

# Memorandum

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**To:** Elaine McCormack  
**Date:** June 3, 2010  
**From:** Lisa Mackie  
**Matter Number:** n/a  
**Re: Law of Nuisance**

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## Law of Nuisance

At common law, a “nuisance” is a condition on a property or some use of a property that interferes with a neighbouring owner’s ability to enjoy their property. Nuisances can arise from intentional acts undertaken for lawful purposes. For example, an industrial plant that otherwise operates lawfully may cause a nuisance if smoke or noise invades the right of enjoyment of neighbouring land owners to an unreasonable degree. As stated by the British Columbia Court of Appeal in *Royal Anne Hotel Co. Ltd. v. Ashcroft et al* (1979), 8 C.C.L.T. 179:

“The test then is, has the defendant’s use of this land interfered with the use and enjoyment of the plaintiff’s land and is that interference unreasonable? Where . . . actual physical damage occurs it is not difficult to decide that the interference is in fact unreasonable. Greater difficulty will be found where interference results in little or no physical injury but may give offence by reason of smells, noise, vibration or other intangible causes.”

The law of nuisance attempts to reconcile competing uses of land. It endeavors to balance the rights of one occupier of land to use his or her property for lawful purposes with another occupier’s right to the quiet use and enjoyment of his or her land. The Court can intervene when the interference with the other’s use or enjoyment of land is unreasonable.

The Courts in British Columbia have adopted an objective test for nuisance, which applies the standards of an ordinary reasonable person. In *Popoff v. Krafczyk*, [1990] B.C.J. No. 1935, the British Columbia Supreme Court approved the objective test as follows:

“In every case it is not whether the individual plaintiff suffers what he regards as substantial discomfort or inconvenience, but whether the average man who resides in that locality would take the same view of the matter. The law of nuisance does not guarantee for any man a higher immunity from discomfort or inconvenience than that which prevails generally in the locality in which he lives.”

Where the nuisance complaint involves individuals living in a condominium complex governed by legislation and the bylaws of a Strata Corporation, the Courts have recognized that there are additional factors to consider when determining whether there is an actionable case of nuisance. In this type of communal living arrangement, the residents of a condominium complex are required to exhibit more cooperation and respect for others to ensure that each occupier is able to enjoy their property to the fullest extent. As stated by the British Columbia Supreme Court in *The Owners, Strata Plan NW 87 v. Karamanian*, [1989] B.C.J. No. 629 (“*Karamanian*”):

“While the courts are reluctant to interfere with how persons live in their own homes, there are some activities which may not be done particularly when the home is regulated by the *Condominium Act* and the by-laws of a Strata Council. This is the communal type of living which often requires a tremendous amount of co-operation and consideration from each other, for all residents to enjoy the lifestyle to its maximum.”

In *Karamanian, supra*, the plaintiff Strata Corporation sought an Order restraining the defendant, a strata lot owner, from breaching the bylaws of the Strata Corporation or continuing to create a nuisance. The defendant had installed an air conditioning unit and a Jacuzzi tub on his property. The air conditioner and Jacuzzi tub created excessive noise and vibrations that could be heard and felt in the suite directly below the defendant’s suite. The owners of the suite directly below the defendant’s suite complained that the noise and vibrations interfered with their quiet enjoyment of their suite. At trial, the plaintiff asked the Court to limit the operation of the defendant’s air conditioner and Jacuzzi to specific periods during the day. The Court granted the plaintiff’s application and ordered that operation of the air conditioner and Jacuzzi be limited to specific hours during the day.

## **Case Summaries re Nuisance**

### **Royal Anne Hotel Co. Ltd. v. Ashcroft et al (1979), 8 C.C.L.T. 179 (BCCA)**

This was an appeal by against the attribution of liability for nuisance, and a cross-appeal against the finding absolving the appellant of negligence.

The question for the Court was summarized by McIntyre, J.A. at paragraph 5: “Where a municipality constructs and operates a sewer pursuant to the authorizing provisions of the Municipal Act, R.S.B.C. 1960, c. 255, and where it is not in the construction, maintenance and operation of the sewer negligent, is it responsible in the absence of such negligence in an action for nuisance where damage results from a random blockage in an adequate system?”

