



# Civil Resolution Tribunal

Date Issued: November 7, 2019

File: ST-2019-004092

Type: Strata

Civil Resolution Tribunal

Indexed as: *Neigum v. The Owners, Strata Plan K210*, 2019 BCCRT 1272

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

CATHY NEIGUM

**APPLICANT**

**A N D :**

The Owners, Strata Plan K210

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Kate Campbell, Vice Chair

## INTRODUCTION

1. The applicant, Cathy Neigum owns a strata lot in the respondent strata corporation, The Owners, Strata Plan K210 (strata).

2. The applicant says that for the past 4 years, the strata has failed to deal with a neighbouring strata lot's tree she says is encroaching onto the limited common property patio adjacent to her strata lot. She says the tree encroachment is a violation of the strata's nuisance bylaw, and as remedy she requests that the strata enforce the bylaw by removing the tree.
3. The strata denies the applicant's claim. It says the strata council has been dealing with the tree issue since January 30, 2015, and has enforced the bylaw.
4. The applicant is self-represented in this dispute. The strata is represented by a strata council member. The strata lot owner who has allegedly breached the nuisance bylaw is not a party to this dispute.

## **JURISDICTION AND PROCEDURE**

5. 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.
6. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.
7. 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.

8. 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.

## **ISSUE**

9. Has the strata failed to enforce its nuisance bylaw, and if so what remedy is appropriate?

## **EVIDENCE AND ANALYSIS**

10. I have read all of the evidence provided but refer only to evidence I find relevant to provide context for my decision. In a civil proceeding like this one, the applicant must prove their claims on a balance of probabilities.
11. The strata was created in 1978, and consists of 32 residential strata lots. The strata is an attached townhouse development, and the strata plan shows that the yard areas are limited common property (LCP) for the use of the immediately adjacent strata lot.
12. In July 2017, the strata repealed and replaced all previous bylaws, and filed new bylaws at the Land Title Office. These are the bylaws applicable to this dispute.
13. In particular, bylaw 3(1) is the strata's nuisance bylaw. It says, in part, that an owner, tenant, occupant or visitor must not use a strata lot, common property, or common assets in a way that causes a nuisance or hazard to another person, or unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets, or another strata lot.
14. "Nuisance" is not defined in the bylaws. However, the BC Supreme Court has defined "nuisance" in a strata setting as an unreasonable continuing or repeated interference with a person's enjoyment and use of their strata lot (see *The Owners, Strata Plan LMS 3539 v. Ng*, 2016 BCSC 2462).

## ***The Tree***

15. According to an April 8, 2019 email from the strata's arborist hired, the disputed tree is a curly willow, located outside unit 116 (strata lot 30). The owner's strata lot is unit 115 (strata lot 29), located next door. These 2 strata lots are both 2-storey townhouse-style units. They share a single building, and share a single wall.
16. The photos provided in evidence show that the tree's base is located on the grassed LCP yard area immediately behind unit 116. The strata plan shows that this area, and the owner's adjacent yard and patio area, are both LCP.
17. The owner says a large portion of the tree broke off due to wind in July 2017 (one of the "arms" of the tree, above where the base of the trunk divides to form the crown). This is confirmed by a photo she provided, and is not disputed by the strata. The owner says that after this breakage, a tree service company removed the fallen portion and severely cut back the tree to "bare trunks". She says this caused the tree to enter a rapid growth phase. The strata does not dispute this account of events, and based on the photos, I agree that the tree has grown significantly since 2017.
18. The photos show that the tree is very tall and large. Its trunk is at least 2 feet in diameter. The owner submits the tree is over 30 feet high. The strata has not provided contrary evidence, and I find the photos confirm the owner's height estimate. The tree's upper branches reach far above the roof of the 2-storey building. The photos also show that the tree's base trunk divides into at least 4 smaller trunks, each of which is over 1 foot in diameter.
19. The photos also show that that the tree's crown is very wide, and overhangs the owner's patio and second floor deck by several feet. In the photos, which appear to have been taken in the spring or summer based on the tree's green leaves, the tree's branches and leaves fully block at least 3 feet of the view from the owner's second floor deck.

