



# Civil Resolution Tribunal

Date Issued: February 16, 2021

File: ST-2020-004601

Type: Strata

Civil Resolution Tribunal

Indexed as: *Teh v. The Owners, Strata Plan 202*, 2021 BCCRT 180

BETWEEN:

GERALDINE TEH

**APPLICANT**

AND:

The Owners, Strata Plan 202

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Julie K. Gibson

## INTRODUCTION

1. This dispute is about enforcing bylaws to prevent noise and smoking, related damages, and whether an owner may install a security camera on a limited common property (LCP) patio.

2. The applicant Geraldine Teh owns a strata lot in the respondent strata corporation The Owners, Strata Plan 202 (strata).
3. Ms. Teh says the strata has incorrectly fined her for a noise violation, unfairly refused to approve her security camera installation request and failed to adequately enforce its bylaws to address smoking, vaping and noise.
4. Ms. Teh seeks orders that the strata:
  - a. reverse a September 25, 2019 \$200 noise bylaw violation fine it issued,
  - b. permit her to install a security camera on the exterior of her strata lot,
  - c. investigate the source of smoke entering her strata lot, including through air quality testing (\$2,000),
  - d. enforce the nuisance bylaw against the unit above hers for smoke and vaping,
  - e. if bylaw enforcement is insufficient to stop the second-hand smoke, pay for and implement recommendations from an expert report on minimizing air transfer between units (\$3,000),
  - f. retain an independent expert to review the unit above's flooring to determine if it was properly installed and complies with the bylaws (\$1,500),
  - g. pay her \$6,000 in damages for the loss of quiet use and enjoyment of her strata lot, which she says is caused by the strata's failure to properly investigate complaints about smoke, vaping and noise, and
  - h. reimburse her for \$3,020.08 in legal fees.
5. The strata asks me to dismiss the dispute. The strata says it has met its *Strata Property Act* (SPA) obligations. The strata says it properly imposed the September 2019 noise bylaw violation fine, that security cameras may not be installed on common property (CP), and that it reasonably investigated Ms. Teh's complaints about smoking and noise, including through air quality tests that came back negative.

6. The applicant Ms. Teh is represented by articulated student Ms. Katie Lay. The strata is represented by strata council member DE.

## **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. Did the strata comply with SPA section 135 in imposing the September 25, 2019 \$200 noise bylaw fine on Ms. Teh, or must it reverse that fine?
  - b. Did the strata unreasonably refuse to allow Ms. Teh to install a security camera on the exterior of her strata lot?

- c. Did the strata properly investigate and enforce its Bylaws regarding Ms. Teh's complaints of smoke in her strata lot?
- d. If not, should the CRT order the strata to obtain
  - i. air quality testing (\$2,000), or
  - ii. an expert report on minimizing air transfer between units (\$3,000)?
- e. Did the strata properly investigate and enforce its bylaws relating to Ms. Teh's complaints of noise from the strata lot above?
- f. If not, should the CRT order the strata to retain an independent expert to review the flooring in the strata lot above Ms. Teh to determine if it was properly installed and complies with the bylaws (\$1,500)?
- g. Must the strata pay \$6,000 in damages for Ms. Teh's loss of the quiet use and enjoyment of her strata lot, due to a failure to investigate her noise and smoke complaints and enforce the Bylaws?
- h. Must the strata reimburse Ms. Teh for \$3,020.08 in legal fees?

## **EVIDENCE AND ANALYSIS**

### ***Background***

- 12. This is a civil claim in which the burden is on the applicant Ms. Teh to prove her claims on a balance of probabilities. I have reviewed all evidence and submissions provided, but only refer to what I find necessary to give context to and explain my decision.
- 13. The strata is a multi-building residential complex that was created in 1975 under the *Condominium Act (CA)*, the predecessor to the *Strata Property Act (SPA)*.
- 14. The SPA replaced the CA on July 1, 2000.
- 15. Ms. Teh owns strata lot 13 (SL13). According to the strata plan, SL13 is located directly below strata lot 14 (SL14), both covering the same 783 square foot footprint.

SL13's ground floor limited common property (LCP) patio is partly overlapped by SL14's LCP patio one floor above. SL13 also shares an interior wall with strata lot 15 (SL15) on the ground level. SL15 has an LCP patio directly beside that of SL13, on the ground level.

16. On the ground level, at the rear of the building containing SL13, SL15 and SL15, there is an LCP area marked as shared between SL13, 14, 15 and 16. I infer that the shared area is used for parking.

