



# Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Mundel et al v. Hastings-Evans et al*, 2017 BCCRT 108

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

Dittmar Mundel and Pat Mader Mundel

**APPLICANTS**

**A N D :**

Jean Hastings-Evans and The Owners, Strata Plan VIS 4072

**RESPONDENTS**

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## REASONS FOR DECISION

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Tribunal Member:

Julie K. Gibson

## INTRODUCTION

1. An owner says she should be permitted to smoke on her balcony and in her unit. The applicants, also owners, say that her smoking negatively impacts their health and interferes with their ability to enjoy their unit.

2. Dittmar Mundel and Pat Mader Mundel (applicants) and Jean Hastings-Evans (respondent) are self-represented. The respondent, The Owners, Strata Plan VIS 4072 (strata) is represented by its strata council President.

## **JURISDICTION AND PROCEDURE**

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims brought under section 3.6 of the Civil Resolution Tribunal Act (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.
4. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
5. The applicable tribunal rules are those that were in place at the time this dispute was commenced.
6. Under section 48.1 of the Act and the tribunal rules, in resolving this dispute the tribunal may make one or more of the following orders:
  - a. order a party to do or stop doing something;
  - b. order a party to pay money;
  - c. order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

7. The issues in this dispute are:

- Did the respondent breach the strata's bylaws by smoking tobacco and/or vaping on her balcony and in her unit?
- Would an order prohibiting the respondent from smoking in her unit or on her balcony constitute discrimination on the basis of disability?
- Is the respondent allowed to smoke in her unit or on her balcony because her ability to do so has been grandfathered?
- What is an appropriate remedy?

## **BACKGROUND AND EVIDENCE**

8. The parties agree about the following facts:

- (a) On May 13, 2015, the respondent bought strata lot 13 (unit 404). Unit 404 is located on the fourth floor of the building.
- (b) On May 29, 2015, the applicants bought their strata lot (unit 305). Unit 305 is located on the third floor of the building, directly below unit 404.
- (c) The strata passed a no smoking bylaw on March 28, 2017 which became effective April 12, 2017.
- (d) Smoking was a common source of complaint to the respondent strata prior to the passing of the no smoking bylaw.
- (e) The applicants have health conditions and are sensitive to tobacco smoke and vapour from e-cigarettes.
- (f) The respondent has smoked for many years.

9. I will summarize the additional factual background below. I have reviewed all of the documents filed with the tribunal, whether or not I mention them below.

10. The limited common property balconies of units 305 and 404 are situated directly above and below one another.
11. A September 21, 2016 letter from Dr. Michael Dorey, ophthalmologist, says that Pat Mader Mundel has glaucoma and that prior therapies to treat her glaucoma mean that her eyes may have heightened sensitivity to irritants including smoke.
12. A November 9, 2016 letter from Dr. Loree Larratt, hematologist, says that Dittmar Mundel has chronic lymphocytic leukemia, is at risk for increased malignancies (cancers), and that a "smoke free environment will be important for his health."
13. Don and Rose Nelson, owners of unit 203, provided a statement explaining that they visited the applicants in unit 305 on January 9, 2017, and that the den, which had the window closed "since August", smelled of cigarette smoke.
14. Elsie Maders, the applicants' mother/mother in law, wrote that she smelled smoke when visiting unit 305. She offered her observation that it appeared to be entering the suite off the balcony and that another smell entered through the ventilation of the bathroom off the dining room and kitchen hallway.
15. Dr. Erika Mundel, the applicant's daughter, wrote that she visited unit 305 on February 19 and 20, 2017. While there, the family experienced a stale smoke smell in the den, and could not use that space. She notes that her children (aged 2 and 4) are being raised in a smoke -free home.
16. A friend of the applicants, Dr. John Otto Olson, wrote that during his visit at unit 305 he detected cigarette smoke on the balcony. He also smelled both fresh and stale cigarette smoke in their den. Dr. Olson wrote that he could not stay in the den overnight due to the smoke smell, even though it was normally the guest room.
17. Ruth Taylor, owner of Unit 204, provided a statement that she smelled smoke in the den of unit 305 on August 13, and 16, 2016.

