



# Civil Resolution Tribunal

Date Issued: January 7, 2021

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Type: Strata

Civil Resolution Tribunal

Indexed as: *McIntosh v. Weinehl*, 2021 BCCRT 18

BETWEEN:

GINA MCINTOSH

**APPLICANT**

AND:

KIRSTEN WEINEHL and The Owners, Strata Plan NW2444

**RESPONDENTS**

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## REASONS FOR DECISION

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Tribunal Member:

Julie K. Gibson

## INTRODUCTION

1. This dispute is about smoking in a strata building.
2. The applicant Gina McIntosh owns a strata lot in the respondent strata corporation The Owners, Strata Plan NW2444 (strata). The respondent Kirsten Weinehl owns the adjacent strata lot.

3. Ms. McIntosh says Ms. Weinehl is causing smoke to enter the hallway and Ms. McIntosh's strata lot, creating a nuisance and health risk to Ms. McIntosh and her family.
4. Ms. McIntosh seeks orders that:
  - a. Ms. Weinehl immediately stop smoking in her unit,
  - b. The strata and Ms. Weinehl prevent further smoke from entering Ms. McIntosh's unit or the hallway,
  - c. Ms. Weinehl be fined if the smoking continues,
  - d. The strata replace drywall and insulation in Ms. McIntosh's master bathroom and bedroom to prevent further smoke penetration,
  - e. The strata replace Ms. McIntosh's master bathroom ceiling fan,
  - f. The strata create a protocol for addressing future second-hand smoke concerns,
  - g. Ms. Weinehl pay \$1,500 in damages for allowing smoke to escape her unit and enter the hallway and Ms. McIntosh's strata lot, and
  - h. The strata pay \$1,000 in damages for failing to provide a hearing or otherwise address the smoking issue in a timely way.
5. Ms. Weinehl denies any wrongdoing. The strata says it responded reasonably to Ms. McIntosh's concerns. The respondents ask me to dismiss the dispute.
6. Ms. McIntosh and Ms. Weinehl are each self-represented. The strata is represented by a strata council member.

## **JURISDICTION AND PROCEDURE**

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

*Tribunal Act (CRTA)*. The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.

8. The CRT 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.
9. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The CRT may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.
10. Under section 123 of the CRTA and the CRT rules, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.

## **ISSUES**

11. The issues in this dispute are:
  - a. Has Ms. Weinehl violated strata bylaws by smoking in her strata lot?
  - b. Has the strata failed to properly enforce its bylaws to prevent smoke from entering Ms. McIntosh's strata lot and the common property (CP)?
  - c. If so, what are the appropriate remedies?

## **EVIDENCE AND ANALYSIS**

12. In February 2008, Ms. McIntosh purchased strata lot 24 (SL 24).
13. In September 2016, Ms. Weinehl purchased strata lot 23 (SL23).

14. The strata plan shows that SL23 and SL24 are immediately next to each other on the second floor of the 3-storey strata building. A CP hallway runs on the inside of SL23 and SL24, shared with 4 other strata lots in that wing of the building.
15. It is undisputed that the only smoker in the north wing of the strata building's 2<sup>nd</sup> floor resides in SL23. Ms. Weinehl submits that she does not smoke in SL23.

### **Bylaws**

16. On April 3, 2019, the strata filed the applicable bylaws (Bylaws) at the Land Title Office (LTO). These Bylaws repealed and replaced any previous bylaws.
17. Bylaws 3(1)(a) and (c) prohibit an owner, tenant, occupant, or visitor from using a strata lot or CP 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 CP or another strata lot.
18. Bylaw 3(27), part of a separate amendment filed at the LTO slightly later on April 3, 2019, prohibits an owner, tenant or visitor from smoking or vaping in a strata lot or any CP or limited CP locating within the building, or on a balcony, patio or deck. Smoking is also prohibited on the exterior CP within 7.5 meters of a door, window or air intake.
19. Although in this dispute the strata referred to Bylaw 3(27) containing a clause exempting existing owners from the no-smoking restrictions, I find no such exemption in the applicable Bylaws. This is consistent with the March 21, 2019 AGM Minutes which record that the owners passed a  $\frac{3}{4}$  vote resolution introducing Bylaw 3(27), without an exemption for existing owners.
20. The lack of an exemption clause makes the situation different from *Mundel et al v. Hastings-Evans et al*, 2017 BCCRT 108. In *Mundel*, although the bylaws included an exemption for existing owners, I found that smoking in a strata lot constituted a nuisance.

