

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan NW 1815 v.
Aradi,*
2016 BCSC 105

Date: 20160125
Docket: S157175
Registry: Vancouver

Between:

The Owners, Strata Plan NW 1815

Petitioner

And

Paul Aradi

Respondent

Before: The Honourable Madam Justice Harris

In Chambers

Reasons for Judgment

Counsel for Petitioner

D.P. Dahlgren

Counsel for Respondent:

P. Roxburgh

Place and Date of Hearing:

Vancouver, B.C.
January 12, 2016

Place and Date of Judgment:

Vancouver, B.C.
January 25, 2016

Overview

[1] The present case arises out of the petitioner’s bylaw prohibiting smoking in strata units and common areas. The strata corporation has fined the respondent on multiple occasions for smoking in his unit contrary to the bylaw. The strata corporation and certain of its residents believe that the respondent’s smoking is negatively affecting their health and the use and enjoyment of their property.

[2] The petitioner seeks an order that the respondent immediately cease and desist from contravening the bylaw pursuant to s. 173 of the *Strata Property Act*, S.B.C. 1998, c. 43 (the “*Act*”), as well as a declaration confirming that he is in contravention of the bylaw. The petitioner submits that the Court should exercise its discretion to grant such a remedy where there is a bylaw in effect which prohibits smoking in strata units and common areas; where the respondent has breached the bylaw repeatedly over the last two years; where the fines which were imposed for breaching the bylaw have not brought a change in behaviour; and where there is no reasonable alternative available to the petitioner to enforce its bylaw.

[3] The respondent opposes the injunctive relief sought on the grounds that he has a disability resulting from his addiction to cigarettes and from his limited mobility, which affects his ability to smoke outside of his unit. He has brought a human rights complaint that the strata corporation should accommodate his disability. The respondent anticipates that the hearing of his human rights complaint will be in July of 2016. The respondent submits that no order should be made under s. 173 until the Human Rights Tribunal has determined his complaint.

[4] The respondent has also challenged the fines which were imposed by the strata council in a provincial court action which the strata corporation has brought against him. No trial date has been set in relation to that action.

Background

[5] The respondent is a 70 year-old retired gentleman who is also a veteran of the Canadian Forces. He has been a “life-long smoker”. He purchased his strata unit

in 2002. At the time he purchased the unit, there were no restrictions with respect to smoking in his unit.

[6] On March 31, 2009, the strata corporation owners passed a bylaw which prohibited smoking inside individual units, including the respondent's unit.

8.1 Municipal Bylaws and Strata Bylaws do not permit smoking in any areas of the building including suites, hallways, lobbies, elevator, laundry room, or stairwells, as they are designated non-smoking.

[7] The respondent has acknowledged that he has smoked in his unit. The 2009 bylaws was not enforced against the respondent until December of 2013.

[8] Subsequently, on April 15, 2014, the strata owners revised bylaw 8.1. Section 33(1) provides that:

Smoking

33(1) Smoking is prohibited

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

[9] The bylaws were filed in the Land Title Office. It is not disputed that both bylaws prohibit smoking in an owner's strata units as well as in common areas. I will refer to the bylaws as the "no smoking bylaw".

[10] Commencing in approximately December of 2013, there were complaints about the respondent's smoking affecting other strata residents. The respondent was sent letters outlining the days and times that he was alleged to have been smoking within his unit contrary to the bylaw. The complaints concerning the respondent's smoking continued until this petition was filed on August 31, 2015.

[11] After being informed of the complaints alleging a contravention of the bylaw, the respondent was advised of his opportunity to file a written response or be heard at a council meeting.

[12] The respondent acknowledged that he did not generally file a response or seek a hearing with the strata corporation after receiving notices of bylaw violations, except on a couple of occasions. On November 17, 2014, he filed a short hand written response in which he asserted that the bylaw was discriminatory in creating two classes of citizens, smokers and non-smokers, and that the strata corporation was trying to get him to move out because he had complained about certain strata council bills. On January 22, 2015, the strata corporation received a brief note in which the respondent stated he was not in his unit at the time of an alleged violation referenced in a January 1, 2015 letter to him. The respondent has also asserted that the bylaw did not apply to him as there was not a prohibition against smoking in his unit when he came to live at the strata complex.

