



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Wiebe v. The Owners, Strata Plan LMS 4512*, 2022 BCCRT 533

BETWEEN:

MITCHELL WIEBE

APPLICANT

AND:

The Owners, Strata Plan LMS 4512

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This strata property dispute is about bylaw enforcement about cigarette smoke.
2. The applicant, Mitchell Wiebe, co-owns strata lot 29 (SL29) in the respondent strata corporation, The Owners, Strata Plan LMS 4512 (strata).

3. Mr. Wiebe says he smells cigarette smoke in SL29 and that the strata refuses to enforce the strata's bylaws about smoking. He seeks orders that the strata enforce its bylaws and reimburse him \$5,000 for the cost of a CCTV camera, legal fees, and his time and energy to document and record the incidents involved in this dispute.
4. The strata disagrees with Mr. Wiebe and says it properly investigated his complaints but has not been able to identify the source of the smoke. The strata asks that the claims be dismissed.
5. Mr. Wiebe is self-represented. The strata is represented by a strata council member.
6. As explained below, I dismiss Mr. Wiebe's claims and this dispute.

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). CRTA section 2 says the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.
8. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice and fairness.
9. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, even where the information would not be admissible in court. The CRT may also ask questions of the parties and witnesses and inform itself in any other 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.

Preliminary Issue – Inadmissible Evidence

11. The strata submitted in evidence emails to the CRT case manager and applicant which provide details of each parties' version of events. Under CRTA section 89 and rule 1.11, information provided during the facilitation stage of a CRT dispute is confidential and not admissible as evidence unless all parties consent. Mr. Wiebe did not provide his consent, so I find these emails are not admissible evidence in this dispute and I have not considered them in making this decision.

ISSUES

12. The issues in this dispute are whether the strata has failed to enforce its bylaws and if so, is there an appropriate remedy.

BACKGROUND, REASONS AND ANALYSIS

13. As applicant in a civil proceeding such as this, Mr. Wiebe must prove his claims on a balance of probabilities, meaning "more likely than not". I have read all the submissions and evidence provided by the parties, but I refer only to information I find relevant to give context for my decision.
14. The strata was created in October 2001 under the *Strata Property Act* (SPA) and consists of about 146 strata lots in 2 4-storey buildings. SL29 is on the second floor of 1 of the buildings. The strata plan shows the balcony next to SL29 is limited common property (LCP) for the exclusive use of the owner of SL29. Other balconies and patios are similarly identified as LCP for the owners of the strata lots next to them.
15. Land Title Office (LTO) documents show the owner developer filed bylaws different from the Standard Bylaws on November 11, 2001. The strata filed a complete new set of bylaws on November 11, 2013 which repealed and replaced all previous bylaws filed with the LTO. I infer the Standard Bylaws under the SPA do not apply. The

November 2013 bylaws included bylaw 45.1 that prohibited smoking on common property. Bylaw 46.1 was filed on June 14, 2018 that expressly expanded the smoking prohibition to LCP but was then replaced with bylaw 4.10 on December 17, 2018. Other bylaw amendments have been filed with the LTO, but I find they are not relevant in this dispute. I also find that bylaw 45.1 has not been repealed. Based on my review of the bylaws, I find the relevant bylaws applicable here are as follows (reproduced in full):

Bylaws 4.1(a) and (c): A resident or visitor must not use a strata lot, the common property or common assets in a way that

(a) causes a nuisance or hazard to another person,

(c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot,

Bylaw 4.10: An owner, tenant, occupant or visitor must not smoke or permit smoking of any kind on any common property, limited common property (including patios and balconies), or land that is a common asset, or within 6 meters (20 feet) of any common area building door, open window or air intake. For the purpose of this bylaw, “smoke” or “smoking” means using, inhaling, exhaling, burning or carrying of a lighted cigarette, joint, e-cigarette, vapor pen or similar vaporizing device, cigar, pipe, hookah, bong or other smoking equipment that burns or vaporizes tobacco, nicotine, controlled substances or marijuana/cannabis including oils, resins or other derivatives (my emphasis).

Bylaw 45.1: A resident or visitor must not smoke on common property.

16. Mr. Wiebe became the owner of SL29 in November 2019. Shortly after, he began to lodge complaints with the strata manager about the smell of cigarette smoke in SL29. Mr. Wiebe made numerous complaints about the smell of cigarette smoke between November 2019 and July 2020. Initially he detected the smell within SL29 but during warmer weather, such as in July 2020, he says the cigarette smoke was not noticeable in SL29, but that smell came in through his open balcony door.