18. Betty Taylor, owner of unit 301, wrote that between September 2016 and December 2016 she was authorized to inspect the applicants' unit for insurance purposes while they were away. She writes that she inspected it every four days, and never detected the smell of smoke in any room. She says that her unit is partially under the individual respondent's unit, and that she and her husband do not detect smoke coming from unit 404's balcony. While I accept her evidence as accurate, it does not address the time periods in August 2016 nor after December 2016, where there is a great deal of evidence establishing that smoke had entered the applicants' unit from the respondent's balcony and through shared ventilation.
19. On January 17, 2017, the strata council met. A rule was created prohibiting smoking on interior and exterior common property, limited common property patios and balconies, and within three meters of the exterior common property boundary.
20. Current owners as of January 17, 2017 were "grandfathered" from this smoking rule, but it was noted that they must still comply with Bylaws 3(2)(a) and (c) and ensure that, if they smoke within their strata lot, they do not interfere with another owner's use and enjoyment of their strata lot.
21. The strata wrote to the respondent on March 2, 2016 informing her of "concerns" of secondary smoke in common areas of the strata building. Betty Taylor, then the strata council vice president, signed the letter.
22. The strata council received a formal complaint from the applicants on August 16, 2016.
23. The strata council responded, based on s.135 of SPA, by sending the respondent a letter notifying her of the nuisance bylaw complaint, offering her a hearing and the opportunity to make a written response instead, which was the option she chose.
24. The strata said in its response that due to a lack of corroborating evidence about the smoke, it did not make a decision about whether the bylaw had been breached

at that time. That explanation for non-enforcement is not supported by the documentary evidence.

25. On November 4, 2016 Karen Bennett O'Brien from Concise Property Management, the strata's property manager, wrote an email to the applicants advising them that the dispute about the respondent's smoking was not resolvable by council. Ms. Bennet O'Brien did not refer to a lack of evidence for the bylaw contravention, but suggested that the strata council could not choose between owners saying "council represents both owners in this issue, and cannot put the rights of one over the other."
26. The strata did start the process to consider a no smoking bylaw, which was eventually adopted on March 28, 2017.
27. I accept the evidence from the Lung Association/Heart & Stroke Foundation fact sheet filed with a tribunal that second-hand smoke "cannot be contained" and that there is "no safe level of exposure to second-hand smoke." Due to the nature of smoke, "separating smokers from non-smokers, cleaning the air, and ventilating buildings cannot eliminate exposure to second hand smoke."
28. The respondent wrote that she smokes on her balcony, except one day where she smoked inside thinking that it might avoid complaints from the applicants. She writes that she vaped for one week, but that the applicants complained of the smell then too.
29. The respondent writes that "The Mundels could have kept their balcony door and windows closed and smoke would not have entered their unit...I smoke on my balcony every day".
30. She also rejects the suggestion that HEPA filtered air cleaner would solve the problem, writing:

"It only works indoors and I do not wish to smoke inside my condo."

31. In the same document, the respondent says she has tried reducing "...the amount she smokes at home."
32. On March 28, 2017, a special general meeting was held and a new Bylaw (Bylaw 30) was passed by a  $\frac{3}{4}$  vote, prohibiting smoking in a strata lot or in the interior or exterior common property or on the limited common property patios and balconies, and anywhere within 5 metres of the street side strata property line.
33. The new Bylaw contained a grandfathering provision stating that while current owners who smoked were grandfathered from the no smoking bylaw, they must still comply with Bylaws 3(2)(a) and (c).

## **POSITION OF THE PARTIES**

34. The applicants say they are exposed to second hand smoke from the respondent smoking in her unit, that this aggravates their health conditions and increases their health risks, and is contrary to strata bylaws 3(2)(a) and 3(2)(c).
35. The applicants requests that I order
  - the respondent to smoke in such a location and manner that it does not drift into the applicants' balcony or unit;
  - the respondent use a high quality charcoal/HEPA filter designed for tobacco smoke and vapours in a room that does not have vents connecting to their unit;
  - the respondent stop smoking or vaping on her balcony or in her strata lot if she cannot do so in a manner that does not enter their unit or drift onto the applicants' balcony
  - the respondent reimburse them for remediation in their den include cleaning blinds, washing walls and repainting walls, if needed
  - the strata enforce bylaws 3.2.a. and 3.2.c, and