[13] The strata corporation levied fines against the respondent for his violations of the no smoking bylaw for the period from December 2013 to August 2015. The fines, totalling \$2,300, have not been paid by the respondent.

[14] The strata corporation filed a number of affidavits in support of the petition. Its secretary and treasurer, Mr. Pachal, deposed that the strata corporation is bringing this proceeding because the respondent has been contravening the bylaw by smoking cigarettes in his unit for at least two years and that, despite being fined for ongoing infractions, the respondent has refused to stop smoking in his unit.

[15] Mr. Pachal asserted that the respondent was causing a nuisance and disturbance for other owners. He deposed the strata corporation was and is seeking to protect the health and security of owners and their units and the resale value of the units by enforcing the no smoking bylaw. He stated that he was personally aware of at least five owners making complaints or expressing concerns about the respondent's smoking in his unit. He expressed concerns as a strata owner about the health risk of second hand smoke, the fire risk associated with smoking, the

smell of cigarettes diminishing the use and enjoyment of strata lots, the possible negative effect on property values and the prospect of other owners following the respondent's lead by ignoring the bylaw.

[16] Mr. Pachal denied that the strata corporation has discriminated against the respondent. He deposed that the respondent is capable of walking outside his unit without assistance in order to smoke and referred to a video aired by CTV News on September 7, 2015 that showed the respondent smoking a cigarette on the public sidewalk outside the strata complex. He noted that the public sidewalk is located 31 meters from the respondent's unit.

[17] The strata corporation asserts that the respondent has been smoking in his unit with his window open and that the smell of cigarette smoke has drifted into other units. One of the respondent's neighbours, Mr. Tait, deposed that he observed the window of the respondent's unit open at the time he smelled smoke coming from the respondent's unit and expressed his concern that the respondent's smoking negatively impacted on his wife's health and his own health. Mr. Tait stated that he does not want to breath second-hand smoke when in his unit or on his balcony. He also stated that he is concerned that the respondent might fall asleep while smoking, causing a fire hazard.

[18] Ms. St. Pierre, who owns two units which are above the respondent's unit, deposed to her concerns about the value of her units and her ability to rent out the units, as well as a concern that other owners may ignore the bylaw if it is not consistently enforced. Ms. St. Pierre stated that she has represented to tenants that the strata complex is a non-smoking building.

[19] After being found to have contravened the no smoking bylaw on multiple occasions, counsel for the strata corporation wrote to the respondent, by letter dated December 22, 2014, demanding he cease and desist from violating the no smoking bylaw. The strata corporation confirmed that it considered the respondent's smoking was in violation of s. 33(1) of the bylaws and was creating a nuisance and hazard to other residents; was unreasonably interfering with their rights, and damaging to the

strata corporation and the health and property of other residents. The strata corporation advised the respondent that it would pursue its available legal remedies, including fines, enforcement of payment of fines, and an application for injunction under s. 173 of the *Act* restraining further smoking violations and, ultimately, an order for sale of his strata unit.

[20] The strata corporation commenced a provincial court action on January 14, 2015 to enforce the payment of fines and subsequently filed this petition on August 31, 2015. The strata corporation was authorized to bring the petition by resolution at its April 15, 2015 Annual General Meeting.

[21] In the respondent's affidavit in this proceeding, he deposed that he has smoked "from time to time" in his own unit but stated that he smoked with the windows closed "in order to prevent the smell of smoke bothering my neighbours". He stated that while he had "made efforts I find myself physically unable to go outside to smoke [due] to mobility issues".

[22] He further deposed that he had smoked in his unit for a period of over 4 years without any issue. He denied smoking as often as the strata corporation alleged and stated that it was his belief that he is being targeted for complaining about the strata council and discriminated against on account of his physical addiction to cigarettes and for his lack of mobility, due to his inability to walk outside to smoke on a regular basis.

[23] The respondent attached a report of an occupational therapist, Ms. Lane, to his affidavit, which described the respondent's physical limitations, including the respondent's reports "that he has developed difficulties walking and standing due to pain in his left leg and low back". Ms. Lane stated that the respondent "has demonstrated reduced endurance and abilities to walk, stand and complete stairs which are demands required to mobilize in and out of the complex to have a cigarette on the city side walk". I note there is no affidavit directly from Ms. Lane.

Issues

[24] The issue before me is not the validity of the petitioner’s no smoking bylaw. The respondent has not challenged its validity.