21. At some point, likely in early 2019, the strata circulated a memorandum to owners implying that there was a clause exempting existing owners from the no-smoking bylaw. Though I have found no such exemption clause, the inaccurate memorandum raises the question of whether applying Bylaw 3(27) would be significantly unfair to Ms. Weinehl.
22. The test for significant unfairness established in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44 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?
23. Given that an undisputed nuisance bylaw applies, I find that Ms. Weinehl's expectation that she could continue to smoke in her strata lot indefinitely was not objectively reasonable. Put differently, Ms. Weinehl should have known that the bylaws prohibited nuisance, even if she misunderstood the application of the no-smoking bylaw. If her ongoing smoking caused a nuisance for fellow owners, she should have held a reasonable expectation that the bylaws would be enforced against her for that activity. As well, Ms. Weinehl should have understood that the Bylaws are those filed at the LTO, where there is a conflict with a memorandum from strata council.
24. Therefore, I find it is not significantly unfair to Ms. Weinehl to be subject to both Bylaws, despite the inaccuracy in the strata's memorandum.

### ***Background Facts***

25. In September 2019, Ms. McIntosh and two other strata lot owners wrote to strata council to complain of cigarette smoke from SL23 entering their units, impacting their health and wellness.

26. In December 2019, a member of strata council noticed smoke in the CP hallway coming from SL23. The strata council member wrote to council noting that the “strong and unpleasant” odour was likely also going into SL24. The strata council member asked that the matter be placed on council’s agenda to write to Ms. Weinehl citing the nuisance bylaw.
27. On January 14, 2020, strata council met and discussed a complaint letter that I infer was written by Ms. McIntosh and 2 other strata lot owners. The letter complained of second-hand smoke in their strata lots and the CP hallway. Strata council decided to engage plumbing duct and air duct specialists to check the “common stacks on the east side of the building for any obstructions as smoke seems to be coming out of the common air ducts and plumbing ducts.”
28. On April 7, 2020, the strata wrote to Ms. Weinehl about several complaints from other owners about second-hand smoke originating from SL23. In the letter, the strata identified several parts of SL23 that required re-sealing or duct repairs to allow properly venting to outside and reconnecting her bathroom fan. The strata directed Ms. Weinehl to address these issues by the end of April 2020.
29. On April 11, 2020, the strata wrote to Mr. McIntosh to say that duct and vent inspections in her unit and 11 other units revealed a need for repairs in those units to prevent smoke from escaping some units and entering others. The strata council noted that the repair requirements had been provided to each unit owner in writing.
30. The strata also outlined steps Ms. McIntosh could take to reduce smoke migration in her home, including caulking to reseal areas where water supply lines and drainage linked enter vanities or kitchen sink cabinets, given her common wall with SL23. The strata also recommended that Ms. McIntosh use power smart foam to cover her electrical outlets.
31. On June 16, 2020, strata council met and reported that one of the units directed to complete repairs to prevent smoke escape and ingress had completed repairs and that an inspection revealed the repairs were completed to council’s satisfaction.

32. In July, August and September 2020, three different owners emailed Ms. McIntosh confirming that they had noticed smoke emanating from SL23 in the hallway on many occasions. In one of those emails, the owners reported smoke entering their suite, located directly above SL23. The owners wrote that their well-being and health was being negatively affected by the smoke from SL23. Based on the strata's correspondence to Ms. Weinehl and Ms. McIntosh, I find it was aware of the ongoing complaints of smoke coming from SL23 through September 2020.
33. Ms. Weinehl denies smoking in SL23 and says there has not been smoke from SL23 in the CP hallway or in other units. Based on the evidence, I disagree. I find that the multiple complaints from different owners, including one from a strata council member, prove that smoke from SL23 entered the CP hallway and SL24, among other strata lots, on many occasions.

