

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Andrushko v. The Owners Strata Plan KAS*
1041 McIntosh Grove,
2015 BCSC 2445

Date: 20151224
Docket: 15807
Registry: Salmon Arm

Between:

Walter Peter Andrushko

Petitioner

And

**The Owners Strata Plan KAS 1041 McIntosh Grove, John Pape,
Joe Lancaster, Deanna Little, Charlene Zappone,
Sharon Charlebois and Linda Beckman**

Respondents

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

The Petitioner: Appeared on his own behalf

Council for the Respondents: Emily Unrau

Place and Date of Hearing: Salmon Arm, B.C.
November 20 2015

Place and Date of Judgment: Salmon Arm, B.C.
December 24, 2015

INTRODUCTION

[1] The petitioner, Walter Peter Andrushko, applies for relief under s. 165 of the *Strata Property Act*, S.B.C. 1998, c. 43 (“SPA”) to compel the respondent The Owners Strata Plan KAS 1041 McIntosh Grove (the “Strata Corporation”) to enforce its bylaw prohibiting smoking on balconies that are “substantially enclosed”.

Mr. Andrushko also seeks orders requiring the Strata Corporation to “remedy the nuisance of second-hand smoke infiltrating adjoining units” and compelling the Strata Corporation to “implement a smoke-free environment until the nuisance of second-hand smoke has been eliminated.” The petitioner also applies for an order requiring the personal respondents to bear the costs of this proceeding.

[2] The petitioner is the owner of a unit in Strata Plan KAS 1041 located in Salmon Arm, British Columbia.

[3] Under s. 3 of the SPA, the respondent Strata Corporation is responsible for managing and maintaining the common property and the common assets of the Strata Corporation for the benefit of the owners.

[4] The respondents, John Pape, Joe Lancaster, Deanna Little, Charlene Zappone, Sharon Charlebois and Linda Beckman were all members of the Strata Council at the time of the events giving rise to this proceeding. Pursuant to s. 4 of the SPA, the Strata Council must exercise and perform the powers and duties of the Strata Corporation.

[5] For their part, the respondents contend that they have taken all reasonable steps to enforce the bylaws, rules and regulations of Strata Plan KAS 1041. The respondents submit that the petitioner has not established that he has experienced any nuisance from second-hand smoke, and deny any breach of duty or bad faith. The respondents say that the Strata Council is willing and able to enforce its bylaws and that the Court's intervention is not required to resolve this dispute.

FACTS

[6] Strata Plan KAS 1041 is an 80-unit strata complex for residents aged 55 and older. The strata complex consists of two three-storey buildings and underground parking facilities.

[7] The petitioner and his wife have occupied their second storey unit since March 2012.

[8] The owner of the third storey unit directly above the petitioner's condominium is a smoker.

[9] Each of the units has a balcony. A door from the living area provides access to the balcony. There are also windows and air-conditioning intakes that permit air to enter the units from the balconies. Under the Strata Corporation's bylaws, the balconies are designated as limited common property to be used exclusively by the owner or resident.

[10] Through much of the time he has occupied his unit, the petitioner has been disturbed by his upstairs neighbour smoking on her balcony. Mr. Andrushko has repeatedly complained to the Strata Council about second-hand smoke interfering with his, and his wife's enjoyment of their property.

[11] Between 2013 and the hearing of this petition, the issue of smoking on balconies became an increasingly divisive and acrimonious source of controversy among the owners of Strata Plan KAS 1041. The petitioner and the owners of at least one other unit complained of second-hand smoke entering their units. As the Strata Council's deliberations over what measures, if any, should be taken in response to the petitioner's complaints continued through 2014 and into 2015, Mr. Andrushko's demands that council enforce a ban on owners smoking on balconies escalated to include a request that council prohibit all smoking in the strata complex.

[12] In March 2013, the Strata Council Rules Committee circulated a draft of the Strata Corporation's proposed, revised bylaws and requested comments from strata unit owners.

[13] On April 3, 2013, Mr. Andrushko responded, proposing that smoking be prohibited on balconies, and that owners who smoked should only be permitted to do so within the confines of their own units. The petitioner asserted that given the proximity of the balconies to each other and to the doors, windows, and air-conditioners of the adjacent units, smoking not only interfered with the owners' right to use and enjoy their respective homes but also presented a health hazard. The bylaws of the Strata Corporation then in force prohibited smoking in any common areas of the building except balconies.

[14] At the Strata Corporation's annual general meeting of July 5, 2013, the owners discussed revisions to the bylaws. Much of the debate focused on whether owners and their guests would be able to smoke on the balconies. The Strata Council expressed concern about balancing the interests of smoking and non-smoking owners.

