



# Civil Resolution Tribunal

Date Issued: September 18, 2019

File:ST-2018-008801

Type: Strata

Civil Resolution Tribunal

Indexed as: *Foulds Kennedy v. The Owners, Strata Plan LMS 1495*,  
2019 BCCRT 1098

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

Liliane Foulds Kennedy

**APPLICANT**

**A N D :**

The Owners, Strata Plan LMS 1495

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Kathleen Mell

## INTRODUCTION

1. The applicant, Liliane Foulds Kennedy (owner), owns a strata lot, unit 315, in the respondent strata corporation The Owners, Strata Plan LMS 1495 (strata).

2. This dispute is about the strata's alleged failure to enforce its nuisance bylaw. The owner says that the strata has failed to properly address the issue of second-hand smoke entering her strata lot from the unit 215, the strata lot below her. The owner requests that the strata enforce the nuisance bylaw by imposing fines and sealing unit 215. The owner is self-represented.
3. The strata says that it properly investigated all the owner's complaints. It points out that the strata has no bylaw against smoking. The strata say that the owner can seal up her own strata lot if she wishes. The strata is represented by MF, a strata council member.

## **JURISDICTION AND PROCEDURE**

4. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The tribunal must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the tribunal's process has ended.
5. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. In some respects, this dispute amounts to a "she said, it said" scenario with both sides calling into question the credibility of the other. In the circumstances of this dispute, I find that I am properly able to assess and weigh the evidence and submissions before me. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note the decision *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, in which the court recognized that oral hearings are not necessarily required where credibility is in issue. I therefore decided to hear this dispute through written submissions.

6. The tribunal may accept as evidence information that 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 inform itself in any way it considers appropriate.
7. Under section 123 of the CRTA and the tribunal rules, in resolving this dispute the tribunal may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

## **ISSUES**

8. The issues in this dispute are:
  - a. Has the strata conducted an appropriate investigation into the owner's second-hand smoke complaints?
  - b. If not, what further investigatory steps should be taken?
  - c. Has there been a contravention of the standard nuisance bylaw and, if so, should I order that the strata enforce the standard bylaw by imposing fines and sealing the strata lot beneath the owner?

## **EVIDENCE, FINDINGS AND ANALYSIS**

9. While I have reviewed all of the material provided, I have only commented below on the evidence and submissions necessary for this decision.
10. It is undisputed that the strata does not have a non-smoking bylaw. However, bylaw 3 of the strata's bylaws, filed in the land title office on December 6, 2012, states that a strata lot owner is not allowed to use their strata lot or the common property in a way that causes a nuisance or hazard to another person or unreasonably interferes with the rights of other people to use and enjoy their strata lot or the common property.

11. The owner submits the strata has failed to properly investigate the second-hand smoke that has been coming into her strata lot since the new owners moved into unit 215 in 2014. In support of her claim that the second-hand smoke is a nuisance and interfering with her enjoyment of her strata lot, the owner says that the smoke is affecting her health and she now suffers from asthma and allergies. She says that she is experiencing constant coughing, headaches, chronic throat irritation, and a lack of sleep, among other symptoms. The owner says the second-hand smoke is so bad that she has to leave her doors and windows open in all weather conditions. She says that she cannot enjoy her strata lot and that she spends a lot of her time outside or in the building lobby to get away from the smoke.
12. The strata submits that the owner's claim should be dismissed as she may be overly sensitive. The strata also alleges that the owner is not willing to work with the strata to address the issue. The owner acknowledges that the strata asked her to contribute to the cost of sealing unit 215 but she declined as she was not the one causing the problem.

### ***The Smoking Complaints***

13. The owner states that there is smoke coming into her strata lot every day and she has provided a smoking log from May 2019 to indicate when the smoking has recently occurred. She says that she has sent the strata emails and logs documenting smoke coming into her strata lot for years. She has also submitted to the tribunal witness statements that corroborate her claims about the second-hand smoke. She submits that she spoke with the owner of the unit below her and begged her to stop smoking and offered to pay for a purifier, but this just made matters worse and there was an increase in the smoke coming into her strata lot.
14. The owner says that she phoned the president of the strata and asked for a council member to come to her strata lot and smell the conditions she was living in, but they did not attend. The owner also says she went to a council meeting in November 2018 and asked for help but she did not receive a reply. The owner suggests the

reason the strata has not enforced the nuisance bylaw is because the owner of the strata lot beneath her is a council member.