### ***Bylaws***

17. The applicable bylaws were filed at the Land Title Office (LTO) on December 20, 2012 (Bylaws).
18. Bylaw 4 prohibits any owner, tenant, occupant or visitor from using a strata lot or the CP in a way that causes a nuisance or hazard to another person, causes unreasonable noise or unreasonably interferes with the rights of other persons to use and enjoy the CP, common assets or another strata lot.
19. Bylaw 4(11)(a) also prohibits an owner, tenant or occupant from using a strata lot for any purpose which involves undue traffic or noise in or about the strata lot or CP between 11:00 p.m. and 7:00 a.m. (quiet hours) or from (b) making undue noise or smell in a strata lot or on CP.
20. Bylaw 6 says that an owner must obtain the strata's written approval before making an alteration to CP, including LCP.
21. I will now address each of Ms. Teh's claims in turn.

### ***\$200 Fine For Alleged Unreasonable Noise – September 2019***

22. The first issue is whether the strata followed the SPA in imposing a September 2019 \$200 fine on Ms. Teh for alleged unreasonable noise.
23. Ms. Teh says the strata fined her without giving her a reasonable opportunity to respond, contrary to SPA section 135.

24. The strata says it sent Ms. Teh a “warning letter” with a timeline to respond, but then voted to fine her immediately upon receiving additional recordings. The strata submits that Ms. Teh could “still have responded to the warning and the fine” after the fine was imposed. For the reasons given below, I disagree with the strata’s position.
25. SPA section 135(1) says a strata cannot impose a fine against a person for a bylaw contravention unless it has
  - a. received a complaint about the contravention,
  - b. given the owner the particulars of the complaint in writing, and
  - c. given the owner a reasonable opportunity to respond to the complaint (including a hearing if requested).
26. SPA section 135(2) requires the strata to give notice in writing of a decision to fine a person for a bylaw contravention, as soon as feasible.
27. The strata must strictly follow the SPA section 135 requirements before fines can be imposed: *Terry v. The Owners, Strata Plan NW 309*, 2016 BCCA 449. This means that a strata must not impose a fine during the period designated for the owner to respond to the complaint, unless the owner has expressly waived their response.
28. I turn to the factual background.
29. On September 24, 2019, the strata wrote to Ms. Teh informing her of a noise complaint. The letter warned Ms. Teh that further slamming of doors might result in fines of up to \$200.00 for violating Bylaw 4. Ms. Teh was offered the option of a hearing and was asked to respond in writing no later than October 7, 2019.
30. On September 25, 2019, the strata council wrote to Ms. Teh to say it had received a complaint letter on September 16, 2019 about unreasonable noise. The council wrote that it received a video of Ms. Teh slamming doors on September 24, and that it had decided to fine her \$200 for “blatant disrespect, verbal abuse and door slamming” that disrupted Ms. Teh’s neighbours. The council wrote that it would fine Ms. Teh again “immediately” if she persisted in this behaviour.

31. The strata now characterizes the video as demonstrating that Ms. Teh breached strata rules prohibiting profane language. The strata did not cite the rules in its September 2019 correspondence to Ms. Teh. Rules may govern CP, but not strata lots. In *Terry*, at paragraph 28, the court holds that a strata must identify the particular bylaw or rule a person allegedly contravened, in its notice letter. Given that the strata did not raise the rules in its notice letter to Ms. Teh, I find the strata cannot rely on the rule now.
32. On September 27, 2019, Ms. Teh emailed strata council and asked that future correspondence be sent to her lawyer's attention.
33. According to the SL14 strata lot ledger provided by the strata, Ms. Teh was fined \$200 on September 30, 2019. I infer that this was the \$200 fine imposed in the strata's September 25, 2019 letter.
34. I find that, after telling Ms. Teh that she had until October 7, 2019 to respond, the strata proceeded to fine her without waiting until then. As well, the strata introduced new evidence (the video recording) as a basis for the fine, but did not give Ms. Teh any opportunity to respond to the videos. This makes it unclear whether the September 23, 2019 warning letter applies to one noise incident but the videos to another.
35. This is important because the courts have held that noise violations are not continuous or continuing contraventions when observed on different dates. Noise violations are distinct contraventions for which a fine may be imposed if section 135 SPA requirements are met in each instance: see *Strata Plan VR 2000 v. Grabarczyk*, 2006 BCSC 1960 at paragraph 43, appeal dismissed at 2007 BCCA 295.
36. Even if the videos are from the same incident that the strata referenced in its September 23, 2019 letter, I find that the strata failed to give Ms. Teh a reasonable opportunity to respond to the complaint, contrary to section 135(1)(e), by:
  - a. fining her before the time for response elapsed, and
  - b. failing to allow a reasonable opportunity to respond to the videos.

37. As the strata failed to comply with SPA section 135 before finding Ms. Teh, the fine is invalid. I order the strata to reverse the \$200 fine applied to Ms. Teh's strata lot account on September 30, 2019, within 30 days of this decision.