***Has Ms. Weinehl breached the Bylaws by smoking in SL23?***

34. Given my findings that the Bylaws do not exempt Ms. Weinehl or others residing in SL23 from the no-smoking restrictions, I find that Ms. Weinehl has breached Bylaw 27(3) by smoking in her strata lot.
35. Even if Ms. Weinehl were exempt from Bylaw 3(27), Bylaw 3(1)(a) and (c) apply, requiring her not to use her strata lot in any way that unreasonably interferes with the rights of other persons to use and enjoy the CP or another strata lot or causes a nuisance or hazard to another person.
36. In a strata setting, nuisance is defined a substantial, non-trivial, and unreasonable interference with an owner's use and enjoyment of their property: see *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.*, 2018 BCSC 1502 at paragraph 33.
37. I accept Ms. McIntosh's reference to Government of Canada guidance that second-hand smoke is carcinogenic (cancer-causing), and dangerous to adults and children. Consistent with this finding, a CRT Tribunal Member recently took notice of the generally accepted fact that second hand smoke is a health hazard, in a non-binding

but persuasive decision in *The Owners, Strata Plan KAS879 v. Casoro*, 2020 BCCRT 491 at paragraph 26. Because there were repeated complaints of smoke, which Ms. McIntosh reported impacted herself and her child, I find that Ms. Weinehl's smoke also constituted a nuisance because it created an unreasonable interference with Ms. McIntosh's use and enjoyment of her strata lot.

38. For these reasons, I find Ms. Weinehl violated Bylaws 3(1)(a) and (c), and 3(27).

### **Damages**

39. Ms. McIntosh seeks damages of \$1,500 from Ms. Weinehl for the ongoing nuisance she suffered due to the smoking.

40. Ms. McIntosh also seeks \$1,000 in damages from the strata, for failing to provide her a hearing, properly enforce its bylaws or otherwise address the smoking in a timely way.

41. For the following reasons, I find that Ms. McIntosh is entitled to \$1,000 in damages, with half payable by Ms. Weinehl and half by the strata.

42. I will first consider Ms. McIntosh's submission that the strata should pay her damages for failing to provide her a strata council hearing, despite her request.

43. I agree that the strata council did not hold a meeting with Ms. McIntosh, despite her email request to the strata's property manager. The strata says that requests for hearing must be directed to strata council, to ensure "receipt" and "accountability".

44. SPA section 34.1 says that by application in writing stating the reason for the request, an owner may request a hearing at a strata council meeting. After such a request, the council must hold the hearing within 4 weeks. Section 4.01 of the *Strata Property Regulation* defines hearing as an opportunity to be heard in person at a council meeting.

45. I find that Ms. McIntosh's January 14, 2020 email to the strata's property manager triggered SPA section 34.1. The property manager acknowledged receipt and wrote that he was forwarding the hearing request to the strata council. Given that



assurance, I find Ms. McIntosh reasonably expected that her request had reached strata council. The strata did not provide Ms. McIntosh the requested hearing.

46. However, I find there was no significant unfairness arising from this breach. The courts have described actions that are “significantly unfair” as being 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. Here, Ms. McIntosh’s position and submissions were clearly laid out in her correspondence to the strata.

47. I now turn to the question of damages for nuisance.

48. In *The Owners, Strata Plan LMS 3539 v. Ng*, 2016 BCSC 2462, the BCSC said that in cases of nuisance, a remedy should be made without undue delay once the respondent is aware of the nuisance. At paragraph 45, 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.

49. A CRT 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 CP 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.

50. In *Bahmutsky v. Petkau*, 2020 BCCRT 244 (*Petkau*) a CRT vice chair applied the reasoning from *Ng* to award \$1,000 in damages to applicants who experienced smoke nuisance in a strata for 16 months, where the strata failed to enforce its bylaws.