[25] The respondent has elected, through his human rights complaint, to seek an accommodation in respect of the application of the bylaw on account of his addiction and limited mobility. In that regard, I note that the respondent has not requested an adjournment of the petitioner’s application under s. 173 of the *Act* pending the hearing of the human rights complaint. Rather, the respondent has asked me to take into account the fact that the petitioner has filed a human rights complaint as a consideration which bears upon the exercise of my discretion under s. 173. I have, therefore, approached the case on this basis.

[26] Accordingly, the principal issues I must determine are whether the respondent has breached the bylaw and whether this is a proper case for the exercise of my authority under s. 173 of the *Act* to declare that the respondent has breached the no smoking bylaw and/or to order the respondent to cease and desist from contravening the bylaw.

Statutory Framework

[27] It is not disputed that the scheme of the *Act* is that a strata corporation is to be governed by the bylaws it establishes. The powers and duties of the strata corporation are to be exercised by the elected strata council in accordance with its bylaws, as well as the *Act* and regulations. Within this statutory scheme, the strata council has an obligation to perform the duties of the strata corporation, including the enforcement of bylaws.

Strata corporation functions through council

4 The powers and duties of the strata corporation must be exercised and performed by a council, unless this Act, the regulations or the bylaws provide otherwise.

...

Council exercises powers and performs duties of strata corporation

26 Subject to this Act, the regulations and the bylaws, the council must exercise the powers and perform the duties of the strata corporation, including the enforcement of bylaws and rules.

[28] Under the *Act*, where a strata owner does not comply with the bylaws, the strata corporation is authorized to fine the owner, remedy the contravention, or deny access to a recreational facility.

Enforcement options

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.

[29] In the event that the imposition of a fine does not cause an owner to comply with the bylaws, the strata corporation is entitled to seek an order of the court under s. 173(1) that the owner or other person perform a duty he or she is required to perform under the bylaw and/or that the owner or other person stop contravening the bylaws.

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).

Position of the Parties

[30] The petitioner submits that an order of the court under s. 173 is justified in light of the respondent's repeated violations of the no smoking bylaw. The petitioner refers to the evidence that the respondent has continued to smoke in his unit despite notices of violation and fines being imposed for violating the bylaw. It also refers to the evidence that smoke from the respondent's unit is entering neighbouring units and causing health and safety concerns, as well as concerns related to the residents' enjoyment of their property and the value of the units.

[31] The petitioner observes that a strata corporation has an obligation to enforce its bylaws and refers to decisions of the Human Rights Tribunal which have found strata corporations liable for failing to enforce bylaws, including no smoking bylaws, for example, *McDaniel and McDaniel v. Strata Plan LMS 1657 (No. 2)*, 2012 BCHRT 167. The petitioner contends that the respondent does not have the right to ignore the bylaw and the rights of other owners, especially where his actions create a nuisance, pose a health and safety risk and may adversely affect property values. The petitioner emphasizes that the scheme of the *Act* contemplates that strata corporations will enforce their bylaws and thereby ensure the proper functioning of the strata complex.

[32] As noted above, the respondent opposes injunctive relief and submits that the Court should apply the factors established in *R.J.R.- Macdonald Inc. v. Canada*

(*Attorney General*), [1994] 1 S.C.R. 311 in exercising its discretion under s. 173 of the *Act*, that is, whether there is a serious issue to be determined; whether irreparable harm will result if the relief is not granted; and whether the balance of convenience, taking into account the public interest, favours retaining the status quo until the court has disposed of the legal issues.

[33] As to whether there is a serious issue to be determined, the respondent submits that there has been no determination as to whether or not the fines claimed by the petitioner will be enforced in the provincial court action because, although he has admitted to smoking from time to time, he has not admitted to the times or frequencies alleged in the provincial court action. Further, the respondent is actively seeking to enforce his rights under the *Human Rights Code*, R.S.B.C. 1996, c. 210, before the Human Rights Tribunal.

[34] In respect of irreparable harm, the respondent contends that the petitioner's actual motive is to force the sale of the respondent's unit. The respondent suggests that this would be facilitated by an order of the Court under s.173 of the *Act*.

