



# Civil Resolution Tribunal

Date Issued: December 11, 2023

File: ST-2022-008158

Type: Strata

Civil Resolution Tribunal

Indexed as: *Foster v. The Owners, Strata Plan LMS 35, 2023 BCCRT 1083*

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

DARYL FOSTER and TANYA FOSTER

**APPLICANTS**

**A N D :**

The Owners, Strata Plan LMS 35 and KRISTINE CLARK

**RESPONDENTS**

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## REASONS FOR DECISION

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Tribunal Member:

J. Garth Cambrey, Vice Chair

## INTRODUCTION

1. This is a strata property dispute about a strata corporation's governance and alleged failure to enforce its nuisance bylaw about second-hand smoke. It is linked to another dispute (ST-2022-008157), which has the same underlying facts. However, neither the issues nor the respondents are the same in the linked dispute, so I have issued separate decisions for each dispute. My decision for the linked dispute is indexed as *Foster v. The Owners, Strata Plan LMS 35, 2023 BCCRT 1082*.

2. The applicants, Daryl Foster and Tanya Foster, co-own strata lot 158 (SL158) in the respondent strata corporation, The Owners, Strata Plan LMS 35 (strata). The respondent, Kristine Clark, owns strata lot 123 (SL123) in the strata. At all relevant times Ms. Clark was a strata council member. Daryl Foster represents the applicants. A strata council member other than Ms. Clark represents the strata. Ms. Clark is self-represented.
3. The applicants say the strata's bylaws prohibit smoking in a strata lot and on common property or limited common property, if the smoking creates a nuisance. They say Ms. Clark and others smoke on her balcony and that smoke enters SL158, creating a nuisance. The applicants also say the strata has failed to enforce bylaws against Ms. Clark and other residents who smoke.
4. The applicants seek orders:
  - a. That the strata enforce its bylaws about the smoking nuisance,
  - b. That the strata exclude Ms. Clark from council emails, discussions, and votes about smoking,
  - c. That the strata issue bylaw infraction notices to Ms. Clark and other residents who violate nuisance bylaws by smoking,
  - d. That Ms. Clark be prohibited from smoking on her balcony, and
  - e. That the strata and Ms. Clark pay them damages of \$4,000 for the loss of use and enjoyment of their strata lot, and pain and suffering.
5. The strata denies the applicants' allegations. It says it has made its best efforts to comply with its obligations and has acted honestly, in good faith, and in the best interests of the strata. In submissions, the strata says it reasonably investigated the applicants' bylaw complaints. It also says the applicants did not accept the strata's offer for 2 council members to attend SL158 when the smoke nuisance occurred and did not agree to allow the strata to conduct testing in SL158. The strata asks that the applicants' claims be dismissed.

6. Ms. Clark denies violating any bylaws and says the applicants have not proved smoke from her balcony entered SL158. She also says she attempted to resolve the issue directly with the applicants, but they declined to participate in any direct communications. She asks that the applicants' claims be dismissed.
7. As explained below, I find the strata did not reasonably investigate the applicants' smoke complaints and order it to take steps to do so. I dismiss the applicants' remaining claims.

## **JURISDICTION AND PROCEDURE**

8. 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.
9. 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.
10. 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.

## **ISSUES**

11. The issues in this dispute are:
  - a. Did Ms. Clark breach the strata's bylaws?

- b. Did the strata fail to reasonably investigate the applicants' smoke complaints, and if so, what is an appropriate remedy?

## BACKGROUND

12. As applicants in a civil proceeding such as this, Daryl Foster and Tanya Foster must prove their claims on a balance of probabilities, meaning more likely than not. I have considered all the parties' submissions and evidence but refer only to information I find relevant to explain my decision.
13. The strata was created in May 1991 under the *Condominium Act*. It continues to exist under the SPA and is comprised of 220 strata lots in 2 high-rise towers shown as towers 1 and 2 on the strata plan. Balconies and patios are designated as limited common property for the strata lots next to them. Although the parties refer to the balcony of SL123, I note the strata plan identifies the area as a patio. Nothing turns on this and I will use the term "balcony" to be consistent with the parties' submissions. SL158, also known as unit 806-71, is located on the 8<sup>th</sup> floor of tower 2. SL123, also known as 306-71, is located on the 3<sup>rd</sup> floor in the same tower, directly below SL158.
14. The strata filed a complete new set of bylaws with the Land Title Office on January 26, 2018, which I find are the bylaws applicable to this dispute. They replace the Standard Bylaws under the SPA. Bylaw amendments filed later do not apply here. I summarize the relevant bylaws as follows:

"Resident" is defined to include owners, tenants, and occupants.