17. Mr. Wiebe's description of his claim is that the strata provided "no help" to investigate his concerns and the strata manager failed to communicate with him. I find the opposite is true as the evidence shows the strata manager responded quickly to many of Mr. Wiebe's complaints by posting general notices about complaints received about its no smoking bylaws and writing to Mr. Wiebe's surrounding neighbours in an attempt to identify the source of the cigarette smoke. It is difficult to tell from the evidence before me if the strata failed to respond to some of Mr. Wiebe's complaints or if its responses were simply not provided in evidence.
18. Before July 2020, Mr. Wiebe concluded the smoke was coming from his next door neighbour. Through correspondence between the neighbour and the strata manager, the neighbour admitted to smoking in their strata lot until February 2020, when they said they quit smoking, apparently because of a "health scare". Despite the neighbour's assertion they quit smoking cigarettes, and that they took steps to change their lifestyle, Mr. Wiebe says he continued to smell smoke in SL29 after February 2020. Mr. Wiebe continued to make complaints to the strata alleging the source of the smoke was from his neighbour. Through the strata or strata manager, Mr. Wiebe suggesting his neighbour complete an ozone treatment of his strata lot and submit to a blood test to confirm there was no nicotine in his blood. The neighbour reported to the strata manager that he did these things and provided photographs of the ozone equipment he says was in his strata lot during treatment. Mr. Wiebe said the ozone treatment is rendered ineffective if smoking continues and that he did not believe the results of the blood test.
19. As a result of Mr. Wiebe's July 4, 2020 complaint, the strata wrote to the neighbour on July 8, 2020 to warn them of potential fines for breach of bylaw 4.10.
20. The neighbour continued to deny they were smoking and later in July, the strata retained Barclay Restoration to investigate the smoke smell in both Mr. Wiebe's neighbour's strata lot and SL29. The evidence suggests the inspection took place, but the results are not before me.
21. On July 29, 2020, the strata held a council hearing at Mr. Wiebe's request. The neighbour also attended the hearing. The result of the hearing was that Mr. Wiebe

was asked to contact a strata council member when he smelled smoke so the member could investigate. A written statement from a different strata council member states they were 1 of 2 council members who physically attended during a time when he smelled smoke. The statement does not identify the date of the inspection but based on the overall evidence and submissions I find it was after the council hearing in July 2020 and before the end of August 2020. The council member states they found no evidence of smoking odour, ashtrays, or cigarette butts. I infer they inspected both SL29 and the neighbour's strata lot.

22. Mr. Wiebe provided signed witness statements from 3 owners that agreed on July 31, 2020 they could smell cigarette smoke on the balcony coming from the neighbour's strata lot, but not inside SL29. The statements are identical and appear to be written by Mr. Wiebe and signed by other building residents.
23. On August 21, 2020, Mr. Wiebe retained a lawyer who wrote to the strata and requested the strata take action against Mr. Wiebe's neighbour. According to Mr. Wiebe, his lawyer also wrote separately to his neighbour.
24. After almost 1 year, Mr. Wiebe wrote to the strata on July 5, 2021 stating the smoke smell recurred on June 30, 2021. In the letter he says he had been "content" since his lawyer's letters of August 2020 because he had not smelled cigarette smoke since that time. Mr. Wiebe again blamed his neighbour. Other than several further complaints from Mr. Wiebe between July and August 2021, there is very little correspondence after August 2021 that is relevant. However, Mr. Wiebe's neighbour appears to have refused the strata's request to conduct "environmental air testing" in their strata lot, as expressed in a November 19, 2021 email. In that email he reiterated that he had stopped smoking in February 2020, taken steps to be a healthier person, and listed several things he said he had done to co-operate with the strata's and Mr. Wiebe's earlier requests.

Did the strata fail to enforce its bylaws?

25. The main focus of Mr. Wiebe's claim is that the strata failed to enforce its bylaws against his neighbour. The strata denies Mr. Wiebe's allegation and says it

investigated his complaints but could not locate the source of the cigarette smoke. For the reasons that follow, I agree with the strata.