- the strata order the respondent to stop smoking/vaping on her balcony or in her strata lot
  - the respondent reimburse the applicant's tribunal fees in the amount of \$150.
36. The respondent submits that her "rights" to smoke on her balcony have been grandfathered through a 75 % vote of the strata owners.
  37. The respondent says she is 80 years old and addicted to cigarette smoking. She submits that her unit is on the top floor. She feels it therefore lessens the impact of her smoking on others.
  38. The respondent does not have a drivers license and says that asking her to walk to the edge of the property to smoke is "unfair and unsafe", particularly in the evenings or in winter weather.
  39. The respondent does not allege that she is disabled from walking to the edge of the property to smoke, nor has she provided any medical evidence of disability.
  40. She says the applicants knew this was a building where smoking was permitted before they bought their unit in it.

## **ANALYSIS**

### **Did the respondent breach the strata's bylaws by smoking tobacco and/or vaping on her balcony and in her unit?**

41. I find that the respondent repeatedly smoked on her balcony or in her unit from July 2016 to at least February 2017.
42. The respondent admits to smoking on her balcony frequently. She admits to smoking inside her unit for one week during this period.
43. I accept the evidence that smoke from the respondent's unit was entering the applicants' unit from the balcony to their balcony, and through the bathroom and



kitchen fan vents, as well as through the joints and condensation holes on the den's bay window on the applicants' unit.

44. In the materials, there was a contention that smoke only rises, and so any complaint from the unit below the respondent's unit is unfounded. I do not agree. There is evidence before me, including from the Health Ministry of the Government of Australia that smoke travels in complex patterns and can infiltrate units in a strata other than the unit where the smoking occurs or those directly below it.
45. I put significant weight on the smoking logs prepared by the applicants, created at the times that they smelled smoke in their unit, detailing its location and origin. As well, their observations are confirmed by several other people, including owners and members of the strata council, who provided statements of smelling smoke in the applicants' unit over this time period.
46. I find that the owner's smoking activity in her strata lot interfered with other residents' health, safety, enjoyment or use of their property, contrary to the strata's nuisance bylaw.
47. Both applicants filed medical evidence supporting a finding that second hand smoke is particularly harmful for them. Mrs. Mundel has glaucoma. Her eye doctor says that her eyes are particularly sensitive to smoke. Mr. Mundel has a condition that puts him at higher risk of further malignancies (cancers). His doctor says that a smoke-free environment is important for him.
48. From a health perspective, the respondent's smoking is creating a hazard for them and interfering with both applicants' ability to use their strata lot.
49. As well, one of their guests said he could not stay overnight in their guest room, due to the smoke smell. The smoke has interfered with the ability of Mrs. Mundel to show her balcony flowers to a friend. The smoke has negatively impacted many parts of the applicants' lives.
50. I therefore find that the respondent breached the strata's nuisance bylaw.

**Is the respondent allowed to smoke on her balcony and in her unit because she is “grandfathered” and not subject to the strata’s no smoking bylaw?**

51. Grandfathering describes an exception to a new bylaw to recognize an owner’s pre-existing rights to do certain things. For example, the *Strata Property Act* (SPA), in section 123, recognizes that owners can continue to live with their pet, if the pet lived with the owner at the time of that a no pets bylaw is passed.
52. The respondent argues that she is exempt from the no smoking bylaw because she owned her unit and smoked on her balcony before the no smoking bylaw was passed.
53. While she is exempt from the no smoking bylaw, the respondent is not exempt from Bylaw 3(2)(a) and (c), requiring her not to use her strata lot or the common property in any way that “unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot” or “causes a nuisance or hazard to another person”
54. The no smoking bylaw itself also notes that owners are not exempt from complying with Bylaw 3(2)(a) and (c).
55. Despite the argument that her ability to smoke in her unit is grandfathered, I find that the respondent may still be prohibited from smoking in her unit or on her balcony, because her behavior in doing so contravenes Bylaws 3(2)(a) and (c).

**Is the respondent disabled such that an order that she not smoke in her unit or on her balcony would be discriminatory?**

56. Under section 3.8(2) of the Act, the tribunal has jurisdiction to apply the Human Rights Code (Code) in a dispute.
57. 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.