[15] Before seeking the owners' approval of the revised bylaws, the Council retained a solicitor, Ms. Christy Lovig, to provide advice concerning the bylaw revisions.

[16] At a special general meeting held on November 21, 2013, the Strata Corporation approved the revised bylaws. Of the forty-six owners who voted, only two opposed their adoption.

[17] The bylaws of the Strata Corporation adopted on November 21, 2013 relevant to these proceedings provide:

3(1) An owner, tenant, occupant or visitor must not use the strata lot, the common property or common assets in any way that:

(a) causes a nuisance or hazard to another person,

...

(c) unreasonably interferes with the right of other persons to use and enjoy the common property, common assets or another strata lot, ...

3(7) Smoking is not permitted on any common property of the strata corporation. Notwithstanding this smoking prohibition, smoking is allowed on balconies which are designated as limited common property, provided that the smoker maintains strict compliance with the *Tobacco Control Act* and Regulation, which directs that the smoker must remain a minimum of three (3) meters from the doorway, window or air intake, and the balcony must not be fully or substantially enclosed.

[18] Mr. Andrushko was one of the two owners who voted against the bylaw amendments. He did so after expressing his view that the administration of s. 3(7) might be difficult for Council. When the petitioner suggested the Strata Council obtain further legal advice on the interpretation of the proposed amendment, the Strata Council President, John Pape, informed Mr. Andrushko that the Strata Council had already paid significant funds for a legal opinion and did not intend to spend any more.

[19] On April 2, 2014, the petitioner sent an e-mail to the Strata Council complaining about his upstairs neighbour making noise when she went on her balcony during “quiet time” between 11:00 p.m. and 7:00 a.m. to smoke, and about being disturbed by cigarette smoke from her balcony.

[20] In response, Mr. Dan Ewart, the Strata Manager, wrote to the upstairs owner on April 8, 2014, informing her of Mr. Andrushko’s complaints about smoke and emphasizing that the Strata Corporation’s rule respecting quiet time was in effect and must be observed.

[21] On April 8, 2014, Mr. Andrushko wrote to Council repeating his request for a ban on smoking on the balconies, and that owners only be permitted to smoke inside their strata units. The petitioner also reiterated his position that when the upstairs owner was smoking on her balcony she was doing so within three meters of the air intake to his unit, and that the balconies were substantially enclosed. He reminded Council that in these circumstances bylaw 3(7) prohibited smoking on the balconies, and requested that Council take action to enforce the bylaw.

[22] Mr. Andrushko's letter of April 8, 2014, and similar complaints from another owner, caused Council to seek further advice.

[23] At its meeting of April 22, 2014, the Strata Council noted that the issue of tobacco smoke finding its way into the complaining owners' suites "seems unsolvable aside from preventing other owners from smoking or spending large amounts of Strata dollars to substantially upgrade the venting of the buildings". Council turned to Ms. Lovig for further legal advice.

[24] Ms. Lovig explained to Council that under the *SPA* the Strata Council has the duty to enforce its bylaws and rules and that the Strata Council must fulfil its statutory duty by following the bylaw enforcement procedures set out in s. 135 of the *SPA*.

[25] Council made further attempts to grapple with the petitioner's demands that the bylaws be enforced.

[26] On August 14, 2014, Mr. Andrushko made another complaint about smoke and noise from his upstairs neighbour's balcony. His neighbour responded by complaining that the petitioner was harassing her.

[27] On August 20, 2014, at the request of the Strata Council, Mr. Ewart contacted Mr. Bill Miller, a Strata Advisor with the Condominium Home Owners Association ("CHOA"), to seek advice regarding the dispute between the petitioner and his neighbour. Mr. Miller advised that this was a "personal dispute". He also expressed his opinion that a smoker on an upper balcony was probably more than three meters away from any door or window on a lower balcony, but suggested the Strata Council check the distances.

[28] While the respondents, not unreasonably, looked to CHOA for assistance, Mr. Miller's advice was of little help to the Strata Council in resolving the petitioner's complaint.

[29] On August 21, 2014, the strata manager informed Mr. Andrushko that Council were working to resolve his complaint, as well as a complaint from another owner regarding smoking.

[30] On August 27, 2014, the strata manager informed the petitioner that his complaint would be addressed at the Strata Council meeting of September 16, 2014.

[31] On September 3, 2014, Mr. Andrushko urged the Strata Council to impose a ban on smoking anywhere within the strata complex. Referring to the entry in the minutes of the Strata Council of April 22, 2014 that the tobacco smoke issue “seems unsolvable”, the petitioner asserted that the Strata Corporation appeared to be devoting more energy to the preservation of smoking within the strata complex than to the application and enforcement of the SPA and the bylaws, rules and regulations.