***Must the strata approve Ms. Teh's request to install a security camera on the LCP?***

38. Ms. Teh says the strata unreasonably refused to grant her permission to install a security camera. Ms. Teh says she needs the camera for security, particularly after undisputed problems with the behaviour of some previous SL14 tenants.

39. Ms. Teh seeks an order requiring the strata to grant her permission to install a security camera on the exterior wall of her unit. I find that the front door and strata lot exterior walls facing the LCP patio are CP, because these walls are not identified as LCP on the strata plan: see SPA section 68(1).

40. In submissions, Ms. Teh's counsel takes issue with a \$200 fine levied against her for the security camera alteration was valid. However, as Ms. Teh did not seek to set aside the fine in her Dispute Notice, I have only considered whether the strata unreasonably refused to grant her permission to install the camera.

41. In April 2019, Ms. Teh says she installed "a small, motion-activated security camera on the exterior wall" of SL13. It is uncontested that Ms. Teh had the camera mounted on the patio from April 2019 to March 2020, without the strata's written approval. At that point, Ms. Teh took the camera down and put it on a table facing her doorway "so that it would not record common areas".

42. On March 25, 2020, the strata wrote to Ms. Teh informing her that it had received a complaint about a camera being installed on CP. The strata asked Ms. Teh to respond or request a hearing in writing no later than April 8, 2020.

43. On May 12, 2020, strata council met. At their meeting, they considered a submission from Ms. Teh's then representative requesting permission for the camera to remain where it had been previously mounted.



44. On May 22, 2020, strata council wrote to Ms. Teh asking her to move her camera inside her strata lot, citing privacy concerns for people using the CP.
45. On May 5, 2020, Ms. Teh's counsel wrote to the strata requesting permission for Ms. Teh to keep her security camera. Ms. Teh's lawyer pointed out that people in CP areas have a lower expectation of privacy than in their strata lots, and that the camera was "small and unobtrusive".
46. After consideration, the strata says it denied Ms. Teh's request and recommended she put the camera inside her unit or add other security inside her unit if she wished.
47. On September 24, 2020, the strata wrote to Ms. Teh to inform her that a \$200 fine had been levied for failing to remove her camera from LCP and offering her an opportunity respond or request a hearing by October 8, 2020.
48. It is undisputed that, for a period, Ms. Teh had a small security camera plugged into an exterior electrical outlet and sitting on a small side table on her LCP patio. In the photograph provided by the strata, I find that the camera was oriented towards Ms. Teh's LCP patio, but would also capture an image of a CP path. In photographs provided on behalf of Ms. Teh, I find that the camera is oriented towards her door and does not capture significant images from other strata lots or the CP.
49. The Bylaws do not prohibit security cameras. However, Bylaws 6 and 7 require an owner to obtain written permission before making an alteration to the building exterior, or any CP or LCP and the strata can ask an owner to assume liability for an alteration.
50. I find that the fixed installation of a security camera on the LCP patio would be an "alteration" because it would physically attach to the structure and change the character of the area to one where images and recordings may be captured: see the non-binding but persuasive analysis of this issue in *Parnell v. The Owners, Strata Plan VR 2451*, 2018 BCCRT 7 at paragraphs 12-17.
51. Section 123(2) of the CRTA gives the CRT the power to make an order directed at the strata, if the order is necessary to prevent or remedy a significantly unfair action,

decision or exercise of voting rights. This is similar to the powers given to the Supreme Court under SPA section 164.

52. The BC Court of Appeal considered the language of SPA section 164 in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in *Dollan* was restated 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?
53. To be significantly unfair, the strata's conduct must be more than "mere prejudice" or "trifling unfairness" (see *Dollan* at paragraph 27). "Significantly unfair" means conduct that is oppressive or unfairly prejudicial. "Oppressive" is conduct that is burdensome, harsh, lacking fair dealing or done in bad faith while "prejudicial" means conduct that is unjust and inequitable (see *Reid v. Strata Plan LMS 2503*, 2001 BCSC 1578, affirmed in 2003 BCCA 126).
54. According to Chapter 11 of the CLE-BC Strata Property Practice Manual, "The courts have held that by living in a strata community, a strata lot owner or tenant may be subject to unfairness or prejudicial bylaws and rules. The key is whether the unfairness is significant enough to warrant court intervention. In *Milacek v. Strata Plan LMS 18* (1997), New Westminster S36466 (B.C.S.C.), the court denied an owner's application to have an antenna removed from LCP because, while prejudicial, it was not unfairly prejudicial because she chose to live in a strata community."
55. In applying this analysis, I am mindful that a strata is obligated to work toward the greatest good for the greater number of owners: see *Gentis v. Strata Plan VR 368*, 2003 BCSC 120.
56. In the non-binding but persuasive CRT decision in *Hayer v. The Owners, Strata Plan LMS 3812*, 2020 BCCRT 1288 at paragraphs 66-86, the Tribunal Member held that

a strata had reasonably refused an owner's request to mount security cameras due to privacy concerns of other owners.