[35] In terms of the balance of convenience, the respondent submits that a review of the evidence demonstrates that the motivation behind the petitioner's action is ideological, nor situational. He submits that there has been an exaggerated depiction of the impact of the respondent's smoking, which is exemplified by the lack of complaints for four years after the no smoking bylaw was first enacted in 2009. Accordingly, the petitioner submits that the balance of convenience favours not granting the order sought and allowing the respondent to have his hearing before the Human Rights Tribunal. The respondent says that he will not contest a s. 173 order in the event that he is not successful before the Tribunal.

[36] The petitioner responds by noting that the criteria for injunctive relief, as set out in the *R.J.R. - Macdonald* case have no application to s. 173 of the *Act* - which is a statutory remedy available to a strata corporation to enforce its bylaws. A strata corporation should not have to establish irreparable harm in order to enforce its bylaws through the mechanisms established under the *Act*. The petitioner notes that

certain bylaws may pertain to rather innocuous matters such as the use of barbeques on patios but are nevertheless entitled to be enforced without having to meet the irreparable harm element of the test.

Expert Reports

[37] Both parties have filed “expert” reports. The petitioner relies on an affidavit from a Dr. Kreisman, who is an endocrinologist. The respondent objects to the report on the basis that it does not comply with Rule 11-2 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, as it does not contain a statement confirming that he is aware of his duties as an expert and on the basis that he is an advocate rather than an expert. The respondent also questions Dr. Kreisman’s qualifications to give expert evidence in relation to the impact of second-hand smoke or the measures which can be taken to address an addiction to cigarettes. Dr. Kreisman’s affidavit responds to the claim of the respondent that he is addicted to cigarettes. Dr. Kreisman stated:

3. It is my understanding that Mr. Aradi has stated that he is unable to stop smoking in his strata unit because he is addicted to cigarettes. However, this statement is not medically correct. His addiction is actually not to cigarettes, but to the chemical nicotine. Therefore, while he could go outside and continue smoking cigarettes, his failure to do so does not mean that his only other alternative is to satisfy his addiction via smoking cigarettes indoors. He could easily satisfy his nicotine addiction in his own unit by using Nicotine Replacement Therapy. Multiple options of such are available today including the patch, gum, and inhalers. Furthermore they are even all provided free of charge by British Columbia’s government.

Dr. Kreisman also referred to certain research studies on the particular risks of second-hand smoke to the health of people living in apartments.

[38] The respondent relies on the report of an industrial hygiene technologist, Mr. Glassco, who specializes in the assessment of indoor air quality and providing mitigation solutions. He responded to Dr. Kreisman’s report and also reported on the presence of toxins in the area of the unit, what could be done to minimize the impact of any cigarette smoke escaping from the unit, and whether, if cigarette smoke was escaping, it was at a safe level.

[39] Mr. Glassco questioned Dr. Kreisman's conclusion that second hand smoke (which he refers to as "environmental tobacco smoke" or "ETS") was escaping from the respondent's unit, suggesting that Dr. Kreisman's reference to owners being "constantly subjected to second hand smoke" was over-stated and observing that the ground level of the strata complex contains a parking lot which could be the source of gases and vapours. In his opinion any release of ETS could be mitigated by air sealing between units; replacing the bathroom exhaust; installing an air cleaning device; and replacing the carpet - which he states should reduce the amount of ETS affecting other units by 30%.

[40] The petitioner questions the evidentiary basis for Mr. Glassco's opinion that the measures he recommends would result in a 30% reduction in ETS and notes that Mr. Glassco concedes that there is no feasible method of quantifying any improvement in the ETS in this situation. Further, he notes that Mr. Glassco does not dispute the studies referred to by Dr. Kreisman that second hand smoke migrates between multiple dwelling units.

[41] I did not find either report to be helpful. Dr. Kreisman's report, as the respondent noted, does not comply with the *Rules* for expert reports and, more significantly, I agree with the respondent that it is not apparent from his curricula vitae that Dr. Kreisman has the qualifications or experience to provide opinion evidence as an expert on addictions to cigarettes generally or as they relate to the respondent or on the impact of second-hand smoke in apartment buildings. I note that Dr. Kreisman himself describes his efforts in reducing second-hand smoke exposure as "advocacy".

