



# Civil Resolution Tribunal

Date Issued: February 27, 2019

File: ST-2017-006736

Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan NW 2539 v. Renpenning*, 2019 BCCRT 232

B E T W E E N :

The Owners, Strata Plan NW 2539

**APPLICANT**

A N D :

Lillian Renpenning

**RESPONDENT**

---

## REASONS FOR DECISION

---

Tribunal Member:

Fred Wynne

## INTRODUCTION

1. This is a dispute between a strata corporation and a resident owner over second-hand smoke penetration into a strata lot. The applicant strata corporation, The Owners, Strata Plan NW 2539 (strata) has received complaints over smoking and

had a BC Human Rights Tribunal complaint filed against it because of second-hand smoke. The strata has therefore started this dispute in an attempt to stop the respondent, Lillian Renpenning (owner), from smoking in her strata lot.

2. The strata seeks orders that:
  - a. the owner is in breach of the strata's bylaw 3 by smoking in a manner which causes a nuisance to her neighbour in unit 10;
  - b. the owner cease and desist from smoking in her strata lot; and,
  - c. the owner reimbursement it for remediation costs to prevent second-hand smoke from entering unit 10 and legal costs.
3. The owner admits smoking in her strata lot. The owner states that she suffers from a nicotine addiction under the *BC Human Rights Code* but makes no claim of discrimination and asks for no accommodations. The essence of the owner's response is that the strata has not shown her smoking constitutes a nuisance within the meaning of the strata's bylaw 3.
4. The strata is represented by a member of the strata council.
5. The owner represents herself.
6. For the reasons that follow, I find that the strata has not proven the owner's smoking constitutes a nuisance under the strata's bylaw 3. I therefore dismiss this dispute.

## **JURISDICTION AND PROCEDURE**

7. These are the formal written reasons of the tribunal. The tribunal has jurisdiction over strata property claims brought under section 121 (formerly section 3.6) of the *Civil Resolution Tribunal Act* (Act).

8. 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 recognise any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
9. 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.
10. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I find that I can decide this matter on the documents provided to me, without an oral hearing.
11. Under section 123 of the Act and the tribunal rules, in resolving this dispute the tribunal may make order a party to do or stop doing something, order a party to pay money, order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

12. The issue I must decide is whether the strata has proved that the owner's smoking is a nuisance under its bylaw 3.

## **EVIDENCE AND ANALYSIS**

13. I have read and considered all of the evidence and materials filed by the parties, but I do not recite or refer to all of them in my decision. I only refer to the evidence I found was necessary for me to make my decision.
14. The strata's bylaw 3 states, among other things, that no owner may use their property in such a way that causes a nuisance or a hazard to another person, or

that unreasonably interferes with other people's use and enjoyment of their property.

15. The owner's neighbours purchased unit 10 in the strata and moved in on November 20, 2015. The owner and her husband already resided in unit 9, having occupied the unit since approximately September 2015.
16. It appears that problems began between units 9 and 10 nearly immediately after the neighbours moved in.
17. Unit 9 and unit 10 are adjacent units with unit 10 located directly above the owner's unit, unit 9.
18. Sometime in early December, 2015 the copper water pipes supplying unit 10 leaked, leaking into the owner's unit and damaging its ceiling such that it was open to the floor above. In December 2015 the ceiling in the owner's unit was repaired, and new insulation and a new vapour barrier were installed.
19. On December 15, 2015 the neighbour wrote to the strata with her first complaint about smoking. They wrote that her downstairs neighbours smoked, that the smell of smoke in unit 10 was at times intolerable, that they had been sick ever since they moved in and that the neighbour in particular suffered from an incurable lung disease, and that 2 air purifiers which the neighbours had purchased were not improving the situation. The neighbour acknowledged that the strata was not non-smoking and cited the issue as a nuisance under the strata's bylaw 3.
20. On January 6, 2016 the neighbour again wrote to the strata complaining that while the recent repair work had diminished some of the smoke, there was still smoke entering the bathroom and laundry room of unit 10 and that the health of herself and

her husband were suffering. The neighbour advocated for the adoption of a non-smoking bylaw.