57. I apply the reasoning in *Milacek* and *Hayer* here. While there may be prejudice to Ms. Teh in removing the security camera and mounting it inside her strata lot or obtaining other security, I find the strata reasonably considered Ms. Teh's request to mount the security camera on LCP and rejected it due to privacy concerns for other owners. I find doing so was not significantly unfair.
58. The CP outdoor area is for the strata to manage and maintain. The Bylaws provide that LCP or CP may not be used in a way that causes a nuisance or unreasonably interferes with the rights of others to use and enjoy their strata lots, LCP or CP.
59. Ms. Teh submits that because the *Personal Information Protection Act* (PIPA) does not apply to her as a private individual, she should be allowed to mount the security camera. However, the strata is bound by PIPA. Sections 1, 6 and 10 of PIPA require a strata to have a bylaw authorizing the installation of surveillance equipment and disclose its existence and purpose to those affected by it. I find that the strata does not have bylaws allowing video cameras in common areas. I find that the strata cannot authorize someone else, such as the owner, to do something that it could not do itself, namely install security cameras on CP without proper notice and consent.
60. In this analysis I am following the CRT decisions in *Parnell v. The Owners, Strata Plan VR2451*, 2018 BCCRT 7 and *Herr v. The Owners, Strata Plan KAS 1824*, 2020 BCCRT 496, which I find persuasive though non-binding.
61. For these reasons, I find that the strata was not unreasonable or significantly unfair in denying Ms. Teh's request. I dismiss Ms. Teh's claim to require the strata to approve her camera installation request.

### ***Smoking Complaints and Bylaw Enforcement***

62. Ms. Teh seeks \$6,000 in damages for the loss of quiet use and enjoyment of her strata lot, which says were caused by the strata's failure to investigate her smoke and

noise complaints and to enforce the Bylaws. I will address the smoke complaints first, followed by the noise complaints.

63. Section 26 of the SPA requires the strata council to exercise the powers and perform the duties of the strata, including enforcing bylaws. The strata council is required to act reasonably when carrying out these duties, and this includes a duty to investigate alleged bylaw contraventions, such as noise complaints.
64. Aside from section 135, the SPA sets out no procedural requirements a strata must follow when investigating a complaint. The courts have said a strata may investigate bylaw contravention complaints as its council sees fit, provided it complies with the principles of procedural unfairness and is not significantly unfair to any person appearing before the council: see *Chorney v. Strata Plan VIS 770*, 2016 BCSC 148.
65. I turn to a summary of the chronology for the smoking/vaping complaints.
66. On August 28, 2019, the strata wrote to Ms. Teh to inform her that there were many smokers in the complex so odours could be coming from different areas depending on the wind direction.
67. On September 17, 2019, Ms. Teh attended a strata council hearing. At the time, her lawyer wrote to the strata about her complaints of excessive noise, cigarette and marijuana smoke originating in SL14.
68. Ms. Teh's then lawyer provided a letter from Dr. Melissa Duff, general practitioner, setting out that Ms. Teh could not be exposed to second hand smoke due to health concerns.
69. On September 23, 2019, the strata wrote to Ms. Teh about what it called the "issues between" SL13 and SL14. In that letter, the strata noted that Ms. Teh had complained of smoke from SL14 on July 10, 2019, but SL14 was vacant on that date. The strata suggested that because SL13 and SL14 back onto the parking area "of a neighbouring complex", smoke could be coming from there. I pause here to note that the strata plan shows an LCP area within the strata, directly behind SL13. That area

is within the strata's governance. However, the strata did not mention this in its September 23 letter or take any steps to regulate smoking in the area.