Bylaw 4.1 says a resident or visitor must not use a strata lot, 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,

(d) Is illegal or otherwise contrary to provisions, rules or ordinances of any statute or municipal bylaw.

Bylaw 45.1 says a resident or visitor must not smoke “inside the buildings”.

15. The applicants first complained to the strata of smoke entering SL158 in May 2021. They included a log of 51 dates and times they were affected by the smoke. In the June 2021 council meeting minutes, the strata reminded owners of bylaw 45.1.
16. In a June 11, 2021 email exchange with the council president, the applicants identified 4 possible sources by suite number. One of the suites was SL123. They said closing windows in SL158 did not stop the smoke smell and suggested the smoke was coming in through the ensuite bathroom exhaust vents. At the end of the exchange, the president said the council would investigate. They also asked the applicants to see if they could identify the source when they smelled the smoke. The applicants responded that they had already done this.
17. A further email exchange between the applicants and the strata council president occurred in September 2021, in which the applicants provided additional smoke logs. The council president advised the applicants that it had contacted several residents, including Ms. Clark. The president said the bylaws did not restrict smoking on balconies, but that Ms. Clark had been informed her smoking was considered a nuisance.
18. The applicants continued to raise their smoke concerns and provide additional logs to the strata. In a May 13, 2022 email to the strata manager, the applicants provided handwritten logs noting 281 complaints about smoke entering SL158 between September 2021 and May 13, 2022. The applicants identified SL123 and 1 other strata lot on the 1<sup>st</sup> floor as possible sources of the smoke. The email included photographs of people smoking on Ms. Clark’s balcony. The applicants noted bylaw 4.1(a) addresses nuisance. They requested the strata investigate their concerns and enforce its bylaws, including bylaw 4.1(a).
19. On May 24, 2022, Ms. Clark wrote to Ms. Foster. Among other things, Ms. Clark admitted people smoked on her balcony. In submissions, she says photographs of

ashtrays on her balcony do not prove nuisance. She also says she was not at home during many of the times the applicants' claimed smoke from her balcony entered SL158.

20. In the May 25, 2022 council meeting minutes, the strata reported it had obtained legal advice and set up a process to investigate the applicants' concerns when they smelled smoke in SL158. This included 2 strata council members attending SL158 to investigate the applicants' concerns over a 1-week period. If the allegations were substantiated, the strata agreed the president would follow up in person with the occupants of any identified strata lot. The applicants say they did not initiate the investigation process because Ms. Clark was aware of the 1-week "test" period. They say their smoke logs during the test period support that they did not smell smoke from SL123.
21. On June 14, 2022, the applicants' lawyer wrote to the strata council about their ongoing issues with smoke entering SL158 and the strata's alleged failure to address the applicants' complaints. In part, the letter made the following demands:
  - a. grant the applicants a council hearing,
  - b. issue a bylaw contravention notice to the strata council member,
  - c. properly investigate the source of the smoke, and
  - d. engage an air quality specialist or independent expert to investigate the smoke source.
22. A council hearing was held on July 6, 2022. The strata responded to the applicants' lawyer's letter on July 10, 2022. Among other things, the strata provided the results of discussions 2 strata council members had on July 6, 2023 with the occupants of the 4 strata lots the applicants identified as possible smoke sources plus 2 others. Based on strata's written report about these discussions, the strata declined to issue any bylaw violation letters largely because of the distance between the alleged strata lot sources and the applicants' strata lot, or because the occupants stated they did not smoke.