[32] As I have previously noted at the meeting of April 22, 2014, the Strata Council determined that neither a complete ban on smoking within the strata complex nor the expenditure of substantial amounts of strata funds to upgrade the venting of the buildings was a satisfactory solution, and resolved to obtain further legal advice.

[33] At the meeting in September 16, 2014, the Strata Council decided to seek more help on the question of whether there was a three meter separation between smokers on their balconies and the nearest window or door of the complaining owners’ units. The Strata Council requested that an official with the Inland Health Authority responsible for the administration of the *Tobacco Control Act* determine whether or not the separation met the three meter rule. However, that official declined to measure distances on the affected balconies unless ordered to do so by a court.

[34] On October 1, 2014 the Strata Council responded to the petitioner's correspondence of September 3, 2014. The Strata Council pointed out that it represented all owners; that it did not know how it could prevent owners from smoking within their own units; and that its attempt to enlist the assistance of the Interior Health Authority in determining whether or not the three meter rule applied

had failed. At that point, Council thought that there was nothing further it could do to resolve Mr. Andrushko's complaints.

[35] However, after Mr. Andrushko filed and served his petition, Council responded by seeking further legal advice. As a result of that advice, Council issued a notice to owners on June 24, 2015 drawing bylaw 3(7) to the attention of all strata unit owners, requesting compliance and reminding the owners of the Strata Corporation's power to levy fines of up to \$200 for each contravention of a bylaw.

[36] The notice to owners provided in part:

Ms. Lovig states: "The 3 metres should be measured from the entry point to the strata unit from the balcony; to be safe I would measure it from the interior edge of the door frame to the outer edge of the balcony."

Ms. Unrau states: "That the picture provided with Andrushko's Petition shows that the balconies are substantially enclosed so in effect the Bylaw does not allow smoking".

She further states that, as currently drafted, the bylaw effectively prohibits smoking on balconies within the strata complex because the balconies: a) meet the definition of "substantially enclosed" in section 4.2 of the Tobacco Control Regulation by having a roof and being enclosed on more than three out of four sides, and b) are within three metres of both doorways and windows.

...

We have been instructed to bring Bylaw 3 (7) to the attention of all Owners at McIntosh Grove immediately.

[37] On June 30, 2015, Mr. Andrushko made a further complaint to Council concerning his upstairs neighbour smoking on her balcony. The strata manager and members of Council met with the upstairs owner on July 2, 2015. She informed Council that she had been away for an extended time, had only just returned, and had not yet reviewed the notice to owners. However, she promised to refrain from smoking on her balcony. Council warned the owner that smoking on her balcony would result in fines of \$200 for each contravention of the bylaw, and confirmed their warning by written notice to the owner.

[38] Since July 2, 2015, Mr. Andrushko has made no further complaints to the Strata Council.

DISCUSSION AND ANALYSIS

Statutory Framework

[39] Section 119 of the *SPA* provides that the Strata Corporation must have bylaws, and that the bylaws may provide for the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the Strata Corporation.

[40] The provisions of the *SPA* relevant to enforcement of bylaws in the circumstances of this case are as follows:

129 (1) To enforce a bylaw or rule the strata corporation may do one or more of the following:

- (a) impose a fine under section 130;
- (b) remedy a contravention under section 133;
- (c) deny access to a recreational facility under section 134.

(2) Before enforcing a bylaw or rule the strata corporation may give a person a warning or may give the person time to comply with the bylaw or rule.

130 (1) The strata corporation may fine an owner if a bylaw or rule is contravened by

- (a) the owner,

...

132 (1) The strata corporation must set out in its bylaws the maximum amount it may fine an owner or tenant for each contravention of a bylaw or rule.

...

135 (1) The strata corporation must not

- (a) impose a fine against a person,
- (b) require a person to pay the costs of remedying a contravention, or

...

for a contravention of a bylaw or rule unless the strata corporation has

- (d) received a complaint about the contravention,
- (e) given the owner or tenant the particulars of the complaint, in writing, and a reasonable opportunity to answer the complaint, including a hearing if requested by the owner or tenant, and

...

(2) The strata corporation must, as soon as feasible, give notice in writing of a decision on a matter referred to in subsection (1) (a), (b) or (c) to the persons referred to in subsection (1) (e) and (f).

(3) Once a strata corporation has complied with this section in respect of a contravention of a bylaw or rule, it may impose a fine or other penalty for a continuing contravention of that bylaw or rule without further compliance with this section.