70. The strata noted that occupants "in other units within close proximity" of SL13 "also smoke". The strata wrote that common areas of the strata "allow smoking", writing "**Ocean Pines is NOT a non smoking property at this time.**" (emphasis in original)
71. In terms of evidence from SL14, it is undisputed that the current tenants and the owners have a rental agreement that specifies no smoking in the unit. The tenants provided a statement denying smoking in SL14. The strata says that spot checks it conducted did not turn up any smoking inside SL14. While I accept this evidence, it does not end the matter.
72. On January 27, 2020, the strata held an Annual General Meeting (AGM) at which the owners defeated a proposed bylaw to restrict smoking.
73. On February 10, 2020, a strata council member emailed Ms. Teh to explain that strata council would spend up to \$500 from the repairs and maintenance budget to make alterations to SL13 to try to prevent smoke ingress.
74. On March 9, 2020, Ms. Teh complained to the strata that, since late February, the tenants in SL14 had been smoking and vaping indoors.
75. Between March 6 and April 16, 2020, Ms. Teh kept logs in which she recorded her observation of many instances of vape and cigarette smoke inside her strata lot.
76. On May 22, 2020, strata council wrote to Ms. Teh refusing to pay \$1,795.00 for the further air quality testing that had been proposed unless Ms. Teh produced a letter confirming her diagnosis of a chronic respiratory disease. The strata again offered to spend \$500 to seal her unit.
77. On June 12, 2020, the strata paid for a "PURAIR" report to be prepared which provides some data about air quality in SL14. PURAIR appears to be a company, but beyond this the report's author, LM, did not provide his qualifications. LM provided an email stating that all levels were in an "acceptable range", without explaining how he

defined an acceptable range. I cannot interpret the report without the benefit of an explanation from a qualified expert, so I place little weight on it. As well, it records data for only one point in time, which I find is not conclusive in smoking disputes.

78. In June 2020, a general practitioner, Dr. Campbell, provided Ms. Teh's then lawyer with a letter confirming that she had been diagnosed with a chronic respiratory disease which can be aggravated by second hand smoke. Dr. Campbell recommended that Ms. Teh eliminate exposure to second hand smoke to improve her respiratory condition.
79. On October 2, 2020, the strata obtained a quote from Island Environmental Health & Safety Inc. for \$1,645.00 plus GST to collect 3 Nicotine in air samples and analyze the results, from one strata lot.
80. In October 21, 2020, an acquaintance of Ms. Teh, JO, provided a statement in which he wrote that he attended at her strata lot in summer 2019 and observed incense burning in Ms. Teh's unit, but no cigarette smoke. This is a single observation from one witness. Because there were many other witnesses who experienced smoke in Ms. Teh's strata lot, I do not find JO's evidence determinative.
81. In fall 2020, Ms. Teh paid \$900 to rent an apartment at a different address for one month. Ms. Teh says she moved out to escape the second-hand smoke but returned after finding the additional rent unaffordable.
82. Several friends of Ms. Teh, IC, PT, JT and PL, provided statements which collectively report observations of smoke in her strata lot in November 2019, March 2020, May 2020 and late July – early August 2020. PT also reported observing the SL14 tenants smoking tobacco and cannabis on their LCP balcony.
83. On July 31, 2020, Ms. Teh received a letter from a contractor, JD, who wrote that sealing off her strata lot to prevent smoke transfer was not possible, given the nature of smoke and the building's construction. I find JD's letter consistent with common knowledge. Based on this evidence, I find that trying to "seal off" Ms. Teh's unit would not solve the second-hand smoke problem.

84. On August 21, 2020, Ms. Teh emailed strata council to say the second-hand smoke was a nuisance and health hazard.
85. Another family physician, Dr. A. Cox, provided an undated letter to say that Ms. Teh's health continued to be adversely impacted by second hand smoke in her apartment.
86. On the evidence before me, I find that Ms. Teh has experienced unreasonable ingress of smoke into her strata lot. I make this finding based on the evidence of multiple witnesses and Ms. Teh's own logs of smoke exposure. While she suspected the smoke was coming from SL14, the evidence proves that the SL14 tenants occasionally smoke on their patio, rather than inside the strata lot.
87. A nuisance is an unreasonable interference with an owner's use and enjoyment of their property: *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.*, 2018 BCSC 1502. The test is an objective one, measured with reference to a reasonable person occupying the premises. In strata living, "...a certain amount of give and take is necessary among neighbours and between users, both of the strata lots and of the common property": *Sauve v. McKeage et al.*, 2006 BCSC 781.
88. Applying the test from *Triple P*, I find that, based on Ms. Teh's repeated reports of smoke, the evidence from those who stayed at SL13 and given her respiratory diagnosis, the smoke is a nuisance that unreasonably interferes with her use and enjoyment of SL13.
89. Having said that, the strata had an obligation to investigate Ms. Teh's smoke complaints, whether or not she correctly identified the source of smoke. The strata informed Ms. Teh that (a) the upstairs neighbours were not responsible, (b) other smokers reside in the building, and that (c) Ms. Teh ought to seal off her strata lot. Although the strata obtained the PURAIR report, it fails to fulfil the strata's duty to investigate because it does not address Ms. Teh's complaint of ongoing smoke nor explain what constitutes an "acceptable range" for air contaminants such as smoke. I find the strata's failure to attempt any further concrete steps to investigate and stop the second-hand smoke is unreasonable.

