



# Civil Resolution Tribunal

Date Issued: November 24, 2016

File: ST-2016-00297

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan LMS 2900 v. Mathew Hardy*, 2016 BCCRT 1

B E T W E E N :

The Owners, Strata Plan LMS 2900

**APPLICANT**

A N D :

Mathew Hardy

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Shannon Salter

### INTRODUCTION

1. The applicant strata corporation (the strata) asks the *Civil Resolution Tribunal* (Tribunal) to make a default order that the respondent owner (the owner) stop smoking tobacco and marijuana within the strata. Norman Rettie is the strata council president and represents the strata.
2. Section 7 of the *Civil Resolution Tribunal Act* (Act) states that where no respondent files

a response by the deadline in the Tribunal's rules, the Tribunal must adjudicate the dispute in accordance with its rules. Under Tribunal rule 74, a respondent must respond to a Dispute Notice by the deadline shown on a Dispute Response Form. The deadline on the Dispute Response Form says the response is due within 14 days of receiving the Dispute Notice. Under rules 79 and 80, an applicant can ask for a default order if a respondent does not respond to a Dispute Notice which has been properly delivered.

3. The strata provided the Tribunal with a number of documents to show that it properly delivered the Dispute Notice to the owner. These documents include:

- a registered mail receipt from Canada Post, dated September 19, 2016,
- a delivery receipt from Canada Post with the owner's name as signatory, dated September 21, 2016, and
- a completed proof of notice form, dated September 16, 2016, certifying that the Dispute Notice was sent to the owner by registered mail.

4. On my request, a Tribunal facilitator asked Mr. Rettie to explain why the proof of notice form was dated three days earlier than the registered mail receipt. Mr. Rettie wrote:

I filled in the "Proof of Notice" form on Friday evening Sept 16th [assumed I put the date I filled it in should be on the form]. I pondered how to deliver the notice to Matt and did not want a confrontation doing it in person, thought he could deny getting it by email, so decided to send by registered mail. I worked on Saturday Sept 17th, mail office closed on Sunday Sept 18th, sent the notice by registered mail on Monday Sept 19th. I was away playing golf for most of the week of Sept 20th to the 23rd, so I sent you the email confirmation on Sept 26th.

5. I find that Mr. Rettie's explanation is reasonable in the circumstances. I find that despite the date on the proof of notice form, Mr. Rettie completed this form after he sent the Dispute Notice to the owner by registered mail on September 19, 2016.

6. On October 8, 2016, the strata completed a Request for Default Decision and Order, copied to the owner, certifying that it had received no response to the Dispute Notice. Tribunal staff confirmed that the Tribunal has received no response from the owner, as of the date of this decision.

7. I am satisfied, on the balance of probabilities, that the owner received the Dispute Notice

and did not respond to it by the deadline set out in the Tribunal rules. For this reason, the strata is entitled to apply for a default decision. A default decision in a non-monetary dispute, such as this one, means the Tribunal will make a binding decision without the owner's participation in the hearing. The Tribunal will send the owner a copy of the final decision and order.

## **JURISDICTION**

8. These are the Tribunal's formal written reasons. The Tribunal has jurisdiction over strata property claims brought under section 3.6 of the Act. The Tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
9. Under the Act, the Tribunal may accept as evidence information it considers relevant, necessary, and appropriate, whether or not the information would be admissible in court. The Tribunal may also ask the parties and witnesses questions and obtain information in any other way it considers appropriate.

## **ISSUES**

10. The strata's evidence refers to fines levied against the owner. The Dispute Notice also briefly mentions fines in the description of the dispute. However, the strata did not include the recovery of these fines under the remedies part of the Dispute Notice. Rather, the only remedy it requested is, "Matt stops smoking in his unit." with "\$0.00" as the monetary amount of the remedy.
11. The strata also provided evidence of recent amendments to the strata smoking bylaw from late September 2016, as well as evidence of the owner's breaches of the amended bylaw. These amendments prohibited smoking on strata property, including in strata lots. However, the Dispute Notice was issued on September 12, 2016, before the bylaw amendments. In short, the owner has had no notice of the strata's claims which arose after September 12, 2016.
12. I find that claims for the payment of the owner's outstanding fines, as well as claims arising

after the September 12, 2016 Dispute Notice was issued, are not before me in this decision. This is because the owner had insufficient notice of these claims in the Dispute Notice, and also because in the case of the fines, the strata has not pursued this claim. It is open to the strata, subject to applicable law, to file a fresh Tribunal application on these issues.