[41] By s. 24(1) of the bylaws, the Strata Corporation may fine an owner or tenant a maximum of \$200 for each contravention of a bylaw.

[42] Under s. 135 of the SPA, the Strata Corporation must not impose a fine or other penalty for the contravention of a bylaw unless it has received a complaint, and has provided the owner with written particulars of the complaint and a reasonable opportunity to answer the complaint.

[43] Where the Strata Corporation fails to perform a duty it is required to perform under the SPA, the bylaws or the rules, the court may grant relief under s. 165, which provides:

165 On application of an owner, tenant, mortgagee of a strata lot or interested person, the Supreme Court may do one or more of the following:

- (a) order the strata corporation to perform a duty it is required to perform under this Act, the bylaws or the rules;
- (b) order the strata corporation 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).

[44] Under s. 165, the court has discretion to grant the extraordinary remedy of a mandatory injunction to compel a strata corporation to perform its statutory duties. The court's discretion to intervene in the governance of the affairs of a strata corporation must be exercised judicially, and with restraint. Generally, the court will limit its intervention in strata disputes to circumstances where the Strata Council or administrator is incapable of remedying the problem: *Chorney v. Strata Plan VIS770*, 2011 BCSC 1811 at para. 31. For example, in *Enefer v. Strata Plan No. LMS 1564* (2005), 46 B.C.L.R. 4384 (S.C.), the court intervened under s. 165 where the owners were deadlocked on a matter regarding management of the common property for the

benefit of all owners. Similarly, in *Clarke v. The Owners, Strata Plan VIS770*, 2009 BCSC 1415 at paras. 20, 21, the court granted relief under s. 165 where the Strata Corporation was incapable of fulfilling its duties after the administrator had attempted, and failed to obtain the three-quarters majority vote of the owners required for approval of necessary remedial work.

[45] As a result of Mr. Andrushko's persistent demands that Council enforce bylaw 3(7), the respondents ultimately sought and obtained legal advice from both Ms. Lovig and Ms. Unrau concerning the interpretation of the bylaw and the Strata Council's duty to enforce its bylaws. That advice confirmed that bylaw 3(7) banned smoking on the balconies. As counsel advised, the balconies, which have roofs and walls on three sides, are "substantially enclosed" within the meaning of s. 4.2 of the *Tobacco Control Regulation*, B.C. Reg. 232/2007. After receiving that advice, Council notified all owners of its intention to enforce bylaw 3(7). Council sought and obtained the commitment of the petitioner's upstairs neighbour to refrain from smoking on her balcony, and warned her that she would be fined in the event she contravened the bylaw. Between July 2, 2015 and the hearing of this petition, Council had received no further complaints from the petitioner regarding the upstairs neighbour smoking on her balcony in contravention of bylaw 3(7).

[46] I find that, albeit belatedly, the Strata Council has demonstrated that it is willing and able to investigate complaints, and is capable of taking action to enforce its bylaws.

[47] Here, where there is no outstanding complaint by the petitioner, and where the Strata Council is willing and able to enforce the ban on smoking on balconies, the Court's intervention is not required.

[48] Accordingly, the petitioner's application for an order that the respondent Strata Corporation stop contravening the bylaws and ban smoking on balconies that are substantially enclosed is dismissed.

[49] I turn next to petitioner's application for an order compelling the respondent Strata Corporation to perform its duty under the bylaws to remedy the nuisance of second-hand smoke infiltrating the adjoining units.

[50] Bylaw 3(1)(a) prohibits an owner from using a strata lot common property or common assets in a way that causes a nuisance or hazard to another person.

[51] In *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, [2013] 1 S.C.R. 594, the Supreme Court of Canada defined the elements of the tort of private use at para. 19:

The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable*. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances. This two-part approach found favour with this Court in its most recent discussion of private nuisance and was adopted by the Court of Appeal in this case, at para. 80: [citations omitted].

[52] In *Chorney*, at para. 11, the Court observed that:

... cigarette smoke can constitute a nuisance if its effect is such that a reasonable person's use and enjoyment of their property would be negatively affected by it. Particular or unique sensitivities of a particular owner should not be taken into account in such an analysis ...

[53] In *Chorney*, unlike the case at bar, the petitioners had provided evidence that the structure of the building permitted cigarette smoke to penetrate between units and to infiltrate both common areas and neighbouring units.

[54] Here, each of the petitioner's complaints concerns smoke entering his unit from the balcony above, rather than by infiltration between the interior spaces of neighbouring units.

[55] The respondent has not established that he has suffered any significant interference with his use and enjoyment of his property as a result of any of his neighbours smoking within the confines of their own strata units.