90. Although the Bylaws do not prohibit smoking in strata lots and on LCP patios specifically, Bylaw 4 prohibits an owner or tenant from causing a nuisance to others. I find that Ms. Teh had an objectively reasonable expectation that the strata would investigate the ongoing smoke ingress into her strata lot, find its source and remedy the nuisance. I find that strata's failure to properly investigate the source of the smoke and remedy the nuisance was significantly unfair.
91. Based on the medical letters filed in evidence, I find that Ms. Teh has a respiratory illness that is aggravated by second-hand smoke. By its nature, smoke travels to nearby units within communal living settings. The strata must therefore enforce its Bylaws to stop people from smoking in areas near Ms. Teh's strata lot.
92. I find that the strata's obligation to remediate the smoke nuisance and enforce its Bylaws and the SPA exists, irrespective of the strata's evidence from Island Health's Tobacco & Vapour Enforcement Officer and Reduction Coordinator, SR. SR commented only on application of the *Tobacco and Vapour Product Control Act (Tobacco Act)* and *Regulation*, which I find is not determinative in this dispute. I say that because SR wrote that sections 2.3 of the *Tobacco Act* and, 4.21 and 4.22 of the *Regulation* prohibit smoking in strata common areas where those areas are enclosed or substantially enclosed, or less than 6 metres from a doorway, window or air intake of such enclosed common areas. That is, the *Tobacco Act* and *Regulation* prohibit smoking in enclosed strata common areas or within 6 metres of doorways, windows or air intakes to those areas, whereas this dispute is mainly about exterior LCP, CP and strata lots.
93. Given the evidence that second-hand smoke is coming into Ms. Teh's strata lot on an ongoing basis, and that she has a respiratory illness, I order the strata to prohibit smoking in strata lots and on LCP or CP located near SL13, including at SL4, SL15 and SL16. These are all the strata lots in building 4, where Ms. Teh resides. Where they are able, smoking residents residing near Ms. Teh should be directed to smoke outside, away from any windows or air intakes.



94. I decline to order an expert report on minimizing air transfer between units, which would be an unnecessary expenditure given my findings that sealing a unit completely is impractical, and that the nuisance can be abated by having residents smoke away from SL13.
95. I decline to order that the strata conduct air quality testing in Ms. Teh's strata lot. Most of her observations of smoke have been at night, and further air quality testing during business hours will report information for only one point in time.
96. Turning to the damages claim, in *Bahmutsky v. Petkau*, 2020 BCCRT 244 (*Petkau*) a CRT vice chair applied the reasoning from Ng to award \$1,000 in damages to strata lot occupants who experienced smoke nuisance for 16 months, where the strata failed to enforce its bylaws.
97. While *Petkau* is not a binding precedent, I find the analysis persuasive to establish that the strata may be liable for damages where it takes insufficient steps to investigate nuisance complaints and enforce its bylaws. I have found that the strata failed to properly investigate and remedy the nuisance caused by the smoking within the strata, which was significantly unfair to Ms. Teh.
98. 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.
99. Given that the smoke nuisance has been reported by Ms. Teh at intervals from September 2019 to August 2020, a period of nearly 12 months, and using the range in *Petkau* as guidance, I award Ms. Teh \$750 in damages for the smoke nuisance.
100. I have not considered damages for failure to accommodate Ms. Teh for alleged disability, because her Dispute Notice did not characterize her damages claim in those terms. However, because Ms. Teh's submission referred to the duty to

accommodate, I note that the BC Human Rights Tribunal (HRT) addressed a strata's duty to accommodate a person's disability in a second-hand smoke scenario in *Bowker v. Strata Plan NWS 2539*, 2019 BCHRT 43. In *Bowker*, the HRT wrote that an owner with pulmonary fibrosis was entitled to be accommodated to the point of undue hardship, where the strata had no bylaw specifically prohibiting smoking.

### ***Enforcement of Noise Bylaw***

101. Ms. Teh submits that the strata failed to adequately investigate noise complaints she made about other strata residents.

102. By way of overview, I will summarize some of the correspondence between Ms. Teh and the strata on this issue:

- a. In 2018, Ms. Teh complained that the then tenants in SL14 were causing unreasonable noise between 11 pm and 7 am.
- b. On May 29, 2019, the strata wrote to Ms. Teh to inform her that council had levied a fine against SL14 for unreasonable noise and had requested that the tenant be evicted.
- c. Following other intervening events, in June 2019, the SL14 tenants were evicted.
- d. The strata wrote to Ms. Teh in August 2019, saying that floor coverings in SL14 were compliant with the Bylaws.
- e. In September 2019, Ms. Teh appeared before strata council regarding her complaints, including her complaints of excessive noise.
- f. On September 23, 2019, the strata wrote to Ms. Teh reiterating that it was satisfied with SL14's flooring. The strata also pointed out that its buildings are old and not sound proof. The strata noted that some owners have paid privately to have parts of their strata lots sound proofed.
- g. IC, a friend of Ms. Teh, provided statements that they experienced noise from SL14 while visiting Ms. Teh in November 2019.