At paragraph 18, the Court summarized the test for establishing nuisance as follows:

“The test then is, has the defendant’s use of this land interfered with the use and enjoyment of the plaintiff’s land and is that interference unreasonable? Where . . . actual physical damage occurs it is not difficult to decide that the

interference is in fact unreasonable. Greater difficulty will be found where interference results in little or no physical injury but may give offence by reason of smells, noise, vibration or other intangible causes.”

According to McIntyre J.A., unlike the test for establishing negligence, the test for establishing nuisance does *not* require a finding regarding the defendant’s exercise of due care in the circumstances (at paragraph 18). Rather, liability is strict, and it is no defence that the defendant took the utmost care not to commit the nuisance (at paragraph 19).

McIntyre J.A. further summarized that the law of nuisance protects against the “unreasonable invasion of interests in land,” which is determined on the factual circumstances of each case (at paragraph 21). According to the Court, in reaching a conclusion on nuisance, the Court must consider the nature of the act complained of and the nature of the injury suffered. Consideration must also be given to the character of the neighbourhood where the nuisance is alleged, the frequency of the nuisance, the duration of the nuisance, and other factors which could be of significance in special circumstances (at paragraph 21). The Court further held that the social utility of the offending conduct must be considered against the significance of the injury caused and the value of the interests sought to be protected. However, where the defendant’s conduct causes *actual physical injury* to the plaintiff’s land, the mere fact that such conduct may be of great social utility will not attract greater immunity (at paragraph 21).

Upon weighing the conflicting interests in the circumstances of this case, and recognizing that the offending conduct has interfered with the plaintiff’s right of enjoyment of their land and caused damage to their land, the Court held that the action for nuisance lies against the Municipality absent any defence of statutory authorization (at paragraph 21). The Court ultimately dismissed the appeal. The Court also dismissed the cross-appeal against the finding absolving the appellant of negligence, having found no error in the Trial Judge’s decision.

### **Raith v. Coles, [1984] B.C.J. No. 772**

This application was for an injunction until the trial or final disposition of the action restraining the Defendants, as registered owner of premises, from emitting and discharging noxious substances, or specifically cigar smoke and odour from their premises.

The Petitioners and the Respondents resided in the same condominium building. The Petitioners claimed that the Respondent continually and frequently smoked cigars while on their premises, and the cigar smoke infiltrated the Plaintiff’s premises. The Petitioners claimed both emotional strain and physical harm as a result of the cigar smoke, and deposed that they had done everything reasonably possible to solve the problem, including talking to the Respondent, writing letters, closing their windows and doors, and installing fans.

The Respondent did not deny any of the Petitioners’ allegations, and filed no material.

In considering whether nuisance had been established in this case, the Court looked to several common law and secondary source authorities on the matter, particularly citing the following passage from the text, Salmond on Torts, Volume 17 at paragraph 8:

“The standard of comfortable living which is thus to be taken as the test of a nuisance is not a single universal standard for all times and places, but a variable standard differing in different localities. The question in every case is not whether the individual plaintiff suffers what he regards as substantial discomfort or inconvenience, but whether the reasonable man who resides in that locality would take the same view of the matter.”

The Court ultimately granted the Petitioners’ application for an injunction, holding that the Petitioners’ objections to the nuisance created by the cigar smoke did not simply involve a dislike of the smell, but concerns on medical grounds (at paragraph 10). The Court held that just as no person should be subjected to the unrestricted cacophony of stereo music from his neighbour, neither should he or she be subjected to the continuing smell of cigar smoke if that smell is unreasonably disseminating into other peoples’ worlds.

