



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Bahmutsky v. Petkau*, 2020 BCCRT 244

BETWEEN:

IRINA BAHMUTSKY and MOSHE BAHMUTSKY

APPLICANTS

AND:

LACEY PETKAU, DIANA PETKAU, and The Owners, Strata Plan KAS
3860

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Kate Campbell, Vice Chair

INTRODUCTION

1. The applicants, Irina Bahmutsky and Moshe Bahmutsky (owners) own strata lot 8 (SL8) in the respondent strata corporation, The Owners, Strata Plan KAS 3860 (strata).

2. Diana Petkau owns strata lot 9 (SL9) in the strata. Her daughter, Lacey Petkau, lives in SL9 with her boyfriend or spouse, CB. CB is not a party to this dispute.
3. The applicants say that Lacey Petkau and CB have been smoking in the LCP courtyard in front of SL9. The applicants say the second-hand smoke bothers them, and that this longstanding conduct is harassment. The applicants request \$1,000 in damages, an order that their neighbours stop smoking on the strata's common property, and an order that the strata change its bylaws to prohibit smoking on common property.
4. The Petkaus and the strata admit that Lacey Petkau smokes in the courtyard area. The Petkaus say the applicants' claims should be dismissed for various reasons, which are set out below. The strata says it has taken steps to resolve the problem, but the Petkaus have been "unable" to comply.
5. The Bahmutskys are represented by Irina Bahmutsky in this dispute. The Petkaus are represented by Diana Petkau. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

6. 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.
7. 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.

8. 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.
9. 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

10. The issues in this dispute are:
 - a. Should I order the strata to change its bylaws to prohibit smoking on common property?
 - b. Does Lacey Petkau and CB's smoking violate the strata's current bylaws?
 - c. If so, what remedies are appropriate?

BACKGROUND

11. 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.
12. The strata plan shows that SL8 and SL9 are townhouse-style strata lots, located next to each other in the same building. The 2 strata lots have adjacent limited common property (LCP) courtyards in front, and adjacent patios in the back. The patios are designated on the strata plan as part of each strata lot.
13. Photos show that the Bahmutsky's courtyard is separated from the Petkau's courtyard by a wooden fence about 5 feet high.
14. The applicants say the smoke from the cigars and cigarettes smoked by Lacey Petkau and CB drifts into their courtyard and strata lot and causes a significant

nuisance due to its unpleasant smell and the health hazard it creates. They say the lack of clean air, and the cigar butts left on the SL8 patio, interfere with their use and enjoyment of their strata lot. They say the smoking violates strata bylaws and the, and that Lacey Petkau and CB should smoke elsewhere, like inside SL9. The applicants also say the strata has not taken sufficient steps to stop the smoking nuisance, such as by imposing fines.

REASONS AND ANALYSIS

Order to Change Bylaws

15. The strata's bylaws are the Standard Bylaws under the *Strata Property Act* (SPA), with some additions, as shown in documents filed with the Land Title Office in November 2011 and November 2013. The strata has no bylaw that specifically prohibits smoking anywhere in the strata.
16. The applicants ask that the tribunal order the strata to change its bylaws to prohibit smoking on common property. I decline to issue this order, for the following reasons.
17. The parties agree that an annual general meeting (AGM) held on October 24, 2019, the strata ownership voted on a proposed bylaw resolution to allow smoking only in the common property carport area. While the wording of the resolution and meeting minutes were not provided in evidence, the parties agree that the resolution did not receive sufficient votes to pass.
18. Arguably, the tribunal has jurisdiction to order a strata to change its bylaws. Under CRTA section 123(1)(a), the tribunal can make an order requiring a party to do something, which could include changing bylaws. Also under SPA section 123(2), the tribunal can make an order to prevent or remedy significant unfairness. However, I find it is not appropriate to make such an order in this case.
19. There are a number of BC Supreme Court (BCSC) decisions emphasizing that strata corporations are governed by the strata lot owners, based on democratic

principles. See for example *The Owners, Strata Plan LMS 1537 v. Alvarez*, 2003 BCSC 1085, at para. 35, *Oakley v. Strata Plan V1S1098*, 2003 BCSC 1700, at para. 16, and *Oldaker v. The Owners, Strata Plan VR 1008*, 2010 BCSC 776.

