



# Civil Resolution Tribunal

Date Issued: July 3, 2019

File: ST-2018-008975

Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan BCS 2211 v. Bernard*, 2019 BCCRT 796

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

The Owners, Strata Plan BCS 2211

**APPLICANT**

**A N D :**

Debra Bernard

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Lynn Scrivener

## **INTRODUCTION**

1. This is a dispute about the enforcement of bylaws. The applicant, The Owners, Strata Plan BCS 2211 (strata) says that the respondent, Debra Bernard, smokes in areas of its property in contravention of its bylaws. It seeks an order that the respondent cease this activity and to pay \$750.00 in outstanding fines. The

respondent does not deny that she smokes in various areas, but says she will not stop doing so or pay the fines levied against her as the strata is not enforcing the bylaws in a fair manner.

2. The strata is represented by a member of the strata council. The respondent is self-represented.

## **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 121 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 has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
5. 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.
6. 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**

7. The issues in this dispute are:

- a. whether respondent should be ordered to comply with the strata's bylaws;  
and
- b. whether the respondent should be ordered to pay the \$750.00 in fines claimed by the strata.

## **BACKGROUND AND EVIDENCE**

8. The respondent is the sole owner of strata lot 40, which is also known as suite A115. The respondent's strata lot has an adjacent balcony area. According to the strata plan, the balcony is designated as limited common property (LCP) for the exclusive use of the respondent's strata lot. The parking area is classed as common property (CP).
9. The strata repealed and replaced its previous bylaws by filing amended bylaws at the Land Title Office on December 15, 2011. Bylaw 3 addresses the use of property. According to bylaw 3(1), an owner, tenant, occupant or visitor must not use a strata lot, CP or common assets in such a way that (among other things) causes a nuisance or hazard to another person, or unreasonably interferes with the rights of other persons to use and enjoy the CP, common assets or another strata lot. Bylaw 3(3)(t) states that an owner, tenant or occupant must not smoke or consume alcohol on LCP or CP.
10. On January 31, 2019, the strata filed an additional amendment to bylaw 3(3)(t). The amended bylaw removed the reference to consumption of alcohol, and states that an owner, tenant or occupant must not smoke on LCP or CP.
11. Bylaw 25(1) allows the strata to fine an owner or tenant a maximum of \$200 for a contravention of a bylaw. Bylaw 25(2) addresses continuing contraventions, and states that if an activity or lack of activity that constitutes a contravention of a bylaw continues, without interruption, for longer than 7 days, a fine may be imposed every 7 days.

12. The strata received a number of complaints about people smoking and drinking on the respondent's balcony. On August 27, 2015, the strata's property manager wrote to the respondent to advise that complaints had been received about cigarette and marijuana smoke coming from her strata lot and balcony. The property manager reminded the respondent of her responsibilities under bylaw 3, and stated that she must take steps to prohibit smoke from leaving her strata lot.
13. In an April 28, 2017 letter, the property manager advised that the strata had received complaints about the respondent smoking and drinking on her balcony and smoking in the parking garage. The strata had determined that the applicant's conduct amounted to a breach of bylaw 3, and imposed a \$100 fine.
14. On May 8, 2017, the respondent wrote to the property manager to respond to the complaints. The respondent admitted that she did smoke and drink on her balcony, but denied that this activity occurred at the times listed in the complaint. The respondent noted that other residents smoke on their balconies, and that some of these individuals live in close proximity to the person the respondent suspects of making the complaints. The respondent advised that she did not intend to stop smoking on her balcony unless the bylaw was enforced against all residents in the strata.
15. More complaints were received, and the strata decided to impose another \$100 fine. In a September 19, 2017 letter about "Continuous Smoking on Your Deck", the property manager advised the respondent of this fine and the strata's decision that the fine would be \$150 should a further complaint be received.
16. In a November 14, 2017 letter, the property manager advised the respondent that the strata had received a complaint about her smoking in the parkade on November 4, 2017. The strata council decided to impose a \$150 fine for this occurrence.
17. On March 15, 2018, the property manager wrote to the respondent about a complaint of smoking on her deck on March 1, 2018. The strata council had decided to impose a \$200 fine for this activity.

18. In a July 27, 2018 letter, the property manager provided details of complaints about the respondent smoking on CP on multiple occasions in July of 2018. The strata decided to impose a \$200 fine for “continued non-compliance with the bylaws”.
19. The strata has imposed a total of \$750 in fines, none of which have been paid by the respondent.

## **POSITION OF THE PARTIES**

20. The strata says it has received numerous complaints about smoking on the respondent’s balcony. The strata states that the respondent is responsible for what happens on her balcony, and that it enforces its bylaws by sending a warning letter, then a fine for each complaint received. The strata requests that the tribunal order the respondent to comply with the bylaws and pay the \$750 in outstanding fines. It says that these orders are warranted as the respondent shows no signs of willingness to moderate her behaviour and respect the bylaws.
21. The respondent says that many other residents of the strata smoke and drink on their balconies. She states that a bylaw must apply to all residents. The respondent says that she will not stop smoking on her balcony until all residents (including current and former members of the strata council) are required to do the same. She says she has rejected all fines levied against her by the strata council on the basis that she will not pay fines for something that others are permitted to do. According to the respondent, she does not want to receive special treatment, but will not accept what she perceives to be unfair treatment from the strata.
22. The respondent provided a letter from another strata resident who says that the occupant of suite B205 smokes “constantly”, both inside her strata lot and out on her deck. The other resident states that she has not made complaints about this behaviour.