[42] Not dissimilarly, I note that Mr. Glassco's educational qualifications and experience are not well described in his report. Further, the usefulness of his opinion is diminished by his conclusion that air sampling for ETS in the respondent's unit is not feasible. Further, while Mr. Glassco questions the number of complaints about the respondent's smoking, in my view, he was not in a position to assess their validity, particularly given the respondent's admission that he does from time to time

smoke in his unit. Additionally, his opinion, based upon one technical paper, that there are mitigating measures which could be taken to reduce by 30% the effect of any ETS escaping from the respondent's unit must be considered together with Mr. Glassco's acknowledgement that he could provide no "solid quantification" of how much cigarette smoke will be prevented from escaping the unit if the recommendations are implemented.

Discussion

[43] Bylaws of a strata corporation are established to define how property owners are to live in common. As stated by the Court of Appeal in *The Owners Strata Plan LMS 2768 v. Jordison*, 2013 BCCA 484 at para. 25, the old adage that "a man's home is his castle" is subordinated by the exigencies of modern living in a condominium setting. Living in a condominium necessarily involves a surrender of some degree of proprietary independence and owners are subject to the collective's bylaws and rules. At the same time, owners have the benefit of these bylaws and rules which provide a measure of control over their environment; Bruce H. Ziff, *Principles of Property Law*, 5th ed. (Toronto: Carswell, 2010) at 366.

[44] In this case, the owners of the strata corporation have established a no smoking bylaw which prohibits smoking in units and in common areas. As noted above, it is not disputed that the owners were entitled to enact such a bylaw.

[45] In determining whether to grant the relief sought by the strata corporation, I must first consider whether the respondent has violated the no smoking bylaw. If I find that the respondent has violated the no smoking bylaw, I must then determine whether this is an appropriate case for me to exercise my discretion under s. 173 of the *Act*.

Has the respondent violated the no smoking bylaw?

[46] I am satisfied on the evidence before me that the respondent has violated this bylaw and these violations have continued despite warnings and fines. To his credit, the respondent does not dispute that he has smoked in his unit. While the

respondent challenges the frequency of the violations, except in a couple of instances, he has not challenged the notices of bylaw violation by seeking an opportunity to be heard by the strata council, as contemplated by the *Act*.

[47] There were numerous notices of bylaw violation and fines issued against the respondent during the period from December 2013 until August of 2015, including for smoking in his unit in December 2013, January 2014, February 2014, March 2014, April 2014, May 2014, June 2014, November 2014, March 2015, April 2015, May 2015, June 2015, and August 2015. The bylaw violation notices particularize the complaints against the respondent and set out the days and times he was alleged to have smoked in his unit.

[48] The respondent, in his affidavit, questions the motives of the strata corporation and suggests that he is being targeted by the strata corporation because he “dared to question their financial practices” at a meeting that occurred before the “harassment about me smoking started”. However, he gives no further explanation for his belief. This bare assertion is not sufficient for me to conclude that the complaints about the respondent’s smoking were fabricated or did not reflect genuine concerns about the impact of second-hand smoke on their health, property values, and use and enjoyment of their units - particularly given the respondent’s acknowledgement that he is addicted to cigarettes and does smoke in his unit “from time to time”. In that regard, I infer from the respondent’s evidence that he closes his window when he smokes, so as not to bother the neighbours, that the respondent recognizes, to some extent, the validity of concerns about his smoking.

[49] I accept the evidence of Mr. Tait and Ms. St. Pierre, who have units nearby the respondent, that they smelled cigarette smoke coming from the respondent’s unit. At the time of their depositions Ms. St. Pierre identified herself as the president of the strata council. It was not suggested that Mr. Tait was on the strata council.

[50] The evidence of Mr. Tait, whose balcony is approximately 8 feet from the respondent’s window, was that he routinely smelled cigarette smoke drifting into this

unit from the open window of the respondent and that he brought his concerns about this to the attention of the strata council.

[51] The evidence of Ms. St. Pierre was that she has received many complaints from owners over the past two years about the respondent smoking in his unit and that she has personally smelled or noticed cigarette smoke coming from his unit. This is consistent with the notices of bylaw violations sent to the respondent. Although the respondent suggests that her evidence should be discounted because she was not living in the units, I accept that she received complaints in the course of the duties as president of the strata council and that, as an owner of two units located above the respondent's unit, she was in a position to identify cigarette smoke coming from the vicinity of the respondent's unit.