[56] Nor, as counsel for the respondent submits, has Mr. Andrushko established that any second-hand smoke has entered his strata unit as a result of either the upstairs owner, or any other owners, smoking inside their units.

[57] In short, on the evidence adduced on this application, the petitioner has not established that he has suffered any substantial or unreasonable interference with his enjoyment of his property as a result of other owners smoking within the confines of their own units.

[58] Accordingly, Mr. Andrushko's application for an order requiring the Strata Corporation to remedy the nuisance of second-hand smoke infiltrating adjoining units is dismissed.

[59] The petitioner also seeks an order requiring the Strata Corporation to implement a smoke-free environment until the nuisance of second-hand smoke has been eliminated. The application for that relief is also dismissed.

[60] The bylaws of the Strata Corporation do not ban smoking by owners within their own strata units. In order for Council to impose a ban on smoking throughout the strata complex, the Strata Corporation would have to adopt an amendment to the bylaw approved by a three-quarter vote of the owners at an annual or special general meeting, as required by s. 128 of the *SPA*.

[61] This Court will not order the Strata Corporation to implement a ban on smoking within the strata complex that would exceed the restrictions on smoking under the Strata Corporation's bylaw and would prohibit smoking by owners within the privacy of their own units where the petitioner has not shown that such smoking constitutes a nuisance.

[62] Finally, the petitioner contends that the respondent Strata Council members acted in bad faith in failing to perform their duty to enforce the bylaws, and should therefore bear the costs of this proceeding.

[63] In *McIntosh Estates v. City of Surrey et al*, 2000 BCSC 128 at para. 46, the court adopted the following definition of “bad faith” from *Black’s Law Dictionary*, Sixth Edition, at p. 139:

The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Term "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity, it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will...

[64] The members of the Strata Council were under a duty to conduct the affairs of the Strata Corporation in the best interests of all of the owners. They were volunteers confronted with the difficult task of attempting to find a balance between the interests of the petitioner, and at least one other owner, whose strongly held views regarding cigarette smoke and its impact on their enjoyment of their property clashed with the interests of other owners who opposed any restriction on smoking within the strata complex.

[65] The Strata Council considered the petitioner’s comments on the proposed bylaw revisions before their adoption. The members of the Strata Council endeavoured to respond to Mr. Andrushko’s complaints concerning smoke emanating from the upstairs owner’s balcony. Until June 2015, they did so without a clear understanding of the interpretation of bylaw 3(7).

[66] While the Strata Council may be faulted for not having obtained comprehensive legal advice concerning the interpretation and application of bylaw 3(7) at the time of its adoption, the respondents ultimately sought and acted upon such advice. The Strata Council also sought advice from the strata advisor and attempted to obtain expert guidance from the Interior Health Authority on how the

three meter rule applied to balconies in the strata complex. I find that the Strata Council's delay in the enforcement of bylaw 3(7) was the result of their confusion regarding the interpretation and application of the bylaw, rather than any dishonesty or malice on their part.

[67] Mr. Andrushko referred to the fact that at the Strata Corporation's annual general meeting of July 21, 2015 the respondent Joe Lancaster explained that he had resigned from Strata Council because he could not enforce a bylaw with which he disagreed. The minutes record that Mr. Lancaster went on to state that while most of the owners are not smokers, they would want family members or friends who smoked to be able to do so on their balconies rather than inside their residences. The petitioner invited the Court to infer that Mr. Lancaster was biased, and that the Strata Council's delay in addressing his complaints was attributable to bad faith on the part of Mr. Lancaster and any other members of the Strata Council who were smokers. The fact that Mr. Lancaster opposed a ban on smoking on the balconies does not equate to bad faith. The petitioner has adduced no evidence to show that the Strata Council acted deceitfully or with an intention to mislead or deceive him.

[68] I am satisfied that members of Council were struggling to find a solution that would serve the best interests of all the owners. At the very worst, their delay in acting on the petitioner's complaints may be characterized as involving poor judgment at times, together with confusion concerning both the interpretation of bylaw 3(7), and their duties for enforcement of the bylaw. However, all of that falls short of a dishonest purpose or intention to mislead or harm the petitioner, or any other owner. In short, the petitioner has not established that the individual respondents acted in bad faith.

[69] As a result, the petition is dismissed.

[70] Costs usually follow the event. However here, I am satisfied that it was only as a result of the petitioner bringing these proceedings that the Strata Council sought and obtained the advice they required in order to fully appreciate their duties

under the bylaw. Accordingly, the petitioner and the Strata Corporation will each bear their own costs of this proceeding.

“PEARLMAN J.”