23. The applicants continued to provide complaints and logs about ongoing smoke concerns, including a log of 40 additional complaints for July and August 2022. On August 8, 2022, the strata wrote to the applicants stating Ms. Clark wanted to use the strata's voluntary dispute resolution services under bylaw 35 to attempt to resolve the applicants' smoking issue with her. The applicants declined. In submissions, Ms. Clark said that since about August 2022, she had been trying to quit smoking, so she moved off common property to smoke and did not smoke on her balcony.
24. The strata also offered to complete testing in SL158. After reviewing the proposed work, the applicants declined to participate in the testing because they say there is no safe level of second-hand smoke, and the proposed testing was unlikely to assist for 2 reasons. First, the testing being considered including touch-testing of surfaces, which they regularly cleaned. Second, the air quality testing being considered only reported on the air quality at the time of the test, which was not determinative.
25. At an October 5, 2022 special general meeting, the strata proposed a bylaw amendment to prohibit smoking anywhere in the building and on balconies and patios. The bylaw amendment failed to achieve the required  $\frac{3}{4}$  vote. The applicants continued to provide complaints and logs about ongoing smoke concerns, including providing a log of 102 additional complaints for August through October 2022. In response, the strata manager wrote to the applicants on November 4, 2022. In essence, the letter says the bylaws do not prohibit smoking outside the building and the strata's attempt to amend its smoking bylaw to prohibit smoking on balconies failed. The letter also said the applicants have not proved smoke enters SL158 nor the source of any smoke. The strata further said that because the applicants declined to assist the strata in its investigation of the issue by contacting the strata council when they experienced smoke in SL158 or permitting testing on SL158, it would not take further action until the applicants permitted testing within SL158.
26. The applicants responded to the strata's November 4, 2022 letter by email on February 3, 2023. They said the failed bylaw amendment does not excuse the strata from enforcing its nuisance bylaw and that it is the strata's obligation to enforce its bylaws, especially considering the significant number of times the applicants smelled smoke as evidenced by their logs. They say they had proved Ms. Clark's balcony was

a source of the smoke and reiterated that Ms. Clark was aware of the 1-week test period which likely would have affected the results of such a test. They also explained why they declined to participate in the testing proposed for SL158, as I explained above.

27. The applicants maintain the strata has failed to properly investigate its smoking bylaw complaints despite their logs about smelling smoke and complaints about Ms. Clark smoking on her balcony.

## **EVIDENCE AND ANALYSIS**

### ***Did Ms. Clark breach the strata's bylaws?***

28. In essence, the applicants say smoke from Ms. Clark's balcony enters SL158. Ms. Clark says the applicants have not proved that to be true and their refusal to deal with her directly is reason their claim should be dismissed. Based on the overall evidence, I agree with Ms. Clark that the applicants have not proved smoke from SL123's balcony has entered SL158 contrary to the bylaws.
29. The applicants say they identified SL123 as a source of the smoke, but they did not provide any objective evidence that was the case. Confirmation that smoking occurs on SL123's balcony does not prove that smoke enters a strata lot 5 floors above. In fact, the applicants identified at least 3 other strata lots as potential sources, so, their focus on SL123 is also unreasonable. I find the evidence provided about SL123 being a cause of smoke in SL158 is circumstantial and speculative at best. There is simply no objective evidence that smoke from SL123 enters SL158 at all, let alone that it reaches the level of a nuisance.
30. Therefore, I dismiss the applicants' claims against Ms. Clark.

### ***Did the strata fail to reasonably investigate the applicants' smoke complaints?***

31. SPA section 26 requires the strata council to exercise the powers and perform the duties of the strata, including bylaw enforcement. This includes a duty to enforce bylaws, such as the nuisance bylaw in bylaw 4.1(a). When performing these duties,



the strata council must act reasonably. See *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32 at paragraph 237.