## ANALYSIS

23. There is no dispute that, at the time the described complaints were received by the strata, bylaw 3 prohibited both smoking and drinking in CP and LCP areas of the strata. The respondent admits that she has engaged in behaviour that contravenes bylaw 3. She is not claiming that her need to smoke arises from a disability, but rather that her smoking is being treated in a different manner than other residents in the strata. Although not explicitly stated, I infer that the respondent's position is that it is significantly unfair for the strata to enforce the bylaws against her but not against other residents.
24. Section 164 of the SPA permits the courts to make orders to remedy or prevent significant unfairness in strata disputes. Section 123(2) of the Act contains similar language to section 164 of the SPA, and addresses remedies for significant unfairness. Section 123(2) provides that the tribunal has discretion to make an order directed at the strata, the council or a person who holds 50% or more of the votes, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights.
25. The courts have determined that "significantly unfair" actions are burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust or inequitable (see *Reid v. Strata Plan LMS 2503*, 2003 BCCA 128). The British Columbia Court of Appeal considered section 164 of the SPA in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in this case was restated in *The Owners, Strata Plan BCS 1721 v. Watson*, 2017 BCSC 763, as follows: What is or was the expectation of the affected owner or tenant? Was that expectation on the part of the owner or tenant objectively reasonable? If so, was that expectation violated by an action that was significantly unfair?
26. I am satisfied that the respondent has an objectively reasonable expectation that the strata's bylaws will apply equally to all residents. While I do not doubt the respondent's report that other residents are smoking on CP or LCP, I am unable to conclude that the strata has acted in an inequitable manner with respect to smoking.

27. The evidence before me does not establish that the strata has permitted other residents to contravene bylaw 3. The respondent does not state that she has made complaints to the strata about other residents engaging in conduct contrary to bylaw 3. As noted above, the letter from the other strata resident indicates that she has not made any complaints to the strata about her smoking neighbour. There is no indication that the strata has received but failed to respond to complaints about other residents' smoking activities. Therefore, I am unable to conclude that the strata's enforcement action against the respondent is significantly unfair.
28. As noted above, the respondent has stated her intention to not comply with the strata's bylaws. In these circumstances, I find that it is appropriate to order the respondent to comply with the strata's bylaws and, in particular, to immediately cease smoking on CP or LCP, including her balcony.
29. The next consideration is whether the respondent is required to pay the fines imposed by the strata for her admitted breaches of bylaw 3.
30. Section 135 of the SPA states that a strata must not impose a fine against a person, require a person to pay the costs of remedying a contravention, or deny a person the use of a recreational facility for a contravention of a rule or bylaw unless the strata has received a complaint about the contravention, given the owner or tenant the particulars of the complaint, and a reasonable opportunity to answer the complaint, including a hearing if requested. Section 135(2) requires the strata to give notice of a decision in writing, as soon as is feasible. Section 135(3) provides that, once the strata has complied with section 135 in respect of a contravention of a bylaw or rule, it may impose a fine for a continuing contravention of that bylaw or rule without further compliance with the section.
31. The procedural requirements of section 135 of the SPA must be followed strictly before a fine is assessed. A fine for a a bylaw contravention must not be charged unless the strata has received a complaint, given the owner the particulars in writing and allowed a reasonable opportunity to answer the complaint including a hearing, if requested (see *Terry v. The Owners, Strata Plan NW 309*, 2016 BCCA 449).

32. The August 27, 2015 letter warned the respondent that the strata may take action if breaches of bylaw 3 were to continue. The April 28, 2017 letter did advise the respondent of section 135 and gave her an opportunity to answer the relevant complaint. However, the fine had already been imposed prior to this communication. This is also the case for the subsequent letters that imposed fines.
33. I find that the warning contained in the August 27, 2015 is not sufficient to satisfy the requirements of section 135, as each complaint about an alleged breach must be communicated and the applicant given an opportunity to respond before fines are imposed. As fines were imposed at the same time the particulars of the alleged bylaw infractions were communicated, these requirements were not met. Further, as the initial fine was not imposed in compliance with section 135(1), the strata could not rely on section 135(3) of the SPA to impose additional fines for continuing contraventions (see *Dimitrov v. Summit Square Strata Corp.*, 2006 BCSC 967 at paragraph 33).
34. I find that, as the respondent was not provided with a reasonable opportunity to answer the complaints and request a hearing before fines were imposed, the strata did not comply with the requirements of section 135 of the SPA. Accordingly, the fines are invalid and must be removed from the respondent's strata lot account. I dismiss the strata's claim for \$750.00 for the bylaw fines.
35. Nothing in my decision would prevent the strata from following the process set out in section 135 of the SPA and imposing fines on the respondent for any future bylaw infractions.

## **TRIBUNAL FEES AND EXPENSES**

36. 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. As the strata was partially successful, I order the respondent to reimburse the strata for tribunal fees of \$225.00 and dispute-related expenses of \$11.97 for a total of \$236.97.



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

## **DECISION AND ORDERS**

38. I order that:

- a. the respondent comply with all of the strata's bylaws and immediately cease smoking on CP or LCP;
- b. the strata reverse the invalid fine amounts from the respondent's strata lot account; and
- c. within 30 days of the date of this decision, the respondent pay the strata \$236.97 for tribunal fees and dispute-related expenses.

39. The strata is also entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.

40. 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 123.1 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.

41. 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 123.1 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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Lynn Scrivener, Tribunal Member