weight on Dr. Chang’s statement that smoke has been entering SL23 from SL22. There is no suggestion that Dr. Chang visited the strata, or had access to any air quality testing or other objective evidence about the existence or smoke, or its source. Rather, it appears that Dr. Chang’s assertion is based solely on what Ms. Ueda told her. Since Dr. Chang cannot know whether there was smoke in SL23, or where it came from, I find this note unpersuasive.

41. Based on the evidence before me, I find Ms. Ueda, who bears the burden of proof in this dispute, has not proven that the SL22 owners breached bylaw 3(1) by creating a nuisance or hazard.

42. In conclusion, I find the strata failed to enforce bylaw 4(1), but did not fail to enforce bylaw 3(1). I discuss remedies at the end of this decision.

***Did the strata fail to accommodate Ms. Ueda’s disability, contrary to the Code?***

43. Section 8 of the Code says, in part, that unless there is a bona fide and reasonable justification, a person must not, because of a physical or mental disability, discriminate against another person about any accommodation, service, or facility customarily available to the public. Section 8 of the Code applies to strata corporations: see *Konieczna v. Strata Plan NW 2489*, 2003 BCHRT 38; *Cheslock v. The Owners, Strata Plan NW 3158*, 2021 BCCRT 712.

44. The first question in assessing whether the strata had a duty to accommodate Ms. Ueda is to determine if she has a disability. The Code does not define “disability”.

45. Dr. Chang’s October 10, 2022 note states that Ms. Ueda has asthma. It is not clear how Dr. Chang made this diagnosis, since it appears she never examined Ms. Ueda. However, the evidence shows that Dr. Chang prescribed a salbutamol

inhaler. So, for the purposes of this decision, I accept that Ms. Ueda has asthma and that her asthma is a disability under the Code.

46. The strata submits it was not aware that Ms. Ueda claimed to have a disability. However, in the audio recording of a July 24, 2021 meeting with the strata, Ms. Ueda said second-hand smoke from SL22 was causing problems with her asthma. In the meeting, Ms. Ueda requested that the strata take action about SL22's smoking or heetstick use because of her asthma. So, I find the strata was aware of Ms. Ueda's accommodation request.

47. A 2-step analysis applies to cases of alleged discrimination contrary to the Code. First, Ms. Ueda must establish a *prima facie* case of discrimination. If that is proven, the onus then shifts to the strata to justify its actions, including by showing that it has accommodated Ms. Ueda to the point of undue hardship: see *Moore v. British Columbia (Education)*, 2012 SCC 61 at paragraph 49.

48. To establish a *prima facie* case of discrimination, Ms. Ueda must prove that she has suffered an adverse impact in relation to provision of services by the strata, and that her disability was a factor in the adverse impact.

49. I find Ms. Ueda has not proven that her disability was a factor in any adverse impact she suffered due to smoke, odour, or vapour from SL22. Specifically, I find the evidence before me does not prove that smoke, odour, or vapour entered SL23 from SL22, or that it aggravated Ms. Ueda's asthma.

50. Because she is not a medical expert, I am not persuaded by Ms. Ueda's opinion that her asthma was aggravated, and what caused the alleged aggravation. For the same reason, I am not persuaded by SU's opinion on these questions.

51. I find there is no reasoned, objective medical evidence before me establishing that Ms. Ueda's asthma was aggravated, or what caused the aggravation. The only medical report on the subject is Dr. Chang's October 10, 2022 note. As explained above, Dr. Chang wrote that tobacco smoke from SL22 has been entering SL22 and triggering Ms. Ueda's asthma attacks. Dr. Chang also wrote that when Ms.

Ueda is exposed to tobacco smoke, she experiences wheezing, coughing, and shortness of breath.

52. Again, as explained above, there is no indication that Dr. Chang ever examined Ms. Ueda, and there is no way for Dr. Chang to actually know whether smoke entered SL23. There is no documentation of symptoms Dr. Chang or another medical provider directly observed, such as in chart notes. Rather, it appears that the symptoms, the alleged aggravation of asthma, and the cause of the aggravation, are all solely based on what Ms. Ueda told Dr. Chang. I accept that Ms. Ueda gave information to Dr. Chang based on her honest beliefs, and that Dr. Chang had no reason to question that information. However, I find this does not meet the legal standard to prove adverse impacts under the Code. Rather, I find some objective evidence is required to prove that smoke or another asthma-aggravating emission entered SL23, that it came from SL22, and that this caused an objectively-observed aggravation of Ms. Ueda's asthma. I find the evidence before me does not prove any of these factors.

53. For these reasons, I find Ms. Ueda has not proven that the strata failed in a duty to accommodate her under the Code. I dismiss this claim.

### ***Remedies***

54. As remedy in this dispute, Ms. Ueda requests an order that the SL22 owners stop smoking and vaping in SL22, and an order that the strata enforce its bylaws.

55. As explained above, bylaw 4(3) permits registered "smoking" owners to smoke in their strata lots, but they must take reasonable efforts to seal their strata lot and not permit the smoke, odour or vapours to escape such that it can be smelled by another resident. For this reason, and given the evidence of the SL22 owners smoking and using heetsticks on the outdoor patio, I find it is appropriate to order that the SL22 owners may only smoke indoors, with the doors and windows closed.

56. I make no general order for the strata to enforce its bylaws, as the strata is already required to do so, and the order would have no specific effect.

57. Ms. Ueda requests \$2,000 in damages for pain, suffering, anxiety, and loss of dignity. Since I have found Ms. Ueda as not proven her Code claim, or a legal nuisance, I do not order any damages.

58. Finally, Ms. Ueda requests reimbursement of \$463.59 for remediation and cleaning in SL23, a ventilation fan, and a doctor's note. I dismiss these claims. I find she has not proven any damage requiring remediation or cleaning in SL23, and has not proven that a fan would have any effect. Since I found Dr. Chang's note unpersuasive, I do not order reimbursement for that expense.

## **CRT FEES AND EXPENSES**

59. Ms. Ueda was partially successful in this dispute, so under the CRTA and the CRT's rules I find she is entitled to reimbursement half of her CRT fees, which equals \$112.50.

60. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses to Ms. Ueda.

## **ORDERS**

61. I order that:

- a. Effective immediately, the SL22 owners and occupants may only smoke, vape, and use heetsticks or similar products indoors, with all doors and windows closed.
- b. Within 30 days of this decision, the strata must reimburse Ms. Ueda \$112.50 for CRT fees. Ms. Ueda is entitled to postjudgment interest under the *Court Order Interest Act*.

62. I dismiss Ms. Ueda's remaining claims.

63. Under CRTA section 57, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under CRTA section 58, 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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Kate Campbell, Tribunal Member