Smoking bylaws

26. At the outset, I note that neither of the strata's bylaws about smoking, bylaw 4.10 and 45.1, prohibit smoking in a strata lot. They only prohibit smoking on common property or LCP. Given there is no evidence that supports any owner, including Mr. Wiebe's neighbour, breached either bylaw 4.10 or 45.1, I find such a breach did not occur. If a breach of these bylaws did not occur, I cannot find the strata failed to enforce these bylaws.
27. That leaves bylaws 4.1(a) and (c) about nuisance, which clearly apply to a resident's use of a strata lot. Again, in order for nuisance to have occurred a breach of the bylaw must be proven, and I find Mr. Wiebe has not done so. For the reasons that follow, I find the strata did not fail to enforce its nuisance bylaws.

Nuisance Bylaws

28. The courts have found that nuisance in a strata setting is an 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. Whether or not an interference, such as smoking, is unreasonable depends on several factors including its nature, severity, duration and frequency. The interference must also be substantial such that it is intolerable to an ordinary person: see *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64.
29. I recognize that Mr. Wiebe is affected by cigarette smoke and that he considers it hazardous, but that does not mean he has proved nuisance nor that he has proved the strata failed to enforce its nuisance bylaws. On the evidence before me, I find Mr. Wiebe was not proven the smoke smell he complained of met the tests in *Triple P Enterprises Ltd.* or *St. Lawrence Cement*.
30. That is, other than his assertions, there is no evidence the smell of cigarette smoke was an unreasonable interference of his use of his property. The owner statements Mr. Wiebe provided do not prove this, they only confirm the 3 owners smelled smoke

on the SL29 balcony on July 31, 2020. Further while it appears Mr. Wiebe's complaints were made daily at times, there were breaks between his complaints, most notably almost a year between August 2020 and July 2021, when he admits he did not smell smoke. Therefore, without further evidence, I cannot conclude the smoke smelled by Mr. Wiebe constituted a nuisance. Even if it did, the source of the cigarette smoke is unproven.

31. As for the strata's investigation, SPA section 26 requires the strata, through strata council, to enforce the strata's bylaws and rules. The strata corporation may investigate bylaw contravention complaints as it sees fit, so long as it complies with the principles of procedural fairness and does not act in a significantly unfair manner to any person who appears before its strata council: *Chorney v. Strata Plan VIS 770*, 2016 BCSC 148 at paragraph 52. In other words, a strata corporation will meet its obligations under SPA section 26 so long as it acts reasonably.
32. There is no question the strata responded to Mr. Wiebe's in a timely and reasonable fashion. There are numerous emails in evidence that support this, including some involving Mr. Wiebe's neighbour, who cooperated with the strata council's investigation into Mr. Wiebe's complaints. Mr. Wiebe disagrees with the strata (and his neighbour) that his neighbour had not smoked in their strata lot since February 2020. However, he has not provided any evidence to support his belief, such as witness statements similar those provided about cigarette smoke smells entering SL29 from his balcony, or expert reports.
33. This is not a case where the strata did nothing in response to Mr. Wiebe's complaints. In the circumstances here, where I find the strata has reasonably investigated his complaints and not located a source of cigarette smoke, the burden to prove his claims rests with Mr. Wiebe. Complaints filed with the strata from other residents in the building smelling cigarette or marijuana smoke do not support Mr. Wiebe's claim that the strata has failed to enforce its bylaws, especially when details of the strata responses to those claims are not before me. Based on the overall evidence and submissions, I find Mr. Wiebe has not proved his claim that the strata failed to enforce its bylaws and I dismiss it.

34. I reach the same conclusion about Mr. Wiebe's claim for \$5,000 in damages, which Mr. Wiebe says was for a CCTV camera purchase, legal fees and "time and energy [spent] documenting and continuously recording the incidents". He says he had to buy a CCTV camera to prove to the strata that smoke was not entering SL29 from people walking by his balcony, yet he provided no evidence to show the strata made such a request nor did Mr. Wiebe provide a receipt for his camera purchase. Nor did Mr. Wiebe provide any evidence about legal fees, such as lawyer invoices, or time spent, which may or may not have been dispute-related.

CRT FEES AND EXPENSES

35. 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. I find the strata was the successful party but did not pay CRT fees or claim dispute-related expenses, so I make no order for reimbursement.

36. To the extent Mr. Wiebe's legal fees and claim for time spent could be considered disputed-related expenses, I would not order reimbursement because he was not successful.

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

ORDER

38. I dismiss Mr. Wiebe's claims and this dispute.

J. Garth Cambrey, Vice Chair