
The Common Law of Nuisance:

Strata corporations and all residents of strata corporations in BC are protected by the common law action of 'nuisance'. Nuisance has a legal meaning, and it deals with the use of property of one owner that interferes with a neighboring owner's ability to use and enjoy their property. The law of nuisance attempts to balance competing uses of property, and Courts can intervene when the interference with another owner's use or enjoyment of the premises is unreasonable. Examples of potential interferences include noise, smell and vibration (i.e. from a hot tub).

Strata Property Act

In addition to relying on the common law of nuisance to address complaints of second-hand smoke, strata corporations can also deal with the smoking nuisance as a breach of their bylaws.

Pursuant to the Schedule of Standard Bylaws in the *Strata Property Act*, virtually all strata corporations in BC have bylaws that prohibit behavior that creates a nuisance or hazard to another person or that unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or individual strata lots. This can include smoking, regardless of whether the strata corporation has a non-smoking bylaw in place.

Section 3(1) of the Schedule of Standard Bylaws states:

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,

This Bylaw applies to all strata corporations in BC unless they have filed other bylaws that revises or repeals it. Strata corporations can rely on this section to address complaints of second-hand smoke by enforcing their bylaw. A bylaw that prohibits a 'nuisance' can be used to address a variety of behaviors and situations, such as smoking, loud noise or vibrations. To determine whether a given interference is unreasonable, a number of factors must be considered, including the type of complaint, the frequency and duration of the occurrence, the impact on health and the use and enjoyment of the premises. If the behavior is determined to be a nuisance, the Strata corporation needs to be willing to enforce these bylaws, by dealing appropriately with complaints, including following bylaw enforcement proceedings up to and including seeking relief in Court if necessary.

Failure to enforce the nuisance section of the bylaws may result in an owner bothered by smoke taking the position that the strata corporation has a statutory duty to enforce its bylaws, and that failure to enforce them is unfair to him or her. As a result, the non-smoker could seek an order of the Supreme Court of British Columbia that the strata corporation enforce its bylaws. Section 26 of the *Strata Property Act* supports the concept that a strata council has a positive duty to enforce the strata corporation's bylaws.

Tobacco Control Act:

While there are no provincial laws that regulate smoking in private residences of multi-unit dwellings, BC recently enacted legislation to ban smoking in common areas and entrances of condominium and apartment complexes.

Effective March 31, 2008, pursuant to section 2.3 of BC's newly amended *Tobacco Control Act*, smoking is banned in certain places to which the public is ordinarily invited or permitted access, including:

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- Common areas of apartment buildings, condominiums and dormitories, including elevators, hallways, parking garages, party or entertainment rooms, laundry facilities, lobbies; and
 - Within 3 meters (buffer zones) of public entranceways to apartment buildings, open windows and air intakes.

Note: This legislation does not apply to individual units or balconies in condominium or apartment complexes. It specifically avoids any attempt to regulate smoking in private residences.

Strata corporations and its managers are responsible for enforcing the smoking ban in common areas and entrances of apartment buildings. If the strata corporation is not able to enforce the legislation, they should contact their local Health Authority, and ask for a representative in the tobacco control area. Tobacco Enforcement Officers through the various health authorities are charged with the day-to-day enforcement of BC's tobacco control legislation.

In BC, some municipalities have enacted stronger buffer zone requirements than the province, including Vancouver, Surrey, Richmond and the Capital Regional District. Where municipal bylaws are stricter than provincial legislation, unresolved complaints should be made to the municipal bylaw enforcement department.

Human Rights Code:

The creation and enforcement of a bylaw that limits or prohibits smoking can be supported under the *Human Rights Code*. A demonstrated allergy or sensitivity to second-hand smoke could garner the protection of the Code. While there are no specific cases to date, it is possible that a strata owner could apply to the Human rights Tribunal on the basis that the strata corporation did not take reasonable steps to resolve a problem of second-hand smoke infiltrating the owners unit from a neighboring unit. An owner who suffers from a disability that is exacerbated by second-hand smoke, such as asthma or allergies, could take the position that the strata corporation has a responsibility to limit or ban smoking in order to accommodate the owner's disability. The owner could claim that the strata corporation has a duty to address the smoking as a nuisance under the bylaws, and should commence bylaw enforcement proceedings against the smoking owner.

Based on past decisions, strata corporations may need to make reasonable accommodation for owners with a disability that is caused by or worsened by second-hand smoke. This may include enforcing the existing bylaws already in place, or creating a new bylaw to restrict or ban smoking.

Case Law

Supreme Court case Raith v. Coles [1984] B.C.J. No. 772:

The owners of a strata lot applied for an injunction to stop their downstairs neighbors from smoking cigars. The owners proved that there was frequent and pervasive cigar smoke infiltrating their unit. They tried unsuccessfully to negotiate a solution and mitigate the impact, and had medical evidence that the smoke led to health problems. The Court ultimately found that the cigar smoke was a nuisance and granted the injunction to stop the neighbor from smoking in the strata lot.

The common law of nuisance allows both a strata resident and a strata corporation to seek an order restraining an occupant from smoking.

Popoff v. Krafczyk, [1990] B.C.J. No. 1935 (Q.L.) BC Supreme Court:

The courts of BC have adopted an objective test for nuisance, which applies the standard of how an ordinary reasonable person would view a situation. In this case, the 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 Owners, Strata Plan NW 87 v. Karamanian [1989] B.C.J. No. 629 (Q.L):

Regarding nuisance complaints in strata complexes, the Courts have recognized that in communal living situations, there are additional factors that must be considered when determining whether there is a nuisance. In the Karamanian case, the court found that residents of a strata complex must exhibit more respect and cooperation for each other to ensure that each can enjoy their home to the fullest. The complaining neighbors complained that the vibrations from a Jacuzzi tub interfered with their quiet enjoyment of their home. The court granted the strata corporation's application and ordered that the Jacuzzi only be operated during specific hours of the day. This case illustrates that strata corporations can get an order restraining a resident from creating a nuisance even in cases when there is no evidence of a medical health problem resulting from the behavior.

BC Court of Appeal in Royal Anne Hotel Co. Ltd. V. Ashcroft et al (1979), 8C.C.L.T. 179:

Regarding the law of nuisance, many strata corporations have difficulty determining whether a specific behavior is a nuisance. There is case law that finds that a nuisance is an unreasonable interference, regardless of whether the nuisance arises from intentional acts undertaken for lawful purposes. For instance, an industrial plant that operates lawfully can still cause a nuisance if smoke or noise unreasonably invades the quiet enjoyment of neighboring land owners.

In this case, the court found:

“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? Whereactual 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.”

This case illustrates how the law of nuisance tries to balance the rights of one owner with the right of another to the use and enjoyment of his or her home. Ultimately, the court can intervene when the one owner unreasonably interferes with another owner's use of the premises.