20. In *Lum v. Strata Plan VR519 (Owners of)*, 2001 BCSC 493, the BCSC said in paragraph 12 that the democratic government of the strata community should not be overridden by the Court except where absolutely necessary. This principle was quoted with approval in another BCSC decision, *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333.
21. I find this reasoning applies equally to the tribunal. Following *Lum* and *Foley*, I find it would be inappropriate to impose a non-smoking bylaw where the strata ownership has specifically considered the matter and democratically decided not to do so.
22. As previously noted, under CRTA section 123(2), the tribunal may make an order directed at the strata corporation, 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. This is similar to the BCSC's power under SPA section 164. I consider this legislation because in theory, the tribunal could order a bylaw change if significant unfairness were established. However, for the following reasons, I find there was no significant unfairness in this case.
23. The BC Court of Appeal considered the language of section 164 of the SPA in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in *Dollan* was restated by the BCSC in *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164 at paragraph 28:
 - a. What is or was the expectation of the affected owner or tenant?
 - b. Was that expectation on the part of the owner or tenant objectively reasonable?
 - c. If so, was that expectation violated by an action that was significantly unfair?

24. I find the applicants' expectation that the strata have a non-smoking bylaw is not objectively reasonable, given that there were no non-smoking bylaws when they moved in, and given that the strata ownership rejected a proposed non-smoking bylaw. For that reason, I find the strata's lack of a non-smoking bylaw is not significantly unfair.

25. For all of these reasons, I do not order any change to the strata's bylaws.

Does Lacey Petkau and CB's smoking violate the strata's current bylaws?

26. For the following reasons, I find that the smoking by the SL9 occupants violates current strata bylaws.

27. As previously stated, the Petkaus and the strata admit that the complained-of smoking activity is occurring in the LCP courtyard in front of SL9. I find the occurrence of the smoking is also proven based on the photos provided in evidence.

28. While the strata does not have a specific bylaw about smoking, bylaws 3(1)(a) and (c) prohibit an owner, tenant, occupant, or visitor from using a strata lot or common property in a way that causes nuisance or hazard to another person, or unreasonably interferes with the rights of other persons to use and enjoy the common property or another strata lot.

29. Bylaw 3(9) says an owner or occupant shall not "permit the use of or participate in the creation of odorous smells, materials or substances which may be offensive to other occupants."

30. Bylaw 3(11)(c) says that cigarette butts are not to be discarded on common property.

31. I find that the evidence before me establishes that the smoking activity by the SL9 occupants violates all of these bylaws.

32. While bylaw 3(9) is vague about what constitutes an “odorous smell”, I accept the applicants’ statements that the cigarette and cigar smoke from the SL9 courtyard is odorous and offensive to them. I also accept, based on the photographic evidence provided, that cigar butts have been deposited on the SL8 patio. I find these activities breach bylaws 3(9) and 3(11).
33. I also find the SL9 occupants’ smoking in the LCP courtyard breaches bylaw 3(1) because it is a nuisance, and unreasonably interference with the applicants’ right to use and enjoy their strata lot and LCP courtyard.
34. In making this finding of nuisance, I have considered the BC *Tobacco and Vapour Products Control Act* (TVPCA), which was cited by the applicants. The TVPCA bans smoking in common areas of condominiums, including elevators, hallways, parking garages, party or entertainment rooms, laundry facilities, and lobbies. The TVPCA also bans smoking within 6 metres of public entranceways to apartment buildings, open windows and air intakes.
35. I find that the LCP courtyard area in front of SL9 is not a “common area”, as contemplated in the TVPCA. The SPA defines LCP as “common property designated for the exclusive use of the owners of one or more strata lots”. I find that this definition is not consistent with a “common area”, as it is not a shared space. There are also parts of SL9’s LCP courtyard that more than 6 meters away from any window in SL8.
36. However, I find that the TVPCA is not determinative in this case. I find that in the circumstances of this case, smoking cigars and cigarettes in SL9’s LCP courtyard creates a nuisance for the applicants.
37. In a strata setting, nuisance is defined 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). This conduct is also prohibited under bylaw 3(1)(c).