[52] I also accept the evidence of Mr. Pachal in relation to the strata council issuing bylaw violation notices to the respondent from December of 2013 to August of 2015; subsequently fining the respondent for violating the no smoking bylaw; and the respondent's refusal to comply with the bylaw - despite the notices of violation, fines and the formal demand letter.

[53] While the respondent disputes the frequency of the reports of his smoking, I note that in his response to the provincial court action he claims, among other things, that he "was fined for the same alleged infraction numerous times of the same days". He does not assert that he was not smoking at all on those days. In any event, as noted above, the respondent does not deny he has smoked in his unit. The thrust of his human rights complaint is that he should be accommodated by the strata corporation as he is not physically able to regularly go outside the building to smoke.

[54] Accordingly, having considered all of the evidence before me, including the admission of the respondent that he has smoked in his unit, the observations of other owners, and the bylaw violation notices and fines issued to the respondent for smoking in his unit, I conclude that the respondent has repeatedly violated the no smoking bylaw.

Is this an appropriate case for the exercise of judicial discretion?

The test for granting relief under s. 173 of the Act

[55] In considering whether to exercise my discretion to grant the relief sought by the petitioner under s.173 of the *Act*, the respondent asserts that I should apply the considerations established by the Supreme Court of Canada in *R.J.R. - Macdonald*. He provided no authority for the application of this test in the exercise of the court's discretion under s. 173.

[56] I note that in the cases of *The Owners Strata Plan LMS2768 v. Jordison*, 2012 BCSC 31, rev'd in part 2012 BCCA 303, and *The Owners Strata Plan LMS 2768 v. Jordison*, 2013 BCSC 487, aff'd 2013 BCCA 484, neither this Court nor the Court of Appeal referred to the *R.J.R.- Macdonald* case or suggested such an analysis be used. However, Mr. Justice Hall did confirm that "the language contained in ss. 173(a) and (b) empowers a court to order mandatory or prohibitory relief of an injunctive nature".

[57] While I am not persuaded that *the R.J.R.- Macdonald* test is directly applicable to s. 173 of the *Act*, it is well-established that the court's discretion must be exercised judiciously - having regard to the evidence, the legislative scheme and the applicable case law. In that regard, Madam Justice Fitzpatrick in *The Owners, Strata Plan VIS114 v. John Doe*, 2015 BCSC 13 considered the exercise of discretion under s. 173(2) of the *Act*:

[135] Section 173(2) is a new tool available to strata corporations to seek court intervention in appropriate circumstances. I would not, however, expect that court intervention would be appropriate simply because there is a dispute. Clearly, the test under s. 173(2) must be met before the court's discretion can be exercised. Importantly, there must be issues of safety or in the event of loss or damage, that loss or damage must be "significant." Further, the court's discretion is only to be exercised in appropriate circumstances and in accordance with the overall objectives in the Act.

[Emphasis added]

[58] Mr. Justice Cullen, as he then was, in *The Owners v. Grabarczyk*, 2006 BCSC 1960, affirmed the significance of the authority of a strata corporation to seek a court order where there are continuing violations of the bylaws. In that case, the

learned judge rejected the respondent's suggestion that the delay of the strata corporation in bringing the proceedings and the improvement in the noise situation should persuade him not to exercise his discretion to make an order under s. 173. He noted the many warnings the respondent had received and the duty of the court to protect the rights of others under the *Act* and bylaws.

[59] Further, in *Abdoh v. The Owners of Strata Plan KAS 2003*, 2014 BCCA 270, the Court of Appeal reviewed the decision of the chambers judge not to exercise its discretion under s. 165 of the *Act*. I note that s. 165 is similar in its wording to s. 173, although it affords a remedy to strata owners as opposed to the strata corporation. On appeal Mr. Justice Willcock commented on the considerations applied by the chambers judge:

[19] In my view, the judge did not err in concluding that the overriding responsibility of Strata Council members to act honestly and in good faith with a view to the best interests of the Strata Corporation, and to exercise the care, diligence, and skill of a reasonably prudent person in comparable circumstances, must inform the obligation to see that the Strata Corporation is doing what it is obliged by law to do.

[20] In determining whether to come to the Abdohs' aid, the judge referred to the scheme for reconciling individual and collective rights in the *Strata Property Act*. He considered:

- a) the number of owners seeking relief;
- b) whether the order sought was in the best interests of the Strata Corporation; and
- c) whether inaction would unfairly prejudice the applicants.