20. The owner says she has tried to get the strata council to deal with the tree since 2015. This is confirmed by the evidence, including a November 26, 2015 email from the owner to the strata property manager. That email says it had been more than a year since the owner first reported problems with the tree's leaves clogging her eaves and downspouts, and nothing had been done. The owner also wrote that the tree's base was pressing against the fence, causing it to bow. She asked the property manager for a response.
21. The owner says the tree is a nuisance, contrary to bylaw 3(1). She says it interferes with her and her spouse's use and enjoyment of their strata lot and LCP patio.
22. Based on the evidence before me, I agree that the tree is a nuisance, contrary to bylaw 3(1). The photos confirm that the tree's trunk presses up against the fence between the 2 LCP patios, causing it to bend slightly towards the owner's patio (especially at the first fencepost from the building). As noted above, the photos also confirm that the tree's branches overhang and block part of the owner's second floor deck.
23. The photos show, and I accept, that at certain times of year, a large amount of leaves, seeds, and yellow pollen-like material from the tree drop onto the owner's patio and deck. The evidence also shows that at times, smaller branches from the tree have dropped onto the owner's patio. She says she and her spouse have to sweep up tree material from their deck daily. Based on the photos, I accept that this is true, at least during certain times of year.
24. The owner also says the tree has aphids. I find that this is confirmed by a July 16, 2016 letter from the strata to the former owner of unit 116. The letter said the tree appeared to have aphids, and asked the former owner to have it sprayed and pruned. The owner says the aphids produce a sticky "honeydew" liquid that falls on her upstairs deck at some times of year. She says this liquid attracts spiders, ants, and wasps, and limits the enjoyment of her property.
25. The owner says the tree's dropped leaves and twigs collect in the gutters and block the downspouts, causing the gutters to overflow. I find that this is confirmed by the

photos, which shows that the tree partially overhangs the second floor roof. Also, a November 28, 2016 letter from the strata to the unit 116 owners says the tree's leaves "frequently block the gutter drain".

26. The owner also asserts that the tree is dangerous, as established by the large section of it that fell to the ground in July 2017. She says this could happen again and injure someone.
27. Based on all of this evidence, and following the BC Supreme Court's reasoning in *Ng*, I accept that the tree is a nuisance. In particular, the tree blocks the owner's view from the second floor deck, drops a large amount of leaves and material onto her deck and patio, blocks the gutters, and bends the fence. I find that because of the tree's large size, it does encroach on the owner's LCP yard and her deck. For these reasons, I find the tree is an unreasonable interference with the owner's use and enjoyment of LCP and her strata lot, contrary to bylaw 3(1).

### ***Bylaw Enforcement***

28. The strata has a duty to enforce its bylaws. This is stated in SPA section 26, which says the council must exercise the powers and perform the duties of the strata corporation, including the enforcement of bylaws. The owner says the strata has failed to meet this duty.
29. The strata disagrees, and says it has done all it can to enforce the bylaws. It says:
  - a. Since the strata was first notified in 2015, it has done everything within the strata bylaws to resolve the tree issue.
  - b. The tree issue is "between neighbours".
  - c. The tree is on LCP. There are no bylaws that allow the strata to interfere with LCP, so the strata council's ability to resolve the issue to the owner's satisfaction is restricted.

30. The strata also says its council has followed up on each complaint, in an attempt to find a resolution between the neighbours. It says it has sent multiple letters to both affected owners, and notices to all owners about care of trees on LCP.
31. I accept that the strata has sent out letters and notices to owners. However, I find that the strata has not sufficiently enforced bylaw 3(1) in relation to the tree.
32. While the tree was significantly pruned in 2017, the photos in evidence show that by summer 2019 it had grown extremely large, as described above. Thus, I find that whatever steps were taken to manage the tree prior to 2018 are not relevant to this dispute. The question is whether the tree is a nuisance in its current form and size. As explained above, I find that it is.
33. The owner complained again about the tree in a September 3, 2018 email to the strata. In response, the strata offered voluntary dispute resolution, which the owner did not accept. Instead, the owner and the unit 116 owner attended a strata council hearing about the tree on January 9, 2019. The strata's decision letter following the hearing says it would hire an arborist to inspect the tree and provide a report.
34. The arborist's evidence is set out in an April 8, 2019 email to the council president, which I summarize as follows:
  - a. The tree is healthy and has "good vigor". The previous pruning has resulted in lots of new shoot growth.
  - b. The tree will not tolerate pruning multiple times per year, and even pruning once per year could lead to stress and disease.
  - c. This type of tree will grow from 35 to 50 feet tall in an open space, but this tree will not likely get this big because its water and nutrients are likely restricted, and it has been topped.
  - d. The only way to keep the tree from growing over the dividing fence is regular pruning, perhaps every 2 years.
  - e. The tree could live over 30 more years.