15. The owner later added to her submissions that recently in 2019 she managed to get a council member to come to her strata lot and this member could also smell the strong odour of “what was being enjoyed” in the strata lot below her. The owner did not name the council member.

***Has the strata conducted an appropriate investigation into the owner’s second-hand smoke complaints?***

16. The strata acknowledges that the owner has been making complaints about second-hand smoke but it says that no evidence has been submitted to prove where the smoke is coming from or even if there is any smoke. The strata says that when it received complaints about smoking it sent letters to the owners of the strata lots advising them of the complaints. The strata submits that there are many strata lots around the owner’s strata lot occupied by smokers. The strata says that it has taken steps to investigate where the smoke was coming from and has made several attempts to address the issue.
17. The strata submits that an air quality test was completed in the owner’s strata lot which showed that there were no unusual particles in the air. It is unclear who performed this test. The owner acknowledges that testing was carried out in late 2016 which did not come back with a positive result and one in early 2017 where a low-level amount of smoke was detected. The owner says that the owner of the strata lot beneath her was given advance warning of the testing and therefore the results did not reflect the usual conditions.
18. No reports have been submitted. It is unclear whether there were one or two tests, the circumstances surrounding the testing, and what the exact results were. Therefore, I place little weight on the strata’s claim that the air test can be relied on to prove there was no second-hand smoke.

19. The strata also says that it sealed certain portions of the strata lot. It does not indicate which lot. The owner says that the strata only sealed the top of two “dropping lights” and one sprinkler in the strata lot below her, but this did not stop the smoke from entering her strata lot.
20. The strata says it also sent bylaw infraction letters to owners and purchased air purifiers for some owners. The strata did not provide specific information about these general statements. There is no evidence as to the timeframe of these actions and no details as to what steps are currently being taken to address the issue. There is also no indication if the strata lot below the owner is one of the owners who received a letter regarding a complaint.
21. The strata did not provide any other proof that it investigated the owner’s complaints after the testing in 2017 or made attempts to enforce the standard bylaw against nuisance. It did not provide copies of letters it says it sent or indicate if any fines were imposed. The strata says that it was currently working on ways toward preventing smoke from entering the owner’s strata lot but did not explain what these were.

### ***Applicable Law***

22. Under section 26 of the SPA, the strata council must exercise the powers and perform the duties of the strata including the enforcement of bylaws. That duty is subject to the SPA, regulations, bylaws and rules. In *Strata Plan LMS 3259 v. Sze Holding, 2016 BCSC 32*, the Supreme Court held that a strata council has discretion whether to enforce its bylaws in certain circumstances but that discretion is limited, particularly in circumstances where the strata owners have a reasonable expectation that the bylaws will be consistently enforced.
23. Section 135 of the SPA sets out a procedure for investigating a complaint, which includes providing the subject owner or tenant the opportunity to be heard, before any fine is levied. This protection is for the benefit of the owner or tenant that is the subject of the complaint, not the person making the complaint. Notably, there is otherwise no particular complaint procedure set out in the SPA and a strata council

is permitted to deal with complaints of bylaw violations as the council sees fit, so long as it complies with the principles of procedural fairness and is not “significantly unfair” to any person who appears before the council (*Chorney v. Strata Plan VIS 770*, 2016 BCSC 148). As discussed further below, I find the strata’s approach has been significantly unfair to the applicant.

24. The phrase “significantly unfair” has been interpreted to be simply a plain language version of earlier terms “oppressive or unfairly prejudicial” (see *Chow v. Strata Plan LMS 1277*, 2006 BCSC 335). As noted in *Chow*, oppressive conduct is “burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith”.

25. In *The Owners, Strata Plan BCS 1721 v. Watson*, 2017 BCSC 763, the court restated the test for determining significant unfairness as set out in *Dollan v. Strata Plan BCS 1589*, 2012 BCCA 44. While that test was considered under section 164 of the SPA, as referenced above I find it would equally apply to an analysis under section 123(2) of the Act. In particular, in *Watson* the court stated: The test under s. 164 of the [SPA] also involves objective assessment. The *Dollan* decision requires several questions be answered in that regard:

- 1) What is or was the expectation of the affected owner or tenant?
- 2) Was that expectation on the part of the owner or tenant objectively reasonable?
- 3) If so, was that expectation violated by an action that was significantly unfair?