38. In this case, the smoking is admitted, and is occurring outdoors within 9 metres of SL8. Based on those facts, I accept that while the smoking is occurring, and for a short period afterward, the smoke fumes are detectable by the applicants from their LCP courtyard, and in the nearby rooms of their strata lot if any doors or windows are open. Based on the applicants statements, I accept that they find the odour unpleasant. I also take judicial notice of the fact that second hand smoke is a generally accepted health hazard, although I note there is no evidence before me about concentration levels or the health effect of the smoke in this case. For these reasons, I accept that the smoke from the LCP courtyard is a nuisance, and creates an unreasonable interference with the applicants' use and enjoyment of their strata lot and LCP courtyard.
39. The Petkaus argue that they have a reasonable right to smoke in the SL9 LCP courtyard. They argue that Lacey Petkau used to smoke in a common property carport elsewhere in the strata, but this is now unsafe because she was assaulted in the carport on her way to work, by someone trying to break into her car. Based on a newspaper article and medical letter provided in evidence, I accept that the assault occurred and was significant. However, I find the fact that Ms. Petkau is unsafe smoking in the carport does not mean she or CB are entitled to smoke in the LCP courtyard in front of SL9. Rather, as previously stated, I find the odor and smoke fumes are an unreasonable interference with the applicants' use and enjoyment of their strata lot and LCP.
40. In making this finding, I note the applicants say they would not object to smoking inside SL9. The Petkaus did not provide arguments about why they could not smoke inside SL9. I find this would be a more reasonable solution than smoking in the LCP courtyard.
41. I also find the Petkaus' other defences to the applicants' claims unpersuasive. These include:
- a. Lacey Petkau works long hours.

- b. She is a good neighbour, and has helped other strata lot owners with snow shoveling and other tasks.
 - c. The applicants have made false claims about Lacey Petkau's dog.
 - d. Other neighbours smoke cigarettes and marijuana on their back patios and on common property grass areas.
 - e. Smoking is not illegal.
 - f. The courtyard is private property.
42. I find that none of these arguments negate the fact that the cigarette and cigar smoke produced in the courtyard is a nuisance to the applicants. Although the parties disagree about the frequency of the smoking, the evidence shows that it is a regular occurrence.
43. As previously explained, the courtyard is LCP. However, I note that whether or not it is common property, LCP, or part of the strata lot is irrelevant in considering whether the smoke produced on it is a nuisance to the applicants. The question is whether the smoke and its smell enters SL8 or the LCP adjacent to SL8, and I find the evidence sufficient to establish that it does.
44. The evidence shows that the applicants have complained to the strata about smoke from at least one other strata lot. That issue is not before me in this dispute, and I make no findings about it. However, I note that whether or not other neighbours smoke is not determinative of whether the smoke from SL9 is a nuisance to the applicants.
45. For all these reasons, I conclude that Lacey Petkau and CB have violated strata bylaws 3(1)(a), 3(1)(c), 3(9), and 3(11).

Orders About Smoking

46. The applicants request an order that their neighbours stop smoking on common property. I cannot make any order against CB, as he is not a party to this dispute.

However, since bylaw contraventions have been proven, I order that the Petkaus not permit any smoking in the LCP courtyard outside SL9, or on any other common property.

47. There is some evidence before me about smoking on the rear patio and balcony of SL9. The strata plan shows that these areas are part of SL9. I find the evidence establishes that smoking in these areas would also be a nuisance to the applicants, contrary to the bylaws. I therefore order that the Petkaus not permit any smoking on the rear patio or balcony of SL9.

Damages

48. The applicants seek \$1,000 in damages for the ongoing nuisance they say they have suffered due to the smoking.

49. For the following reasons, I find the applicants are entitled to damages.

50. In *Ng*, the BCSC said that in cases of nuisance, a remedy should be made without undue delay once the respondent is aware of the nuisance. In that case, the court found that a strata lot owner had brought to the strata's attention facts that required investigation, and failure to conduct that investigation amounted to an omission to use reasonable care to discover the facts.

51. A tribunal vice chair applied the reasoning in *Ng* in *Chen v. The Owners, Strata Plan NW 2265*, 2017 BCCRT 113. In *Chen*, a strata lot owner complained to the strata about noise from a common property hot tub pump. The vice chair found the strata failed to properly investigate and remedy the noise nuisance caused by the pump for 2.5 years, which was significantly unfair to the owner. The vice chair awarded the owner \$4,000 in damages for loss of enjoyment of her strata lot.