**Strata Plan NW87 v. Karamanian, [1989] B.C.J. No. 629**

This matter came before the Court on second hearing. In this case, the Plaintiff (a Strata Corporation comprised of one hundred owners) sought an Order pursuant to Rule 45 to restrain and enjoin the Defendant (a Strata Lot owner), his agents, tenants, and guests from breaching the Strata Corporation’s bylaws or continuing to create a nuisance. The Strata Corporation takes the position that the defendant has been in breach of the Strata Corporation’s bylaws and the Condominium Act, R.S.B.C. 1971, c. 71, particularly with respect to the installation of an air conditioning unit and the replacement of a bath tub with a jacuzzi/ whirl pool. Complaints of neighbouring owners included excessive noise and vibration.

According to the facts, the Defendant did apply to the City of Richmond for a permit to do certain alterations to his apartment (e.g. removal of a non-bearing partition). While a plumbing permit was required, there was no evidence to indicate that it was ever obtained. The evidence also established that no consent was ever obtained from the Plaintiff Strata Corporation pursuant to any of the renovations, alterations, or installations done, such consent being required under the Strata Corporation’s bylaws. The Court also found that the vibration and noise emanating from the installation of the air conditioning unit and the jacuzzi/tub was beyond acceptable levels of tolerance, and the Defendant had done everything possible short of removing the equipment to eliminate the vibration and noise.

The question before the Court was whether the vibration and/or noise in the circumstances of this cases constituted nuisance within its legal definition.

Relying on the Supreme Court of British Columbia decision in *Raith v. Coles*, [1984] B.C.J. No. 772, and the secondary source authority of Salmond on Torts, Volume 17, the Court held that while the Courts are reluctant to interfere with how persons live in their homes, there are some activities which may not be done, particularly when the home is regulated by the Condominium Act and the bylaws of a Strata Corporation (at paragraph 7). The Court held that this is a communal type of living which often requires a tremendous amount of cooperation and consideration from each other, for all residents to enjoy the lifestyle to its maximum (at paragraph 7).

In this case, the Plaintiff was only seeking to regulate the operation of the air conditioning unit and the jacuzzi/tub, and not remove the offending installations. The Court ultimately placed the following limitations on the use of this equipment: the jacuzzi/tub would be permitted to operate within the hours of 8:00 a.m. and 10:00 a.m., and within the hours of 4:00 p.m. and 8:00 p.m. The air conditioning unit was restricted to the hours between 2:00 p.m. and 8:00 p.m.

**Popoff v. Krafczyk, [1990] B.C.J. No. 1935**

In this case, the Plaintiffs applied for a permanent injunction to restrain the Defendants from keeping and breeding macaws (large tropical birds). The Plaintiffs alleged that the squawking noise made by the birds created a nuisance which escaped from the Defendant's property, and caused the Plaintiffs considerable distress. The Defendants submitted that they had a license to keep the birds in any event, and the Plaintiffs were abnormally sensitive to the noise of the birds given the character of the neighbourhood.

Based on the evidence submitted, the Court found that the macaws created a loud raucous of screeching and squawking noises, particularly early in the morning and periods in the late afternoon and early evening. The Court also found that, given the conditions with which the birds required to breed, it would not be possible to lay down conditions that would give a sufficient standard of sound-proofing.

While the Defendant obtained a Regional District building permit for an aviary, the Court rejected this as a full answer and defence to any claim of nuisance. According to the Court, while it is true that if a nuisance is the inevitable consequence of an activity which has been legislatively authorized, then no action will lie, a building permit does not constitute such authority.

The Court acknowledged that the nature of the locality was of significance in determining whether nuisance existed in this case. The Plaintiffs submitted that the locality was a quiet, rural, residential area, and a retirement area. Conversely, the Defendants submitted that the area was bisected by a very busy highway which is adjacent to commercial businesses, and the locality could not be described as either quiet or residential. The Court subsequently held that the area was essentially rural and residential, despite the highway and some commercial activity taking place in the area. The Court also held that the noise created by the macaws were unusual to the area, and the screeching and squawking of the macaws constituted a legal nuisance. According to the Court, it was a noise which, viewed by an average resident in the neighbourhood, would be regarded as a nuisance. While the Court also found that the Plaintiffs had developed an added degree of sensitivity to the noise over the years, it did not find that to be indicative of a morbid sensitivity.