21. On March 3, 2016, the neighbours wrote to the strata council complaining about smoke coming from unit number 11 and advising that they put foam gap filler around the master bedroom bath pipes which helped but did not stop smoke coming from there. The neighbours requested that the entire strata be made non-smoking, which they saw as the only solution.
22. On April 15, 2016 the neighbour filed a complaint against the strata with the BC Human Rights Tribunal over her lung disease and second-hand smoke issues.
23. Between April 10 - November 17, 2016 the neighbour kept a log of smoke issues. The following points from the log are notable:
  - a. The record does not indicate daily problems and there are several significant unexplained gaps including May 28 - June 12, June 22 - 27, June 29 - July 5, July 7 - 11, July 13 - 21, July 22 - 26, July 30 - August 7, August 25 - September 2, and September 7 - November 17.
  - b. smoke enters unit 10 at all hours and no consistent pattern can be determined. The neighbour notes smoke in the unit at around 2:30 - 4 am (April 13, 29, May 3, June 15); 6 - 8 am (April 11, 23, 27, 29, August 10, September 4); 9:30 - 10 am (August 13, September 6); noon (June 21); 1:53 - 2 pm (April 29, July 29, August 12); 5:20 - 5:30 pm (April 11, 23, May 26); 7 pm (September 3); and 9:30 pm (April 18).
  - c. the bedroom of unit 10 does not seem to be affected by smoke, or as affected as the rest of the unit, and is the neighbour's refuge from smoke;

- d. smoke entry to unit 10 does not always coincide with the owner's unit being occupied. On April 23 the neighbour records that unit 10 was quite smoky from 8 to 10 am, but that the Renpennings had left before 10 am. On April 28 the neighbour records that the people downstairs were not home but the condo was heavy with the smell of smoke and the air purifiers could not keep up to the dirty air. For the days of June 17 – 20, the neighbour records that her air purifier cannot deal with the smoke even when the neighbours are not home. On July 21, the neighbour writes that the smoke is almost overwhelming even when the couple downstairs has gone out.
  - e. By June 13 Mr. Renpenning's health was failing and he was regularly in and out of the owner's unit for medical reasons but the neighbour noticed little difference in the smoke entering unit 10.
  - f. However on August 13 the Renpennings went away for a few days and the neighbour was relieved with the improvement that the smoke was not overwhelming. On August 20, the day after the Renpennings returned home, the neighbours experienced smoke problems again including in the middle of the night.
24. I also note that the log is dated November 17, 2016, exactly one year before the date the dispute notice was issued, November 17, 2017, but the last entry is September 6, 2016.
25. The strata entered into evidence copies of the minutes of strata council meetings over the period of January to November, 2016. The minutes of the January 14, 2016 council meeting record "the owner of unit #10 thanked the Strata Council for its efforts in alleviating the cigarette smoke entering their strata lot from a neighbouring unit". All following meeting minutes are silent on any smoke issue in unit 10.

26. The minutes of the September 19, 2016 council meeting record that due to the Human Rights Tribunal complaint lodged by the owner of unit 10 a no smoking bylaw should be presented at the AGM.
27. At its Annual General Meeting held on October 24, 2016, the strata proposed a motion to adopt a bylaw prohibiting smoking. That motion was defeated with a count of 105 votes in favour, but 78 votes opposed, falling short of the 3/4 majority required to amend strata bylaws under section 128 of the *Strata Property Act*.
28. The strata had an air quality assessment performed on both unit 10 and the owner's unit on December 1, 2016. The results of that assessment were provided to the parties in a report by the assessor.
29. The report concluded:
- a. the air quality in unit 10 was within normal ranges;
  - b. the owner's unit had a strong tobacco odour and elevated level of formaldehyde, which indicates tobacco smoke;
  - c. a significant tobacco smoke odour was not detected in unit 10;
  - d. a mild tobacco smoke odour may have been present in unit 10;
  - e. tobacco was not smoked in the owner's unit at the time of the assessment;
  - f. it is likely that when tobacco is actually smoked in the owner's unit that smoke and odour will travel into unit 10 to some extent.
30. Following the report's recommendations, unit 10 received an ozone treatment to reduce cigarette odour on December 14, 2016 and caulking seals to block airflow between the 2 units over the period of December 5 - 22, 2016.