32. The SPA does not set out any procedures for assessing bylaw complaints. The bylaws are also silent on this process. The courts have held that a strata corporation may investigate bylaw contravention complaints as its council sees fit, so long as 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 at paragraph 52. In other words, the strata must act reasonably when it investigates bylaw complaints.
33. The strata's investigation must also be objective as established in *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.*, 2018 BCSC 1502 at paragraph 33. In *Triple P*, the court found that nuisance in the strata corporation context is an unreasonable interference with an owner's use and enjoyment of their property. Whether an interference is unreasonable depends on several factors, such as 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.
34. Here, I find the strata has not acted reasonably in its investigation of the applicants' smoke complaints. The evidence is that the strata council president spoke to the residents of at least 4 strata lots identified by the applicants, attempted to investigate SL158 during times the applicants smelled smoke, and attempted to conduct independent testing in SL158. I find this investigative action is not enough for the following reasons.
35. First, speaking to residents about if and when they may smoke is not conclusive or objective evidence. Residents may not tell the truth and even if they do, more is required to establish if smoking creates a nuisance for the applicants. As for the strata's offer to attend SL158 when the applicants smelled smoke, I find the applicants' reasons given for why they did not participate are reasonable. Even if Ms. Clark was not aware of the test period, the offer should have been over a period greater than 1 week to adequately identify other potential sources of smoke. Finally,

I find the applicants' reservations about the proposed testing were also reasonable and agree the results of the proposed testing would likely not have identified a smoke source.

36. It is clear from the applicants' log evidence that they were affected by smoke. The strata's decision to abandon all further investigation until the applicants provided access to SL158 for it to complete testing that would likely be unhelpful, is not reasonable.

### ***Remedy***

37. Given the applicants did not prove Ms. Clark created a nuisance, I decline their requests for remedies against her, including that she contribute to their damages claim. I also note that the applicants did not provide supporting evidence for their claimed damages, such a doctors' note, so I would have declined awarding damages in any event. While I acknowledge the applicants provided information about Mr. Foster purchasing inhalers, that information was not accompanied by a doctor's note to link the inhalers to the smoke.
38. As for the strata, I have found it did not properly complete an objective investigation into the applicants' smoke complaints. However, the applicants did not seek remedies about that. Their requested remedies were made on the presumption the strata had failed to enforce its bylaws, which I have found is not the case. In essence, the applicants' claims are premature and I have dismissed them. Therefore, I decline the applicants' requested remedies against the strata, except for excluding Ms. Clark involvement in the applicants' smoke investigation, as I discuss below.
39. In order to meet its objective investigation requirements, I find the strata must at least attend SL158 when the applicants smell smoke. This involves the applicants contacting the strata and permitting access to SL158 by 2 strata council members when they do smell smoke as I have set out below. Therefore, I order the strata to arrange for this testing over a minimum 2-week period and not disclose the timeframe to any other building occupants, including Ms. Clark. The applicants must be reasonable with their requests. Given this process is more likely to produce results in

warmer weather, it must be completed before July 31, 2024, unless a different time is agreed by the 2 parties.

40. I also order the strata to work with the applicants to attempt to identify the source of any smoke entering SL158 and take reasonable steps to address any smoke issue within the confines of the strata bylaws.
41. Nothing in this decision restricts the applicants from filing a fresh dispute with the CRT about a future smoke nuisance.

## **CRT FEES AND EXPENSES**

42. Under CRTA section 49 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 it reasonable in the circumstances of this dispute not to award reimbursement of CRT fees.
43. Neither party claimed dispute-related expenses, so I order none.
44. Under section 189.4 of the SPA, the strata may not charge any dispute-related expenses against the applicants.

## **DECISION AND ORDERS**

45. Prior to July 31, 2024, unless the applicants and strata agree to a different date, I order the strata to:
  - a. Arrange for 2 strata council members to attend SL158 at the applicants' request when they smell smoke in SL158. The applicants' requests must be reasonable and made during reasonable hours. This process must be for a minimum 2-week period which is not disclosed to any other building occupants, including Ms. Clark, and
  - b. With the applicants' assistance, attempt to identify the source of any smoke entering SL158 and take reasonable steps to address any smoke issue within the confines of the strata bylaws.

46. I dismiss the applicants' remaining claims.
47. The applicants are entitled to post-judgement interest under the *Court Order Interest Act*, as applicable.
48. 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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J. Garth Cambrey, Vice Chair