51. While *Chen* and *Petkau* 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 in SL23, which was significantly unfair to Ms. McIntosh.

52. Applying the test for significant unfairness set out in *Dollan*, I find that Ms. McIntosh had an objectively reasonable expectation that the strata would enforce its Bylaws. This duty is set out in SPA section 26.
53. Ms. McIntosh complained of smoke in September 2019, and the strata continued to be made aware of ongoing smoke issues until at least September 2020. The strata did not impose any fines on Ms. Weinehl. Instead, the strata wrote to several owners to have them address ventilation concerns in their strata lots through repairs.
54. While I understand that the strata was trying to find an amicable solution, I find that it was aware of ongoing bylaw violations and should have immediately required Ms. Weinehl to stop smoking or permitting smoking in SL23, applying an accurate interpretation of its own Bylaws. The strata should also have used the process in SPA section 135 to fine Ms. Weinehl if smoking continued. By failing to take these steps, I find that the strata failed to meet its statutory duty to enforce its Bylaws. This was significantly unfair to Ms. McIntosh and permitted the smoke nuisance to continue.
55. Based on the decisions in *Chen* and *Petkau*, discussed above, I find that damages of \$1,000 for the ongoing smoke nuisance over a period of about 12 months are reasonable. I also find Ms. McIntosh is entitled to pre-judgment interest on the \$1,000, under the *Court Order Interest Act* (COIA), from January 14, 2020, the date Ms. McIntosh requested a strata council hearing, to the date of this decision. This interest equals \$11.40, for a total award of \$1,011.40.
56. Because both the strata and Ms. Weinehl were responsible for the ongoing smoke nuisance, I order that they each pay half the total award, or \$505.70 each.

### ***Other Remedies***

57. Ms. McIntosh asked for an order that the strata fine Ms. Weinehl if she continued smoking. Ms. McIntosh also sought an order requiring the strata to create a protocol to address smoke concerns of other residents.

58. A strata is obliged to investigate complaints and to enforce the strata's bylaws. I decline to order a protocol for future smoke complaints because doing so would duplicate the SPA obligations. Should there be a future complaint about smoking, the strata must investigate and enforce the smoking or nuisance bylaws, as applicable. Nothing in this decision prevents Ms. McIntosh or other owners from making smoking complaints to the strata in the future, and the strata must conduct an appropriate investigation and enforce its Bylaws.
59. SPA section 135 sets out a process for the strata to impose fines for bylaw breaches. For this reason, I find an additional order requiring the strata to fine Ms. Weinehl in future is not necessary.
60. Ms. McIntosh also asked for an order that the strata replace her master bathroom ceiling fan, and the drywall and insulation in her master bathroom and bedroom and take other action to prevent further smoke infiltration into her strata lot. However, I find that she did not prove that these repairs were the strata's responsibility or were necessary due to the smoking.

## **CRT FEES and EXPENSES**

61. As Ms. McIntosh 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 CRT fees.
62. No party claimed dispute-related expenses, so none are ordered.
63. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses to Ms. McIntosh.

## **ORDERS**

64. I order that:
- a. Effective immediately, Ms. Weinehl must stop smoking in SL23, or on any interior common property.

- b. If Ms. Weinehl smokes on exterior common property, she must comply with Bylaw 3(27), including by being at least 7.5 metres away from a door, window or air intake.
- c. Within 30 days of this decisions, the strata must pay Ms. McIntosh \$618.20, made up of \$505.70 in damages and COIA interest, and \$112.50 in CRT fees.
- d. With 30 days of this decision, Ms. Weinehl must pay Ms. McIntosh \$618.20, made up of \$505.70 in damages and COIA interest, and \$112.50 in CRT fees.

65. Ms. McIntosh is also entitled to post-judgement interest under the COIA.

66. I dismiss Ms. McIntosh's remaining claims.

67. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court if it is an order for financial compensation or return of personal property under \$35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

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Julie K. Gibson, Tribunal Member