- h. In March 2020, Ms. Teh complained the strata that the SL14 occupants had made unreasonable noise at 2:24 a.m. one morning.
  - i. From March 6 to April 16, 2020, Ms. Teh kept a log of her observations of noise outside quiet hours. This set of logs includes notes of loud noises on one occasion from 7:49-9:17 p.m., 1 report of walking on a squeaky floor between 10 and 11 pm, vacuuming on occasion, some loud bang or thump noises from time to time, “stomping” on the hardwood, slamming a door, and knocking on the floor at 1:42 a.m.
  - j. The SL14 tenants made complaints to the strata that Ms. Teh was slamming doors, playing loud music or making thumping noises on occasion in March 2020 and April 2021.
  - k. In March 2020, an SL217 resident made a similar complaint about Ms. Teh making undue noise at about 11 pm on 5 occasions.
103. In October 2020, the current SL14 tenants prepared a written statement that noise from their strata lot was part of day-to-day living.
104. I find that the strata reasonably enforced its Bylaws regarding Ms. Teh’s 2018 noise complaints by investigating, imposing fines and ultimately supporting eviction of the problematic tenant.
105. Turning to the autumn 2019 noise complaints, I find based on the evidence before me that the strata investigated and determined that sufficient carpeting was used in SL14. The strata also considered that the building’s age and construction make some sound transfer a daily reality for residents. The strata communicated to Ms. Teh that it was satisfied with the flooring and that the noise she reported was part of day-to-day living given the building’s age. Therefore, I find the strata took reasonable steps to investigate those noise complaints, subject to my discussion below about the strata’s flooring Bylaw, below.
106. With respect to the noise complaints Ms. Teh made in March 2020, the strata has not provided much evidence of how it investigated Ms. Teh’s complaints.

107. The strata did not lay out details of its investigation such as whether it wrote to the SL14 tenants to inform them of Ms. Teh's complaints, to warn them to be quieter and to impose fines if the noise, particularly overnight, continued. For this reason, I find the strata failed to conduct a reasonable investigation of Ms. Teh's noise complaints. The strata did not sufficiently explain why the overnight complaints were not investigated further, despite occurring during the quiet hours imposed by Bylaw 4(11). Put differently, I am not satisfied on the evidence that the strata paid adequate attention to the timing or nature of some of the complaints. As a result, I find that Ms. Teh suffered occasional disruption from overnight or unreasonable noise, about 4 different times, over a period of about 2 months. This does not include her complaint about vacuuming or some daytime noise, which I find to be reasonable given the building's age.
108. Because Ms. Teh and the SL14 tenants were both involved in making noise in March and April 2020, some of which likely arose due to their mutual disagreement, I find it would have been reasonable for the strata to warn both the SL14 tenants and Ms. Teh about Bylaw 4, and ask them to reduce their noise levels and be considerate of their neighbours. Then, if complaints arose again, the strata would have been able to consider imposing fines, following the SPA section 135 process.
109. If Ms. Teh continues to have noise concerns, she should report them to the strata. The strata should then conduct a reasonable investigation and, if a bylaw contravention has occurred, take steps to address the contravention either by imposing fines or taking remedial action under SPA section 133. If the strata determines that there is no contravention, it should communicate the objective evidence for that conclusion to Ms. Teh: *Tollasepp v. The Owners, Strata Plan NW2225*, 2020 BCCRT 481 at paragraph 63, which is persuasive but not binding.
110. I find that Ms. Teh was subject to unreasonable noise during quiet hours on a handful of occasions because the strata failed to properly investigate her concerns in March and April 2020 and to enforce Bylaw 4. Given the short time period and occasional nature of the overnight noise, I award Ms. Teh \$50 in damages.