13. The only remaining issues in this dispute are:
- Did the owner breach the strata's bylaws by smoking tobacco and/or marijuana?
  - Did the strata discriminate against the owner on the basis of disability?

### **BACKGROUND AND EVIDENCE**

14. As the owner has not responded to the Dispute Notice, the facts of this dispute are uncontested. I summarize them briefly below.

#### **The strata's smoking bylaw**

15. The strata's bylaws, filed in the land title office in September 2009, have the following nuisance and smoking provisions (the smoking bylaw):

##### 3.1 Use of Property

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,

...

##### 3.5 An owner must not

(p) Owners, residents and tenants must not smoke anywhere on the common property, limited common property or within a strata lot, in a way that interferes with another resident's health, safety, enjoyment or use of their property [Amended *September 15, 2009*].

#### **Complaints from other owners**

16. The strata provided a large number of emails from strata residents sent to the property

manager, detailing smoke complaints.

17. Resident 1 describes repeated incidents of cigarette and marijuana smoke in emails to the property manager from June 2015 to January 2016. They describe the resident's itchy eyes, sore throat, and use of allergy pills to cope with the smoke. Some emails also state that another resident in their unit suffered from the same allergy symptoms. The resident expresses concern about the resale value of their home. I note that none of the emails from this resident link the smoke to the owner's unit.
18. Resident 2 is in the unit above the owner's. In a series of emails from December 2015 to January 2016, the resident details a persistent strong cigarette smoke smell in their unit, particularly in the guest bathroom. They specifically identify the owner's unit as the source of the smoke. According to Resident 2, the smoke causes their spouse to have headaches and nausea.
19. Resident 2's spouse, Resident 3, provided complaints by email. These emails describe the smoke coming from the owner's unit as "an unbearable situation" causing the couple to become "really unhappy and upset" and "desperate." They describe breathing cigarette and marijuana smoke 24 hours a day, and they state that they have the right to live in a healthy environment and that their health is at risk. In one email, they attach a picture of their efforts to cover the bathroom fan with plastic to stop the smoke. According to them, the smell was still horrible. The email states that the smoke "makes it hard for us to stay home." Both residents express concern about damage to their unit and to the resale value of their home.
20. Finally, Resident 4, who lives on the same floor as the owner, wrote an email to the property manager in October 2015 to complain about marijuana smoke. They express concern about the health consequences of the smoke, including chest problems, coughing, running eyes, an irritated throat, and nausea. They describe having four air purifiers in their unit, which still does not solve the problem.
21. The strata provided four letters, from January to July 2015, which it sent to the owner, detailing various complaints of marijuana smoke, and smoke generally, which was causing a nuisance to the surrounding units. The letters informed the owner that this violated the strata bylaws and that the owner had the right to request a council hearing or otherwise respond to the complaint, barring which the strata may take further action, including levying

fines against the owner.

22. The owner sent the property manager a very brief email in June 2015, denying the allegations.
23. On September 21, 2015, the owner's lawyer sent a letter to the strata's property manager stating that the strata had fined the owner for things he did not do, and discriminated against him on the basis of a disability, contrary to the BC *Human Rights Code* (Code). The letter does not include information about the nature or extent of the owner's disability, or his need for accommodation.
24. On October 5, 2015 the strata's lawyer wrote to the owner's lawyer to, among other things, advise that the strata did not know, before the September 21, 2015 letter, that the owner had a disability. The strata's lawyer requested the following information from the owner's doctor, in order for the strata to determine whether the requested accommodation was related to the owner's disability:
  - a description of the owner's disability, symptoms, and prognosis,
  - how the owner's symptoms affect his quality of life, and how smoking marijuana assists him in this regard, and
  - since marijuana can be taken in many forms, an explanation as to why another alternative, such as ingesting marijuana, is not sufficient in this situation.
25. The strata's lawyer stated that the strata would not take steps to enforce the fines until the strata's investigation and accommodation process was complete.
26. It does not appear there was any response from the owner or his lawyer for at least the next three months.
27. On January 15, 2016 the strata levied a \$200 fine against the owner for smoking, on the basis of further complaints.
28. At the strata's invitation, the owner attended a January 28, 2016 strata council meeting to discuss the smoking situation. Mr. Rettie's written evidence is that at the meeting, the owner, "displayed little concern for the effect his smoking had on the other owners." The

owner stated that the problem would be solved because he was moving. However, the owner continues to live in the strata.