31. On December 16, 2016 the strata, through legal counsel, wrote to the owner advising that The neighbour had made a Human Rights Complaint, that the strata council's position was that smoking in the owner's unit was a nuisance under the strata bylaws, and demanding that the owner and the occupants of unit 9 cease and desist from smoking in the owner's unit and its immediate vicinity or face fines.
32. On January 2, 2017 Mrs. Bowker wrote to the strata complaining that the seals did not have any effect in reducing the smoke entering into unit 10.
33. In January, 2017 the strata provided the neighbour with an air purifier.
34. On January 17, 2017 the strata wrote to the owner advising that it had exhausted all reasonable options to control the cigarette smoke entering unit 10 and that if smoking continued in the owner's unit they would face fines on a weekly basis.
35. On January 24 and February 20, 2017 the strata installed the following in unit 10: caulking around the range-hood vent pipe; pocket doors and a membrane on those pocket doors in the den; a divided goose neck vent on the roof; and diverter panels above the lower bathroom window.
36. On April 6, 2017 the strata purchased an air purifier for the owner's unit, which the owner began using.
37. On May 27, 2017 the owner purchased and began using 2 more air purifiers. Since that time the owner has had 3 air purifiers running at all times within their unit.
38. Also in May, 2017, the strata installed a booster fan in the range hood exhaust pipe in the owner's unit, and sealed french doors in the kitchen and den of unit 10.
39. On or around June 29, 2017 the strata installed an induct fan in unit 10.
40. On August 9, 2017 further seals and caulking were installed in the owner's unit.



41. On September 5, 2017 the strata, through its management company, wrote to the owner advising that it had continued to receive complaints from unit 10 over second-hand smoke despite having spent approximately \$7,400 on the remediation efforts described above. By this time the strata concluded it had exhausted all other options and demanded that the owner cease smoking inside her strata lot.
42. On or around September 6, 2017 the strata installed seals behind the electrical plates in the den, hallway, and main bathroom of unit 10. The strata also sealed and caulked around the exhaust pipe in unit 10's kitchen.
43. On September 14, 2017 the owner's daughter replied to the strata's letter confirming that the owner's husband had been smoking inside the owner's unit in the time period between June and September 2017, that he was ill and could not smoke outside the unit, and raised the issue of nicotine addiction as a disability.
44. On September 21, 2017 the owner's daughter e-mailed the strata to request a second air quality test be done in both the owner's unit and unit 10. On September 23, 2017 the strata refused to provide another air quality test because it had already done one in November 2016.
45. On September 22, 2017 strata council members visited units 10, 11 and 12 to "assess smoke issues" in each unit, noting the air quality was significantly better in units 11 and 12 than in unit 10.
46. On September 24, 2017 the owner's husband passed away.
47. Following the passing of the owner's husband she resided in her unit alone, which is corroborated by witness statements of 2 neighbours.

48. On October 23, 2017 the strata held an annual general meeting. At this meeting the strata again attempted to amend the bylaws to add a no smoking bylaw, and for a second time the motion was defeated.
49. On November 17, 2017 the strata applied for dispute resolution under the Act and the tribunal issued the dispute notice commencing this dispute on November 20, 2017 (which was amended on November 22, 2017).
50. On June 14, 2018 The neighbour swore an affidavit which she submitted to the Tribunal. In her affidavit The neighbour gives the following sworn evidence:
- a. she suffers from pulmonary fibrosis for approximately 6 years and cannot tolerate cigarette smoke of any kind;
  - b. enclosing her complaint letters to the strata;
  - c. second-hand smoke persisted in unit 10; and,
  - d. she now detected second-hand smoke in every room in unit 10.
51. The neighbour's affidavit does not contain any detailed evidence of smoke conditions in unit 10 between the end of her log, September 2016, and the affidavit date, June 2018. Instead, The neighbour deposes that "I stopped keeping a detailed log after this but confirm that the incidents of second-hand smoke entering the Unit have happened daily whenever someone was smoking in Unit 9".
52. The neighbour's affidavit also fails to reference any of the repairs detailed above, and whether there were any changes in the conditions in unit 10 following the various repair efforts.

53. On June 21, 2018 a strata council member swore and affidavit which was submitted to the Tribunal. In this affidavit, the following evidence, among other things, is provided on behalf of the strata:
- a. the strata council confirmed that the owner is the source of the second-hand smoke complained of by The neighbour, but it fails to explain how that confirmation was made;
  - b. the strata council has determined that the owner is in violation of bylaws 3(1)(a) - (b), but does not explain how that determination was made;
  - c. enclosing the same complaint letters and smoking log from The neighbour;
  - d. detailing the steps taken by the strata following The neighbour's Human Rights Tribunal complaint, which are described above; and,
  - e. that the strata council had charged the owner's strata account \$5,178.15 for the costs of remediation work performed in unit 10.

