

Court Enforcement of a No Smoking Bylaw

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A recent case decided by the Supreme Court of British Columbia, *The Owners, Strata Plan NW 1815 v. Aradi 2016 BCSC 105*, resulted in the court ordering that an owner stop smoking in his unit. The judge granted relief to the strata corporation even though the owner, Mr. Aradi, had filed a complaint with the British Columbia Human Rights Tribunal, asking that the strata corporation be ordered to allow him to continue smoking in his unit. The decision shows that the court may order an owner to comply with bylaws, even though the owner has filed a human rights complaint about the same matter. This article summarizes the judge's decision to enforce the no smoking bylaw and grant injunctive relief to the strata corporation.

Mr. Aradi, a retired gentleman and a life-long smoker, purchased his strata lot in 2002. In 2002 the strata corporation did not have a bylaw that specifically addressed smoking. In March, 2009, the strata corporation passed and filed a bylaw that prohibited smoking inside individual units and anywhere else inside the building. In 2014 a similar bylaw was passed and filed that provided:

Smoking

33 (1) Smoking is prohibited

- in a strata lot,
- on the interior common property, including but not limited to hallways, elevators, parking, garages, electrical and mechanical rooms,
- on the patios
- within three meters of a door, window or air intake, and
- on any land that is a common asset

In December 2013, the council started to receive complaints about Mr. Aradi's smoking. The council informed him about the complaints and gave him an

opportunity to file a written response or be heard at a council meeting. Even though the council followed this procedure several times, Mr. Aradi did not generally file a response or seek a hearing. From December 2013 until August 2015 he was fined a total of \$2,300.00, and he did not pay the fines or stop smoking in his unit.

Mr. Aradi admitted that he smoked in his unit. He took the position that he had trouble walking outside his unit without assistance, but there was evidence showing him walking to the public sidewalk and he was able to drive his car. His occupational therapist described his functional limitations, but did not address what measures could be taken to assist him with his mobility.

Both sides produced "expert" reports. The strata corporation relied on an affidavit from an endocrinologist who provided an opinion that Mr. Aradi was addicted to nicotine, not smoking. Mr. Aradi relied on a report from an industrial hygiene technologist about indoor air quality and how the problem created by the smoke could be mitigated. The judge did not find the reports to be helpful. The doctor did not appear to have the qualifications or experience to provide a report on addiction. The industrial hygiene technologist did not consider air sampling in the unit to be feasible and his report did not show his relevant evidence and experience.

The judge was not asked to delay the hearing pending the outcome of the human rights claim. She was asked to take into account that Mr. Aradi had filed a human rights claim when exercising her discretion under section 173 of the *Strata Property Act*. Section 173 of the *Strata Property Act* provides:

Other court remedies

173 (1) On application by the strata corporation, the Supreme Court may do one or more of the following:

- (a) order an owner, tenant or other person to perform a duty he or she is required to perform under this Act, the bylaws or the rules;
 - (b) order an owner, tenant or other person to stop contravening this Act, the regulations, the bylaws or the rules;
 - (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).
- (2) If, under section 108 (2) (a),
- (a) a resolution is proposed to approve a special levy to raise money for the maintenance or repair of common property or common assets that is necessary to ensure safety or to prevent significant loss or damage, whether physical or otherwise, and
 - (b) the number of votes cast in favour of the resolution is more than 1/2 of the votes cast on the resolution but less than the 3/4 vote required under section 108 (2) (a),
- the strata corporation may apply to the Supreme Court, on such notice as the court may require, for an order under subsection (4) of this section.
- (2.1) Section 171 (2) does not apply to an application under subsection (2).
- (3) An application under subsection (2) must be made within 90 days after the vote referred to in that subsection.
- (4) On an application under subsection (2), the court may make an order approving the resolution and, in that event, the strata corporation may proceed as if the resolution had been passed under section 108 (2) (a).

The judge took into account the affidavits sworn by various council members and other owners, as well as the affidavit sworn by Mr. Aradi. The council and other owners were concerned about the smoking from a

health standpoint, the potential of a fire, possible lower property values, as well as the impact on the use and enjoyment of their units.

In coming to her decision, the judge found that the no smoking bylaw had been violated, in spite of the fact that the owner had repeatedly received both warnings and fines. The judge also considered whether she should exercise her discretion to grant the injunction. After considering the authorities, she found:

I conclude from these authorities that the court has a broad discretion under s. 173 of the *Act*. The exercise of its authority is to be guided by a consideration of the scheme of the legislation, its overall objectives, and the circumstances giving rise to the application. The interests of the strata corporation must be balanced against the interests of the owner or other person against whom the order is sought, within this legislative context.

She was satisfied that the “strata corporation acted in good faith in seeking to enforce the no smoking bylaw.”

The judge considered that there was a human rights complaint filed on the basis of addiction and mobility limitations. She noted that she was not referred to any decision of the human rights tribunal which suggested that an owner should be accommodated by allowing him to smoke in a unit in spite of a no-smoking bylaw. She also considered that the owner did not file his human rights complaint for one year after he was first fined and until the strata corporation had taken him to Small Claims to enforce the fines.

The judge found that although the owner may have an addiction and has limitations with mobility, she must consider this in the context of the *Strata Property Act* and the duty of the strata corporation to enforce its bylaws.

The judge granted the strata corporation a declaration that Mr. Aradi had contravened the bylaws of the strata corporation by smoking cigarettes in his unit. She ordered Mr. Aradi to cease and desist smoking

cigarettes within his unit and violating the bylaws of the strata corporation.

This case offers hope to strata corporations faced with a human rights claims from a resident. The strata corporation can still apply to court for an order that its bylaws be complied with. Councils should be aware that the outcome of cases can vary based on the specific facts and how the law is presented to the judge. Legal advice should be sought if a council wants to apply to the Supreme Court of British Columbia for injunctive relief.