Having found that the noise created by the macaws constituted a legal nuisance, the Court then considered whether the balance of convenience was in favour of granting the permanent injunction sought by the Plaintiffs. In summary, the Court weighed the Defendant's claim that breeding macaws would provide him with his main source of income, with the Plaintiff's claim that they have experienced various serious health problems as a result of the nuisance.

In light of all of the evidence presented, the Court granted an injunction against the Defendants. While the Defendant was permitted to keep some birds on his property, he could only keep them on the basis of specific conditions (relating to the number of birds permitted, and the manner with which the birds could be housed). The Court granted the Defendant four months from the date of judgment to reduce the number of tropical birds kept on the property to three.

**Anderson v. Jeffries, 2008 BCSC 1410**

The defendant operated a dog rescue shelter on her 13-acre rural property. The area was classified rural residential, indicating residential use but allowing some agricultural uses such as would be associated with a hobby farm. By 1997, the plaintiffs' predecessor in title and others in the neighbourhood had lodged complaints with the governing municipal authority of incessant barking, foul odours and proliferation of rats as a result of poor storage of dog food. The district brought an action to restrain the dog rescue shelter by enforcement of the applicable zoning bylaw, but that action was unsuccessful in that the permitted uses under the bylaw included the keeping of dogs. The district enacted a dog bylaw, limiting to three the number of dogs which could be kept on properties in the district, but enforcement of the bylaw was never pursued against the defendant because her rescue shelter pre-dated the bylaw. The plaintiffs, who were the neighbours living closest to the defendant's land, purchased their property in 1998. The plaintiffs commenced an action in nuisance, seeking injunctive relief. By the time of trial the defendant kept about 60 dogs. Among the evidence used by the plaintiffs in this case included photographs of the rat-infested food storage, and witness testimony.

In the end, the Court held that the "question of whether the dog shelter presents a nuisance is primarily a question to be determined on assessment of the credibility of the witnesses." The Court also looked to the law of actionable nuisance as established in *Royal Anne, supra*, noting that whether or not something constitutes an unreasonable interference with the use and enjoyment of property must take into account the nature of the area involved. In the case of rural areas, the Court noted that there will be a greater tolerance for normal agricultural sights, sounds, and odours. Conversely, the court noted that an urban area might have its own characteristics that would need to be considered. The determination of whether something is a nuisance or not is the reasonable man test in the context of general uses found in the area.

The Court ultimately found that the plaintiffs presented compelling evidence of the ongoing nature of the excessive noise, odour and attraction of vermin on the defendant's property. The defendant's evidence of being able to control the 60 dogs at her shelter was unconvincing. As a matter of common sense, a shelter housing a substantial number of dogs, many with troubled backgrounds, is a use of land that almost assuredly will create a nuisance within a residential area. The setting was rural but, nonetheless, primarily residential. The operation of the dog shelter was an unreasonable interference with the use of the plaintiff's neighbouring property. The odour and barking had unreasonably interfered with such normal uses as outdoor gardening and enjoyment of decks and patios. The barking disturbed sleep at night. The method of food storage attracted rats, which also

accounted for their presence on other properties in the area. The Court awarded the plaintiff's application for an injunction.

**Kenny v. Schuster Real Estate Co. [1990] B.C.J. No. 1420**

In this case, the Court was required to determine whether a restaurant's exhaust fan installed on the exterior of a strata building was a nuisance to the plaintiff, who owned the strata lot above the restaurant. The building housed four residential strata lots and two commercial strata lots. At the time the plaintiff purchased her strata lot, the commercial strata lot contained two restaurant operations. Prior to purchasing her strata lot, the Plaintiff made inquiries about the restaurant operations, and in particular, that no foods were deep fried or cooked on the premises.