## **ANALYSIS**

54. The strata does not have a non-smoking bylaw, so it relies on the nuisance provisions of its bylaw 3.
55. In law, nuisance is unreasonable interference with a person's use or enjoyment of their property. There is always a balance between people's rights and activities, especially when living together in close quarters such as a strata complex. Not every annoyance is a legal nuisance. For something to be a nuisance, it must be shown to be substantial and unreasonable in the eyes of an objective observer.
56. The owner has admitted to smoking in her unit. However, this is not a case where the owner's unit is the only possible source of smoke. The strata is a smoking

building and I infer from the evidence that a significant amount of smokers reside in the complex. In particular I note that the strata has been unable to obtain a sufficient majority of owners to pass a non-smoking bylaw which indicates, at minimum, a strong minority of smokers resident in the complex. Additionally, the evidence was that the owner of unit 10 before The neighbour was a smoker.

57. None of the evidence before me indicates that the strata or The neighbour considered any other possibility than the owner's unit as the source of smoke, which I find is a flaw in the strata's arguments.
58. The most persuasive evidence to me is the air quality report commissioned by the strata in November 2016. That report is evidence that as of December 1, 2016 the air quality in unit 10 was within normal ranges and that only a mild tobacco smoke odour may have been present in unit 10.
59. The air quality testing and report of December 2016 were performed by an independent professional retained by the strata, and I place considerable weight on this evidence.
60. The report does not conclude there is any second-hand smoke coming from the owner's unit into unit 10. Importantly, the conclusion of only a mild odour of cigarette smoke possibly being present in unit 10 illustrates that any second-hand smoke entry into unit 10, regardless of source, did not rise to the level of a nuisance.
61. Notably, the owner requested a second round of air quality testing in September 2017 and the strata refused, preferring instead to rely on the 2016 air quality report.
62. Following the December 2016 air quality report, the strata undertook significant remediation efforts and followed the recommendations of the report in large degree.

Reading the report, however, I cannot conclude that the air quality testing determined such remediation efforts were required.

63. A second reason why I find that the owner's unit was not the source of a nuisance to unit 10 is that none of the strata's very significant remediation efforts, nor any other factors, appear to have alleviated the situation in unit 10 or affected it in any way.
64. The evidence presented by the strata, as reported by The neighbour, paints a picture of a severe, persistent, ongoing problem with second-hand smoke infiltration in unit 10 that progressively worsened as time went on. These circumstances cause me to conclude that even if smoke is causing a nuisance to unit 10, which I find is not the case, based on the evidence submitted, then neither the owner nor unit 9 could be the source of smoke significant enough to constitute a nuisance to unit 10.
65. I come to this conclusion because:
  - a. the log authored by The neighbour does not establish a daily series of incidents, and rather smoke entry incidents were somewhat inconsistent throughout the logged period of April to September 2016;
  - b. the log also establishes that some significant incidents of smoke entry to unit 10 occurred when no one occupied unit 9;
  - c. none of the very significant repair and remediation work performed throughout 2016 appears to have had any effect on the issue;
  - d. the death of the owner's husband in September 2016, removing a source of smoking within the owner's unit, also appears to have had no effect on the smoke entry to unit 10; and,

e. to the contrary, the sworn evidence of The neighbour is that the problem got worse notwithstanding all the above.

66. I note that The neighbour prepared the log after she filed her Human Rights Tribunal complaint against the strata, and provided a sworn affidavit in this dispute. Given the ongoing legal proceedings the neighbour must have taken care to give the most accurate evidence possible. However, the neighbour's own evidence is inconsistent with the strata's claim in these instances.

67. For all the above reasons, I find that the strata has not proven its claim on the balance of probabilities.

## **DECISION AND ORDERS**

68. I order that the applicant's dispute is dismissed.

69. Under section 49 of the Act, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. The strata has not been successful so I find it is not entitled to any reimbursement of tribunal fees or reasonable dispute-related expenses.

70. The owner claims legal fees as reasonable dispute-related expenses to be reimbursed. Under tribunal Rule 132, compensation for legal fees will only be ordered in exceptional circumstances. I do not consider the circumstances of this case as exceptional and therefore do not allow the owner's request for reimbursement of legal fees.

71. The strata corporation must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the owner.

72. 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.

---

Fred Wynne, Tribunal Member