[21] In my opinion, these are all appropriate considerations.

[22] The judge properly concluded that the contravention of the *Strata Property Act* or by-laws, if there was one, was of a trifling nature; the Strata Corporation therefore had no duty to demand removal of the Cooling Equipment or to take action to have it removed.

[Emphasis added]

[60] 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.

Application of the law to this case

[61] In this case, I am satisfied that the strata corporation acted in good faith in seeking to enforce the no smoking bylaw. Even accepting the respondent's suggestion there were a relatively small number of owners complaining about the respondent's smoking, the evidence of concern was expressed by owners who had nearby units and who attested to what they believed to be the negative impact of the respondent's smoking.

[62] In any event, the strata corporation had an interest in enforcing its bylaw. As noted above, the statutory scheme contemplates that strata bylaws will be consistently enforced. While the strata council has some discretion under the *Act* not to require strict enforcement, that discretion is limited, *Abdoh, supra*, and *The Owners, Strata Plan LMS 3259 v. Sze Hang Holdings Inc.*, 2016 BCSC 32.

[63] I have also considered the circumstances of the respondent, who is a long term resident of the strata complex. In particular, I have considered the respondent's contention that I should not make an order under s. 173 until he has an opportunity to proceed with his human rights complaint that he has been discriminated against on the basis of his addiction and mobility limitations.

[64] I am cognizant of the special status of human rights legislation. Section 4 of the *Human Rights Code* provides that it has precedence over other provincial legislation in the event of a conflict. However, as things currently stand, the no smoking bylaw is valid and the strata corporation and other residents, as noted above, have a reasonable expectation that it will be consistently enforced. In that regard, I was not referred to any decision of the Human Rights Tribunal which suggested that a strata owner or resident should be accommodated by allowing him or her to smoke in a strata unit where a no smoking bylaw is in place.

[65] While it is anticipated that the hearing before the Human Rights Tribunal will be held in July of 2016, the hearing date has not yet been scheduled and further time beyond the hearing date will likely be required for the Tribunal to make a decision. Even if a decision were rendered in July, that would be approximately 6 months away from now, which is a significant period for those owners who have expressed concerns about the smell of cigarettes and the effects of second-hand smoke on their health and the use and enjoyment of their property. I reject the respondent's contention that their concerns are exaggerated or ideologically based.

[66] Additionally, I note that the respondent did not file his human rights complaint until February of 2015, more than one year after he was first fined for violating the no smoking bylaw. Indeed, he did not bring the human rights complaint until after the petitioner sought to enforce the fines which had been imposed in provincial court. The respondent's delay in bringing his human rights complaint is a factor which weighs against my deferring the making of the order requested.

[67] While I accept that the respondent may have an addiction to cigarette smoking and has limitations on his mobility in terms of walking and standing, I must consider the respondent's wish to be able to smoke within his unit in the context of the scheme of the *Act* which includes, as noted above, the duty on the strata corporation to enforce the bylaws and the rights of other owners to enjoy their units without being exposed to nuisances such as smoking in areas prohibited under the bylaw.

[68] By the respondent's own report and the photographs from the CTV News video, the respondent has been able to comply with the no smoking bylaw by walking the relatively short distance from his unit to the public sidewalk, albeit with some difficulty. Further, it is not disputed that he is also able to drive his car, which I conclude would allow him to drive to a location where smoking is permitted.

[69] In my view, it is significant that the report of his occupational therapist described his functional limitations but did not address what measures or devices may be available to assist him with his mobility. There was also no report submitted

by the respondent in respect of his addiction to cigarettes. In the absence of such evidence, and having regard to the rights of the strata corporation and other owners, I am not prepared to decline the relief sought by the petitioner where to do so would have the effect of allowing the respondent to continue to disregard the no smoking bylaw for an extended period.

[70] Therefore, I conclude that the petitioner is entitled, pursuant to s. 173 of the *Strata Property Act*, to a declaration that the respondent has contravened the bylaws of the strata corporation by smoking cigarettes in his unit, strata lot 12, also known as suite #114. I order that the respondent immediately cease and desist from contravening the bylaws of the strata corporation by smoking cigarettes within his unit.

[71] The parties may address the matter of costs if they are unable to agree.

“Madam Justice Harris”