29. At the strata council meeting, the owner also provided a January 19, 2016 letter from Dr. Etela Neumann, a doctor specializing in nerve pain. The letter is brief. It states that the owner was referred for chronic pain management, and that Dr. Neumann had provided him with peripheral nerve blocks as well as medicinal marijuana. She commented that Health Canada limits licensed marijuana growers to dry product only, and that patients have no option but to smoke it.
30. Dr. Neumann also comments that, "Strata Plan should observe those regulation and stop harassing patients who need to use prescribed medicinal marijuana." [All quotes are reproduced as written, unless otherwise noted.] The letter contains no information on the owner's diagnosis, prognosis, the nature of his disability, or how the owner's symptoms affect his quality of life. Rather, Dr. Neumann states, "Strata Plan or other entity has no right to receive details of patients medical information."
31. In February 2016, the strata, through its property manager, wrote to the owner, pointing out certain mistakes and omissions in Dr. Neumann's letter. In particular, the property manager noted that since a 2015 Supreme Court of Canada decision, ingestible forms of medicinal marijuana are legal. The property manager explained that since the owner was not prepared to provide information necessary for the strata to determine whether the disability was connected to the accommodation requested and whether there are alternative forms of accommodation, the strata had no choice but to enforce the bylaws in a way that does not cause harm to others. The strata also wrote a substantially similar letter to Dr. Neumann a few days later.
32. It does not appear that the owner responded to the strata's February 2016 letter. In April, May, August, and September 2016, the strata sent the owner further notices of complaints and fines relating to additional smoking complaints.
33. Mr. Rettie stated that since the January 28, 2016 strata council meeting, "we have received complaints from owners regarding the smell of marijuana near the front door of our building [his unit is next to the door] and complaints from the three owners whose condos are affected the most by his smoking. He continued to not comply with our smoking bylaw and

has not paid the fines imposed.”

## **POSITION OF THE PARTIES**

34. The strata argues that the owner disobeyed the smoking bylaw which was in effect until late September 2016 by smoking in his unit in a manner that created a nuisance for other owners and interfered with their health, safety, and the enjoyment or use of their property.
35. The strata argues that the owner’s alleged disability has not been adequately documented, nor has his need for accommodation.

## **ANALYSIS**

### **Did the owner breach the strata’s bylaws by smoking tobacco and/or marijuana?**

36. I find, on the balance of probabilities, that the owner repeatedly smoked marijuana and tobacco in his strata unit from December 2015 until at least September 2016.
37. In making this finding, I put significant weight on the evidence from Residents 2 and 3, which describes in detail the pattern of tobacco and marijuana smoke infiltration specifically from the owner’s unit into other units. I have also considered Mr. Rettie’s evidence that the owner did not dispute that he smoked marijuana at the January 2016 strata council hearing. Instead, he argued that he was entitled to smoke marijuana due to his disability. I have also put weight on Mr. Rettie’s evidence that there have been three more complaints by those most affected by the owner’s smoking and that this second-hand smoke is concentrated outside the owner’s door.
38. I also find that the owner’s smoking activity in his strata lot interfered with other residents’ health, safety, enjoyment or use of their property, contrary to the strata’s smoking bylaw.
39. The repeated and increasingly desperate complaints from Residents 2 and 3 demonstrate that the owner’s cigarette and marijuana smoking had significant physical and emotional health impacts on them. It damaged their use and enjoyment of their home to the point of being “unbearable,” “desperate,” and “unhappy.” This, in addition to Mr. Rettie’s evidence of three more later complaints about the owner’s smoking, leads me to conclude that the owner’s conduct created a nuisance and interfered with the health, safety, enjoyment and use of property for other residents, contrary to the strata’s smoking bylaw.

40. I therefore find that the owner breached the strata's smoking bylaw.

**Did the strata discriminate against the owner on the basis of disability?**

41. Under section 3.8(2) of the Act, the Tribunal has jurisdiction to apply the Code in a dispute.

42. Section 8 of the Code provides, 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 regarding any accommodation, service, or facility customarily available to the public. Also, a person must not deny another person any of these things.