## **Flooring**

111. Ms. Teh seeks an order requiring the strata to spend up to \$1,500 for an “independent expert review” to determine if SL14’s flooring is properly installed and compliant with strata Bylaws. I infer that this claim is related to Ms. Teh’s complaints of noise from SL14, discussed above.
112. If noise bylaw contraventions cannot be addressed by fines, a strata may have to make physical changes under SPA section 133: see the non-binding but applicable decision in *Bobiash v. The Owners, Strata Plan BCS 2656 et al*, 2019 BCCRT 670 at paragraph 104, where the strata upgraded flooring and soundproofing in coordination with the subject of a noise complaint.
113. Bylaw 43 governs hardwood flooring in the strata. It provides that a strata lot owner who “has or installs hard floor surfaces ... must take all reasonable steps to satisfy noise complaints from neighbors, including without limitation, ensuring that no less than 60% of such hard floor surfaces” except in kitchens, bathrooms and entry areas, are covered with area rugs or carpet. Bylaw 43 also requires owners to avoid walking on such flooring with hard shoes.
114. Bylaw 43 then states that “Sound deadening material must be installed beneath laminate or hardwood flooring.” While the strata’s submissions imply that this part of Bylaw 43 applies only to newly installed hardwood flooring, the Bylaw itself does not distinguish original hardwood from new installations. Rather, I find that it mandates sound deadening underlay for all hardwood flooring.
115. The strata submitted photographs showing area rugs on the floor in the rooms of SL14. Based on the strata’s photographs, I find that SL14’s flooring complies with the Bylaw 43 requirement for carpeting. Specifically, SL14 has carpeting on more than 60% of the hardwood flooring, aside from the kitchen, bathroom and entryway areas.
116. The strata also informed Ms. Teh that the SL14 hardwood flooring is original, and not an alteration. However, I find that this does not address the question of whether that flooring has sound deadening material beneath it, as Bylaw 43 requires.

117. I decline to order the strata to order an independent expert review of the SL14 flooring. However, I find that the strata must inspect the hardwood in SL14 to ensure it has sound deadening material beneath it and inform Ms. Teh of the result, in writing. The strata should retain a flooring expert for this inspection, if necessary.

118. If the SL14 hardwood does not have any underlayment, I direct the strata to add underlayment to the hardwood flooring to bring it into compliance with Bylaw 43.

## **CRT FEES, EXPENSES AND INTEREST**

119. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. Here, the parties have had divided success. I therefore order the strata to reimburse Ms. Teh for 50% of her for CRT fees of \$225, which is \$112.50

120. Ms. Teh claims \$266.99 for two HEPA air purifiers she says she bought to mitigate smoke in her strata lot. I dismiss these claims because she did not prove that the HEPA filters were necessary or recommended to address the smoke.

121. Ms. Teh claims rent of \$900 for a one-month period in fall 2020 where she moved out of her strata unit. I dismiss her claim because I find Ms. Teh did not prove that moving into another building at this price was reasonable, nor that she moved to a non-smoking building. On the evidence before me, I find that Ms. Teh's claim to rent alternate accommodation was not a reasonably foreseeable consequence of the strata's failure to enforce its bylaws.

122. Ms. Teh also claims legal fees of \$3,020.08. She says she incurred these fees when she hired private legal counsel to assist her during a break between terms where she had no articulated student assigned through the Law Centre.

123. CRT rule 9.5(3)(b) says the tribunal may order one party to pay another party's legal fees in an extraordinary case. I find this rule applies whether or not free legal counsel is available to an applicant in a given time frame. CRT rule 9.5(4)

provides that, in determining whether or to what extent to order fees charged by a lawyer to be paid by another party, the CRT may consider the dispute's complexity, the degree of involvement of the representative, whether a party's conduct caused unnecessary delay or expense and any other factors the CRT considers appropriate.

124. Although Ms. Teh brought multiple claims, they were each of a nature frequently decided by the CRT and not extraordinary. While her representative was involved in this proceeding, this was Ms. Teh's choice. I also do not find conduct by the strata that would cause me to depart from that analysis: see *Parfitt et al v. The Owners, Strata Plan VR 416 et al*, 2019 BCCRT 330. I dismiss Ms. Teh's claim for reimbursement of legal fees.

125. The *Court Order Interest Act* (COIA) applies to the CRT. Ms. Teh is entitled to pre-judgement interest on the \$750 nuisance damages from August 1, 2020, which I find is the date by which those damages occurred, to the date of this decision. This equals \$1.85.

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

## ORDERS

127. I order that, within 30 days of this decision, the strata must:
- a. reverse the \$200 fine imposed on Ms. Teh for noise in September 2019,
  - b. prohibit smoking in strata lots and on LCP or CP located near SL13, including at SL13, SL14, SL15 and SL16, being all the strata lots in building 4 on the strata plan,
  - c. inspect the SL14 hardwood to determine if it has sound deadening material beneath it and inform Ms. Teh of the result, in writing, and
  - d. if the SL14 hardwood does not have underlayment, the strata should arrange to have it added within a further 90 days.
128. I further order that, within 30 days of this decision, the strata pay Ms. Teh a total of \$864.35, broken down as:
- a. \$700 for smoke nuisance damages,
  - b. \$50 for noise nuisance damages,
  - c. \$1.85 of COIA interest on the nuisance damages, and
  - d. \$112.50 in CRT fees.
129. Ms. Teh is also entitled to post-judgement interest on the \$750 nuisance damages, under the COIA.
130. I dismiss Ms. Teh's remaining claims.



131. 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