Four years after purchasing her strata lot, the commercial tenant installed an exhaust fan. The fan was located below her patio deck, and underneath her dining and living room windows. The plaintiff argued that the fan's operation was noisy, and also created unpleasant musty, greasy odours inside the building's stairways, hallways and underground parking. The plaintiff submitted that she could no longer enjoy her strata lot (e.g. she could not read a book in her strata lot while the fan was on, due to the offensive smell and noise, and she could no longer enjoy her patio deck). As a result of the alleged nuisance, the plaintiff sold her strata lot one year later for ten thousand dollars below her asking price. The plaintiff sued the defendant for the following relief: reimbursement of the real estate commission she paid on the sale of her strata lot, damages alleging that the value of her property decreased by \$10,000 because of the fan, reimbursement of her moving expenses, and legal costs expended in connection with her application for an injunction the year prior. The plaintiff also sought general damages for annoyance, inconvenience, and discomfort. The plaintiff received a default judgment in the proceeding, and this case pertains to an assessment of damages on a default judgment. The issue before the court was whether the noise and smell from the fan constituted an actionable nuisance, and if so, what amount of damages the plaintiff was entitled to.

The British Columbia Supreme Court found that the noise and smell from the fan interfered with the plaintiff's interest in the land so as to constitute a nuisance. The Court accepted the plaintiff's evidence that the noise and smell was a substantial interference, and found that she was not overly sensitive or unreasonable in assessing the degree of interference she experienced from the fan's operation, even though other witnesses submitted evidence that they did not experience the disturbing noise and smell. According to the Court, the plaintiff was a "normal person of ordinary habits and sensibilities who suffered substantial personal discomfort from the noise and smell created by the fan."

In assessing damages, the Court looked to Fridaman's The Law of Torts in Canada, noting that if nuisance causes physical damage to the plaintiff's property or person, then damages will be recoverable. In the case of property damage, a defendant can be held liable for the consequential loss, including the diminution in the value of the plaintiff's property by reason of the interference resulting from the defendant's conduct. With respect to circumstances in which the nuisance consists of personal inconvenience, or interference with one's enjoyment of the property, it "has been said that no proof of damage is required." In other

words, no actual financial or physical damage needs to be proven since the damage consists of annoyance and discomfort.

In this case, the Court was also satisfied that the value of the plaintiff's strata lot decreased due to the fan installation. Her real estate agent testified that it took seven months to sell the unit, and that he alerted the exhaust fan to prospective purchasers because he wanted to ensure that they were aware of its existence. He also testified that he kept the dining room and living room windows closed when showing the unit because he did "not want to emphasize the negative aspect of the fan." Only one offer was received on the plaintiff's unit, and he encouraged her to accept it. A certified appraiser also gave evidence that "marketability may be impaired to the nuisance of the restaurant's exhaust fan," and he appraised the property at ten thousand dollars below her asking price – the ten thousand dollars reflecting the estimated loss due to the noise and odours from the restaurant's exhaust fan.

With respect to non-pecuniary damages, the Court looked to the plaintiff's annoyance, discomfort and inconvenience sustained from the fan's operation. The Court accepted that the plaintiff could no longer use and enjoy her property, and that she had no alternative but to sell the property as there was no evidence that anything more could have been reasonably done to minimize the negative impact of the noise and smell from the fan. The plaintiff had asked for the fan to be removed, she also sought an injunction, and she finally listed her property for sale. In light of these factors, the Court found that the fan's installation was a "gross interference with the comfort and enjoyment of her condominium" over a one year period." The Court assessed her damages at \$7,500.

Finally, the Court held that the plaintiff was entitled to repayment of the commission she was forced to pay for being forced to sell her property, in addition to reimbursement for her moving costs and legal costs for her injunction application.

In the end, the Court awarded the plaintiff \$25,557.45 plus her costs of trial, and interest pursuant to the Court Order Interest Act.

**Kenny v. Schuster Real Estate Co. [1992] B.C.J. No. 220**

The defendant appealed the Court's assessment of damages on the grounds that the trial judge erred in holding that the noise and smell from the fan constituted an actionable nuisance, that the activity was legislatively authorized, that the owner/landlord of the premises should not be held liable for nuisance created by the commercial tenant, and the assessment of damages. The Appeal was dismissed.

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