

Headline: Is Smoking a Nuisance?

Publication date: July 2007

Publication: CHOA Journal

Written by: Elaine McCormack, McCormack & Company Law Corporation

We are often asked if a Strata Corporation or an individual owner can stop another owner from smoking in his or her strata lot, the common property or on a balcony or patio. Inevitably those who ask the question are caught in the classic struggle between the opposing legal rights of two or more residents. The answer to the question is that, given the right fact pattern, a Judge has and will order an owner to stop smoking in his or her strata lot.

In deciding a specific case, a Judge of the Supreme Court of British Columbia may consider the specific facts involved, the common law of nuisance, the Strata Corporation's general bylaws regarding nuisance and any specific bylaws regarding smoking in force for the Strata Corporation.

It is also possible that cases regarding smoking in a strata complex may also be heard by the Human Rights Tribunal or an Arbitrator appointed pursuant to the provisions of the *Strata Property Act*.

A. The Common Law of Nuisance

The word "nuisance" has a legal meaning. It is a civil legal cause of action that deals with interference with the enjoyment of land. Some potential interferences are smell, noise and vibration. It can result from intentional acts undertaken for lawful purposes and it does not necessarily involve negligence. According to the legal text of Salmon on Torts, Vol 17 at p. 56:

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 British Columbia County Court case of *Raith v. Coles* [1984] B.C.J. No 772 dealt with smoking in a residential Strata Corporation. The Plaintiffs were Mr. and Mrs. Raith, an elderly couple who owned a condominium, and Mr. and Mrs. Cole who lived below the Raiths. The Raiths complained that Mr. Cole frequently smoked cigars while on his premises and that the smoke rose and infiltrated the premises where the Raiths lived. The Petitioners advised the Court that they suffered emotional strain and physical harm as a result of the smoke. Mr. Raith suffered from a persistent upset stomach, with associated indigestion, heartburn, nausea and an extremely sore throat and anxiety. Mrs. Raith suffered from emotional strain and an extremely sore throat. According to the Raiths' Doctor who considered the medical complaints that arose since the Coles moved in, "It is therefore reasonable to suggest that the presence of cigar smoke in the Raiths' apartment could have been a significant factor in these symptoms appearing at this time". The Judge found that the smoking had become demonstrably harmful to others. The Judge granted the injunction on the following basis:

There are many things a person may not do in his house or castle -- in the case of these Respondents one of these things now is that he may not allow there to be emitted or discharged a noxious substance, in this case, cigar smoke and odour, from his premises....

For more information on CHOA resources and benefits visit www.choa.bc.ca
or contact the office at 1-877-353-2462 or email office@choa.bc.ca.

page 1

No part of this publication may be reproduced without the prior written permission of CHOA

This publication contains general information only and is not intended as legal advice. Use of this publication is at your own risk. CHOA will not be liable to you or any other person for any loss or damage arising from, connected with or relating to the use of this publication or any information contained herein by you or any other person.

B. The General Bylaws and Strata Corporation Involvement

You will note in the *Raith v. Coles* case set out above, the Plaintiffs were two owners and they named their neighbours in the lawsuit as the Defendants. It is our view that nuisance cases involving the residents of two strata lots may also involve the strata corporation. For instance, the resident being affected by the nuisance could take the position that the council should have dealt with the nuisance by enforcing the strata corporation's bylaws. Certainly the Schedule of Standard Bylaws lends itself to this argument. Section 3(1) of the Schedule of Standard Bylaws from the *Strata Property Act* provides as follows:

Use of property

- 3** (1) An owner, tenant, occupant 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,
 - (b) causes unreasonable noise,
 - (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
 - (e) is contrary to a purpose for which the strata lot or common property is intended as shown expressly or by necessary implication on or by the strata plan.

This bylaw is in force for all strata corporations in British Columbia unless a particular strata corporation has filed other bylaws that amend, repeal or contradict it.

Certainly in the case of *Strata Plan NW 87 v. Karamanian* [1989] B.C.J. No. 629, the Strata Corporation recognized its involvement in a dispute between neighbours. In that case Mr. and Mrs. Martin, who were elderly, were subject to excessive noise and vibration as a result of a jacuzzi tub and an air conditioning unit installed by an owner living above them. The Court found that a nuisance had been created and granted an injunction providing that the jacuzzi could only be used between the hours of 8:00 a.m. to 10:00 a.m. and 4:00 p.m. to 8:00 p.m. and that the air conditioning unit would be restricted to the hours of 2:00 p.m. to 8:00 p.m. Although the Judge in this case spoke of the general laws of nuisance, the issue of the strata corporation's bylaws could be brought up in a similar case.

I worked for a strata corporation that had taken various steps to stop smoke from traveling from one strata lot to another and had been unsuccessful. Eventually, the owners resorted to passing a specific bylaw prohibiting smoking in the strata lots. The bylaw was later found to be enforceable by an arbitrator.

C. Human Rights

Although we are not aware of a specific case at this time, we also foresee the possibility that a strata corporation will be brought to the Human Rights Tribunal for not taking steps to ameliorate the effect smoke has on a resident. In circumstances similar to the ones in *Raith v. Coles*, the party suffering health problems because of the smoke may take the position that the strata corporation must make reasonable accommodation for him or her by taking such steps as are necessary to prevent smoke from entering their strata lot and/or the common property. Those steps could include trying to interfere with the smoke traveling into a particular area by filling up cracks in the building and using negative air pressure. The owner may take the position that the smoking is a nuisance under the bylaws and that the strata corporation must commence bylaw enforcement proceedings against the person smoking.

What we do know is that the Court will not shy away from making tough decisions about balancing the rights of different individuals who live in the same strata complex. Given the many different directions these cases may take, if you are involved in a matter involving a potential nuisance, such as noise, smoke or vibration being caused by a neighbour, we recommend that you seek legal advice.

For more information on CHOA resources and benefits visit www.choa.bc.ca
or contact the office at 1-877-353-2462 or email office@choa.bc.ca.

page 2

No part of this publication may be reproduced without the prior written permission of CHOA

This publication contains general information only and is not intended as legal advice. Use of this publication is at your own risk. CHOA will not be liable to you or any other person for any loss or damage arising from, connected with or relating to the use of this publication or any information contained herein by you or any other person.