43. A number of BC Human Rights Tribunal decisions have found that strata corporations provide management services to the public when they enforce bylaws for the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the strata corporation. (See *Konieczna v. Strata Plan NW 2489*, 2003 BCHRT 38 and *Williams v. Strata Plan LMS 768*, 2003 BCHRT 165).

44. Though not binding on me, I find the reasoning in these, and the other BC Human Rights Tribunal cases cited below, to be persuasive. I find that that section 8 of the Code applies to the strata in this case.

45. In his discrimination claim under section 8 of the Code, the owner must show that he has a disability. He must also show that the effect of the smoking bylaw, or the strata's decision to enforce it, adversely affects his disability or results in his differential treatment because of the disability (see *Ross v. Strata Plan NW 608*, 2007 BCHRT 80 (*Ross*) and *Holloway v. Moore*, 2004 BCHRT 185).

46. I am satisfied, based on Dr. Neumann's letter, that the owner has a physical disability, namely an unspecified chronic pain condition.

47. During the January 2015 strata council hearing, the owner argued he was entitled to smoke marijuana on the basis of his physical disability. He does not appear to have made a similar argument regarding smoking tobacco, nor is there other evidence on file showing the owner's use of tobacco was related to his disability. I therefore find that the owner's use of tobacco was unrelated to his disability.

48. The owner has not shown that the strata's decision that he breached the smoking bylaw, or the effective prohibition on his smoking marijuana in his unit in the future, caused him to be

adversely affected or treated differentially because of his disability.

49. While the owner clearly prefers to smoke marijuana, I find there is no persuasive evidence before me that smoking marijuana, rather than ingesting it in another form, is necessary to accommodate his disability. (See *Ross*, above, at paragraph 11).
50. I have reached this conclusion for two reasons. First, the owner did not respond to numerous warning letters from the strata from January through June 2015, at which point he simply denied the allegations. He did not tell the strata that he had a disability until his lawyer wrote to the strata in September 2015. This letter did not state the extent of the owner's need for an accommodation, including whether he needed to smoke the marijuana to treat his disability.
51. Second, I am unable to put weight on Dr. Neumann's letter, with respect to the owner's need to smoke marijuana to treat his disability. I find that Dr. Neumann's letter inappropriately crosses the line from medical opinion to advocacy, which significantly detracts from the letter's use as a source of objective medical evidence. For example, the letter offers the doctor's personal opinion that the strata was "harassing" the owner and that the strata should let the owner smoke marijuana in his unit. Dr. Neumann also strays from her area of medical expertise by providing opinions on the wisdom of Health Canada's regulatory policy, the legality of ingestible marijuana, and the strata's disentitlement to medical information.
52. Further, much of Dr. Neumann's letter appears to be premised on her incorrect belief that ingestible medical marijuana remains illegal, when this has not been the case since June 2015, when the Supreme Court of Canada issued its decision in *R. v. Smith*, 2015 SCC 34. Neither Dr. Neumann nor the owner responded when the strata's property manager advised them of this error.
53. For these reasons, I find the owner has not shown that the strata discriminated against him under section 8 of the Code.

## **DECISION**

54. I find the owner's smoking of tobacco and marijuana contravened the strata's smoking bylaw. I also find that the strata did not discriminate against the owner under section 8 of

the Code.

55. Under section 49 of the Act, and Tribunal rules 14 and 15, the Tribunal will generally order an unsuccessful party to reimburse a successful party for Tribunal fees and reasonable expenses related to the dispute resolution process. I see no reason in this case to stray from the general rule. The strata did not request the reimbursement of any expenses, aside from Tribunal fees.

## **ORDER**

56. I order that the owner:

- is prohibited from smoking tobacco or marijuana on any property of The Owners, Strata Plan LMS 2900. This includes, without limitation, any strata lot, common asset, limited common property or common property, whether indoors or outdoors, including patios, gardens, walkways, and balconies, and
- must reimburse the strata for any Tribunal fees paid under dispute number ST-2016-00297 within 30 days from the date of this decision.

57. Under section 57 of the Act, the strata can enforce this final Tribunal decision by filing, in the Supreme Court of British Columbia, a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 56.5(3) of the Act has expired and leave to appeal has not been sought or consented to.

58. Once filed, a Tribunal order has the same force and effect as an order of the Supreme Court of British Columbia.

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Shannon Salter, Chair