58. The respondent owner has not made an explicit discrimination argument. I have decided to address it here because of her evidence that she has no driver's license, and that walking to the edge of the property to smoke would be "unsafe" and "unfair", particularly in winter weather.
59. The respondent has not established any disability preventing her from walking to the edge of the property to smoke. She has not filed any medical evidence to support her argument that she would be unsafe doing so. She has not shown that a ban on smoking in her unit or on her balcony would adversely affect any disability. (see *The Owners, Strata Plan NW 1815 v. Aradi*, 2016 BCSC 105 and *The Owners, Strata Plan LMS 2900 v. Mathew Hardy*, 2016 BCCRT 1).
60. There is no evidence before me that the respondent owner has a disability and needs to be accommodated in that disability by being allowed to smoke in her unit or on her patio.

**What is the appropriate remedy for the contravention of the bylaws?**

61. The applicants wrote several letters and had several conversations with the respondent in an effort to see if a solution could be reached. Mr. Mundel even attended on the respondent's balcony to help her adjust a fan there, in the hopes that it could direct the smoke away from their unit. These discussions did not resolve the smoke problem.
62. The strata provided a letter notifying the respondent owner of the smoking complaint and requesting her response. It obtained her response. Beyond that, the strata appears to have encouraged the parties to try to reach a mutually agreed solution, but these efforts were unsuccessful. The strata declined to determine the complaint and deferred to the tribunal process.
63. Although the strata should have made decision about whether or not the bylaw was breached in this case, I find that its process was not "significantly unfair" to

the applicants. As in *Chorney v. Strata Plan VIS 770*, 2016 BCSC 148, the strata appears to have taken the complaint seriously, but had difficulty making a decision between what were viewed by it as conflicting accounts between owners.

64. A strata has an obligation to investigate complaints and to enforce the strata's bylaws. I decline to make a forward looking order requiring the bylaw to be enforced because doing so would duplicate the obligation already present in the SPA. Should there be a future complaint about smoking, the strata ought to investigate and make a determination in the complaint, and enforce the smoking or nuisance bylaws, as applicable. Nothing in this decision prevents the applicants from making smoking complaints to the strata in the future, and the strata must conduct an appropriate investigation and enforce its bylaws. Although not binding on me, I accept the analysis set out at paragraphs 54 and 58 of *D. W. v. The Owners, Strata Plan BCS XXX*, 2017 BCCRT 107 and find that it applies here.
65. The requested remedy requiring the respondent to use a charcoal HEPA filter designed for tobacco smoke in a room without vents connecting to the applicants' unit is impractical. It is very unlikely to resolve the ongoing issue. The respondent says she does not want to smoke in her unit in any event.
66. I reviewed the respondent's assertion that walking to the edge of the property is unfair and unsafe, particularly in winter weather. She did not provide any evidence of disability preventing her from smoking away from her unit. Instead, her materials referred to an attempt by her to smoke at her unit less often, suggesting that she has tried smoking elsewhere.
67. Given the evidence that the respondent's smoking creates a nuisance and a hazard to the respondents, I order that she stop smoking on her balcony or in her unit. She will be required to move a short distance from the strata property in order to smoke or vape.
68. The applicants sought cleaning costs for cleaning blinds, washing walls and repainting walls in their den. They did not put an amount on this request for remedy. I accept that second hand smoke is retained in fabrics. I decline to order

an amount for repainting walls, as the evidence did not establish that this was necessary. I award \$150 for cleaning blinds and washing walls, to be paid by the respondent owner to the applicant within 30 day of this decision.

## **DECISION AND ORDERS**

69. I order that the respondent Ms. Hastings-Evans:

- is prohibited from smoking tobacco or vaping on any property of The Owners, Strata Plan VIS 4072, including in any strata lot, common asset, limited common property or common property, whether indoors or outdoors, including patios, gardens, walkways, and balconies,
- must pay \$150 for cleaning costs of the blinds and walls in the den, to the applicants, within 30 days of the date of this decision and
- must reimburse the applicants for \$150, the tribunal fees paid under this dispute within 30 days from the date of this decision.

70. Under section 57 of the Act, a party 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. Once filed, a tribunal order has the same force and effect as an order of the Supreme Court of British Columbia.

71. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia. However, the principal amount or the value of the personal property must be within the Provincial Court of British Columbia's monetary limit for claims under the *Small Claims Act* (currently \$35,000). Under section 58 of the Act, the Applicant can enforce this final decision by filing in the Provincial 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. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

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Julie K. Gibson, Tribunal Member