35. May 28, 2019 council minutes indicate that the council reviewed the arborist's email. The minutes show that the council decided to send 2 letters:
- a. A letter to the owner stating that the arborist recommended pruning once every 2 years, and she and her spouse were welcome to prune any branches in their backyard.
  - b. A letter to the unit 116 owners stating that they needed to prune the tree every 2 years.
36. The evidence shows that the council sent these letters, and struck the tree issue from its agenda going forward.
37. I find that this evidence establishes that the strata took insufficient steps to enforce the nuisance bylaw. I accept that the arborist's report proves that the tree is healthy. However, it does not address whether or not there is a danger of branches or sections falling off it in the wind, as occurred in July 2017, and as raised by the owner in her September 3, 2018 complaint email to the strata.
38. Also, the fact that the tree is healthy does not mean it is not a nuisance. Again, as stated above, I find the tree and its dropped materials unreasonably interfered with the owner's use and enjoyment of LCP and her strata lot. That violates bylaw 3(1), and the strata has taken no action to reduce or eliminate the nuisance.
39. In *Ng*, the BC Supreme Court said that once a strata becomes aware of a nuisance, a remedy should be made without undue delay. Although the tree had been pruned in 2017, I find that at least by the time of the owner's September 3, 2018 email, the strata was aware of the recurrence of the alleged nuisance from the tree. Based on *Ng*, it was then obliged to act to eliminate the nuisance. While it was open to the strata to get the arborist's report about the health of the tree, and the potential for further pruning, I find that was not sufficient, as it did nothing to address the nuisance.
40. The strata says it could not do anything more about the tree, because it was on LCP. This is legally incorrect. Bylaw 3(1) says, in part, that an owner may not use



**common property** in a way that causes a nuisance to another person or an unreasonable interference with use and enjoyment of common property or another strata lot (emphasis added). LCP is common property designated for the use of one or more strata lots, as defined in SPA section 1(1). Thus, LCP is common property, and bylaw 3(1) therefore applies to items or trees on LCP.

41. Some of the strata's correspondence says the former owners of unit 116 got permission to plant the tree, and the current owners of unit 116 may be subject to an indemnity agreement about the alteration. Since there are no documents or other evidence before me proving the permission or any indemnity agreement, I make no findings about them. However, even if they exist, I find they do not make the current unit 116 owner exempt from bylaw 3(1), and they do not absolve the strata of its duty to enforce it.
42. Based on the evidence, I find the strata did not meet its duty to enforce bylaw 3(1).
43. A strata corporation's options for bylaw enforcement are set out in SPA section 129. The options are to impose a fine, remedy the contravention, or deny access to a recreational facility. The recreational facility option does not apply here, as the bylaw breach did not relate to a recreational facility (see SPA section 134). Thus, the strata could either fine the unit 116 owners, or remedy the contravention (such as by removing the tree, as requested by the owner). SPA section 133 says the strata may do what is reasonably necessary to remedy a bylaw contravention, including doing work on common property (which includes LCP) or removing objects from LCP.
44. Also, under the SPA and bylaw 8(c)(i), the strata is required to maintain and repair LCP where the maintenance and repairs ordinarily occur less than once a year. I find this includes the LCP area where the tree is located, particularly since the tree pruning (and removal) ordinarily occur less than once per year.
45. Based on the above provisions and my finding that the tree is a nuisance, I order the strata to remove the tree in order to enforce bylaw 3(1). I have considered whether further pruning is an appropriate remedy. However, I find the evidence of

fast growth, combined with the arborist's opinion that the tree should not be pruned more often than every 2 years, supports the conclusion that the only way to permanently eliminate the nuisance is to remove the tree.

46. The tree removal is to be performed by the strata at no cost to the owner. I make no findings about whether the strata or the unit 116 owners must ultimately pay for the tree removal. Any indemnity agreement about the tree may be relevant. Also, SPA section 133(2) says the strata may require the person who may be fined for the bylaw contravention to pay the reasonable costs of remedying the contravention. Notice under SPA section 135 must be given before any charge is imposed under section 133(2).

## **TRIBUNAL FEES AND EXPENSES**

47. As the owner was successful in this dispute, in accordance with the CRTA and the tribunal's rules I find she is entitled to reimbursement of \$225.00 in tribunal fees. Neither party claimed dispute-related expenses, so none are ordered.
48. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses to the owner.

## **ORDERS**

49. I order that with 120 days of this decision, the strata must enforce bylaw 3(1) by removing the tree.
50. I order that within 30 days of this decision, the strata must reimburse the owner \$225 for tribunal fees. The owner is entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.
51. Under section 57 of the CRTA, a party can enforce this final tribunal decision by filing a validated copy of the attached order in the Supreme Court of British Columbia (BCSC). Once filed, a tribunal order has the same force and effect as a BCSC order.

52. 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 applicant can enforce this final decision by filing a validated copy of the attached order in the BCPC. Once filed, a tribunal order has the same force and effect as a BCPC order.

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Kate Campbell, Vice Chair