26. Section 123(2) of the CRTA is substantially similar to section 164 of the *Strata Property Act* (SPA) and addresses remedies for significant unfairness in strata property disputes. Section 123(2) provides that a 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.

27. I find that the applicant's expectation that the strata properly investigate her second-hand smoke complaints is a reasonable expectation. The applicant made contemporaneous complaints about the smoking, attended at a council meeting, as well as emailing the council and submitting a smoke log.
28. The strata has not made a consistent effort to attend at the owner's strata lot when the smoke was occurring and it has not provided evidence to support its claim that it has followed up in any way since the air testing of 2017.
29. I find that the strata's failure to properly investigate the amount of second-hand smoke and where it was coming from, was significantly unfair to the applicant and that the strata has not acted reasonably. Because the strata has indicated in its submissions that it knows there is an issue with second-hand smoke, I find that further investigation is necessary.

***What further investigatory steps should be taken?***

30. I find that the strata must properly investigate the owner's ongoing complaints and that it must enforce the bylaw against nuisance. The strata should arrange for additional testing to properly investigate the owner's second-hand smoke complaints. Other owners in the strata, including the council member who lives beneath the owner, should not be given advance notice of the testing that is limited to the owner's strata lot. There are no privacy concerns arising from this testing and no need to give advance notice as the other strata lots do not need to be entered at that time. I agree with the owner that giving advance notice provides an opportunity for manipulation of the results.
31. The strata should also consider arranging for additional testing of other strata lots if it determines that second-hand smoke amounting to a nuisance is entering the owner's strata lot. If second-hand smoke amounting to a nuisance is discovered, the strata must take steps to enforce the standard bylaw, so long as the second-hand smoke continues. The strata's goal must be to have the bylaw violations stop.



32. Nothing in this decision prevents the owner from making second-hand smoke complaints to the strata in future, and in that event, it would be in the owner's best interest to do so at the time the second-hand smoke is entering her strata lot. However, regardless of the possibility of the owner making future second-hand smoke complaints, I find the strata must arrange to conduct an appropriate investigation and enforce the bylaw which includes arranging and paying for the professional testing.

***Has there been a contravention of the standard nuisance bylaw and, if so, should I order that the strata enforce the standard bylaw by imposing fines and sealing the strata lot beneath the owner?***

33. I have found that a proper investigation needs to be carried out to determine if there has been a contravention of the nuisance bylaw. At this time the evidence is insufficient to make a finding that there was a contravention. 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. The strata is obligated to enforce the standard bylaw but further investigation is necessary to determine if smoke amounting to a nuisance is entering the owner's strata lot and if so where it is coming from. The strata will decide whether it is necessary to impose fines and seal the strata lot beneath the owner after it makes this determination.

## **TRIBUNAL FEES**

34. The owner was substantially successful in this dispute. Under section 49 of the Act, and the tribunal's rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. Given my finding that the strata failed to reasonably investigate the owner's complaints, I find the strata must reimburse the applicant the \$225.00 she paid in tribunal fees.

35. The strata corporation must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owner.

## DECISION AND ORDERS

36. I order that within 60 days the strata must arrange for a qualified professional to perform second-hand smoke testing in the owner's strata lot without providing advance notice to those who may be responsible for the second-hand smoke. The strata should also attend at the owner's strata lot when second-hand smoke is reported.
37. I order the strata to reimburse the applicant \$225.00 in tribunal fees, within 21 days.
38. Under section 57 of the CRTA, a party can enforce this final tribunal decision by filing, in the Supreme Court of British Columbia (BCSC), 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 a BCSC order.
39. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia (BCPC). However, the principal amount or the value of the personal property must be within the BCPC's monetary limit for claims under the *Small Claims Act* (currently \$35,000). Under section 58 of the CRTA, the owner can enforce this final decision by filing a validated copy of the attached order in the BCPC. The order can only be filed if, among other things, the time for an appeal under section 123.1 of the CRTA 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 a BCPC order.

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Kathleen Mell, Tribunal Member