52. I also applied *Ng* in a case of floor noise in a strata, in *Torok v. Amstutz et al*, 2019 BCCRT 386. In *Torok*, I awarded damages to an owner, based on my finding that the strata had failed to investigate or remedy her complaints of floor noise from an upstairs strata lot.

53. While *Chen* and *Torok* are not binding precedents, they establish that the strata may be liable for damages where it takes insufficient steps to investigate nuisance complaints and enforce its bylaws. In this case, I find the strata has failed to properly investigate and remedy the nuisance caused by the smoking outside SL9, which was significantly unfair to the owner.
54. Applying the test for significant unfairness set out in *Dollan*, I find the applicants had an objectively reasonable expectation that the strata would enforce its bylaws. This duty is set out in SPA section 26.
55. The evidence shows that the applicants complained in writing to the strata about second-hand smoke from SL9 on September 26, 2018, and again on October 24, , November 18, , November 21, and November 25, 2018. The strata wrote to the Petkaus on October 26, 2018, stating that they had received a complaint about offensive smoking odours from SL9. The strata's letter cited bylaw 3(9), which says an owner or occupant shall not permit the use or creation of odorous smells, material or substances which may be offensive to other occupants. The letter said the Petkau's had 14 days to respond to the complaint.
56. The applicants requested a hearing before the strata council to discuss the smoking problem, which they described as harassment. The hearing was held on November 27, 2018.
57. In a December 5, 2018 letter to Diana Petkau, the strata wrote that it had received several complaints about the level of cigarette smoke from SL9. The letter said that by allowing this to occur, Ms. Petkau was in contravention of Standard Bylaw 3(1), and strata bylaws 3(9) and 3(11). The letter said if the situation was not rectified, the strata would initiate enforcement proceedings, which could include fines up to \$50 every 7 days. In response, Ms. Petkau emailed the strata asking for particulars, such as specific dates and times for the complained-of smoking.
58. In a December 11, 2018 email to Diana Petkau, the strata said it had "little interest" in imposing a fine, but would work with the parties to reach an amicable solution.

59. In its submissions to the tribunal, the strata says it tried to work with the parties to deal with the smoking issue, but its efforts did not work. The strata says it did not fine the Petkaus because it hoped a harmonious solution could be found, and it now admits it should have “enforced the fine system”. I agree. As previously stated, SPA section 26 makes the strata responsible for enforcing bylaws. The strata’s correspondence confirms it was aware of ongoing bylaw violations. While the strata threatened to enforce the bylaws by imposing a fine, when this did not work it took no further steps. I find the strata did not meet its statutory duty to enforce its bylaws, which was significantly unfair to the owners.
60. Based on *Chen* and *Torok*, discussed above, I find that the sum of \$1,000 in damages claimed by the applicants in this dispute is reasonable, given the nuisance of ongoing smoke exposure for 16 months. I find the applicants are also entitled to pre-judgement interest on the \$1,000, under the *Court Order Interest Act* (COIA), from November 27, 2018 which was the date of their hearing before the strata council. The interest equals \$24.16, for a total award of \$1,024.16.
61. I order that the strata must pay half of this amount or \$512.08, and that Lacey Petkau and Diana Petkau must pay the remaining half of \$512.08.

TRIBUNAL FEES AND EXPENSES

62. As the applicants were successful in this dispute, in accordance with the CRTA and the tribunal’s rules I find they are entitled to reimbursement of \$225.00 in tribunal fees.
63. No party claimed dispute-related expenses, so none are ordered.
64. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses to the applicants.

ORDERS

65. I order the following:

- a. Effective immediately, I order that the Petkaus not permit any smoking in the LCP courtyard outside SL9.
 - b. Effective immediately, I order that the Petkaus not permit any smoking on the rear patio or balcony of SL9.
 - c. Within 30 days of this decision, the strata must pay the applicants \$624.58, made up of \$512.08 in damages and COIA interest, plus \$112.50 in tribunal fees.
 - d. Within 30 days of this decision, Lacey Petkau and Diana Petkau must pay the applicants \$624.58, made up of \$512.08 in damages and COIA interest, plus \$112.50 in tribunal fees.
66. The owner is entitled to post-judgement interest under the COIA, as applicable.
67. 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 BCSC. Once filed, a tribunal order has the same force and effect as a BCSC order.
68. 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 applicants 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.

Kate Campbell, Vice Chair