

DON'T LET YOUR CRT CASE GO UP IN SMOKE – MAJIJUANA CASES

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The Civil Resolution Tribunal (“CRT”) has decided several cases relating to smoking marijuana and bylaw enforcement. The legalization of marijuana in Canada is likely to exacerbate tensions between residents in strata corporations, who will look to their council to decide, through bylaw enforcement, which behaviours are acceptable in the complex and which are not. While the facts of the CRT cases reviewed in this article involve smoking marijuana, this article focuses on tips for being successful at the CRT for any bylaw enforcement matter.

Whether you are acting for the strata corporation or acting for yourself as an owner or tenant, it is important to follow the correct procedure in order to be successful at the CRT. It is also important to know that following the correct procedure is a necessary, but not a sufficient condition to be successful. In other words, the facts, or details of what happened, matter to the tribunal as well. Lawyers use the term “factual matrix” when they want to emphasize that the facts in a case are detailed and important, and they often are in strata cases.

I note that the term “marijuana” is used by the CRT as opposed to “cannabis” which is the term commonly used in legislation. I expect that the word “marijuana” is being used by the CRT because its goal is to use plain language. For the purpose of this article, I choose to use the terms interchangeably.

Some councils are addressing complaints about marijuana smoking interfering with other residents by enforcing their nuisance bylaws. Other strata corporations have specific bylaws that prohibit smoking altogether in the complex, or limit it to certain areas, and also have nuisance bylaws to protect residents from second hand smoke. Nuisance bylaws are “catch all” bylaws that address the unreasonable interference in a person’s right to enjoy a strata lot, the common property or limited common property by another individual. Sometimes council members ask me for a definition of what a “nuisance” is, perhaps hoping for an exhaustive list of items that are prohibited nuisances. Trying to define nuisance by providing an exhaustive list of behaviours would go against the whole concept of a legal “nuisance”. A legal nuisance includes those items that can be anticipated, including smoke in a strata complex that impacts other residents, as well as those items that cannot be anticipated. The categories of how we as human beings can interfere with one another, especially when we are sharing common spaces, are never closed.

The change in Federal and Provincial laws regarding ingesting, cultivating and processing cannabis are likely to result in CRT cases dealing with other bylaw enforcement issues revolving around nuisance and cannabis. Eventually the CRT may be dealing with cases about:

- (a) indoor air quality;
- (b) safety of children and pets if cannabis is grown outdoors;
- (c) the disposal of pesticides and the safety of individuals and the environment;
- (d) electrical and fire hazards; and

(e) radiation hazards from UV emitting lamps.

For this reason, many strata corporations have enacted bylaws that address the growth and cultivation of cannabis in a strata lot and elsewhere in the complex. For more information the reader may wish to review the March 2018 document from the National Collaborating Centre for Environmental Health entitled “Growing at Home: Health and Safety Concerns for Personal Cannabis Cultivation”. <http://www.nceeh.ca/documents/evidence-review/growing-home-health-and-safety-concerns-personal-cannabis-cultivation>

I will go over some of the points made by CRT tribunal in two decisions that dealt with marijuana smoke and discuss some procedural requirements pointed out in those decisions. It is important to realize that CRT cases do not constitute binding legal precedent, so tribunal members do not have to follow previous CRT decisions, however, they often refer to them and adopt the reasoning used in previous cases.

A. Owner/Tenant Must Request a Hearing Before Filing Complaint at CRT

Prior to an owner or tenant making a request that the CRT resolve a dispute, the owner or tenant must have requested a council hearing, unless the CRT finds that this requirement does not apply. This requirement is set out in section 189.1 of the *Strata Property Act*.

In the case of *Ball v. The Owners, Strata Plan EPS 3286* Date Issued: July 26, 2019 File ST-2018-008640 the CRT considered the relief sought by an owner against the strata corporation.

Part of the CRT decision provides as follows:

The Dispute Notice and owner’s submissions set out several claims related to strata bylaws and his use of medical marijuana. He seeks the following:

- a. A declaration that the owner is not breaking any bylaws, and/or that for medical reasons he is permanently exempt from applicable bylaws about smoking and nuisance.
- b. A declaration that the strata cannot remove him from his home due to medical marijuana use.
- c. An order that the strata must disclose complaint letters it has received against him.
- d. An order that the strata must conduct air quality testing on 4 floors of the strata building.
- e. \$5,000 in damages.

The strata corporation argued that it had not fined the owner or taken other enforcement procedures against him. The strata corporation also submitted that the owner did not request a hearing before the council, or inform council about his claims before filing the dispute with the CRT. Neither party requested that the CRT waive the requirement for the owner to request a hearing. The tribunal found that the council did not have pre-dispute knowledge of at least some of the owner’s claims. The tribunal further found that the hearing requirement of section 189.1 of the *Strata Property Act* was not met and it was not appropriate to waive the hearing requirement. Since the owner had not requested a hearing before council, the dispute was not in the tribunal’s jurisdiction and must remain unresolved. The decision provides that the owner can file a fresh dispute after meeting the requirements of section 189.1, subject to limitation periods. Since the owner was not successful, there was no order for reimbursement of tribunal fees.

1. Tip for Owners and Tenants

Except in exceptional circumstances, owners and tenants should ensure that they have requested a hearing before council prior to filing a CRT Complaint. Also, although not specified in the *Strata Property Act*, it is generally reasonable for the owner or tenant to wait the four week period for council to hear the application and also wait one week for the decision as specified in section 34.1 of the *Strata Property Act* prior to commencing CRT proceedings.

2. Tip for Council

If an owner or tenant commences a complaint at the CRT without having requested a hearing, the council should consider contesting the claim on the basis that the owner has not complied with section 189.1 of the *Strata Property Act*, as well as on any other relevant basis.

B. Tribunal Orders Owner to Cease Smoking on Common Property and Limited Common Property but no Fines Awarded

In the case of *The Owners, Strata Plan BCS 2211 v. Bernard*, 2019 BCCRT 796 Date Issued: July 3, 2019 File: ST-2018-008975 the tribunal considered the following:

- (a) whether the owner should be ordered to comply with the strata's bylaws; and
- (b) whether the owner should be ordered to pay the \$750.00 in fines claimed by the strata.

The strata corporation had bylaws that prohibited an owner, tenant, occupant or visitor from using a strata lot, common property or common assets in a way that caused a nuisance or hazard, or unreasonably interfered with the rights of others to use and enjoy the common property, common assets or another strata lot. The strata corporation also had a bylaw that prohibited an owner, tenant or occupant from smoking or consuming alcohol on limited common property or common property. The smoking and alcohol bylaw was later changed to remove the reference to alcohol and to simply prohibit smoking on limited common property or common property. The strata corporation received a number of complaints about smoking and drinking occurring on the owner's balcony and marijuana smoke coming from her strata lot and balcony. There were other complaints about the owner smoking in other prohibited locations. The council from time to time advised the owner about the complaints. The council imposed fines and the owner was advised of the fines. The owner admitted that she smoke and drank on her balcony, but denied that she did so during the times complained of. The owner advised the CRT that other residents smoke and drank on their balconies and that some of the individuals doing so lived in close proximity to the person that the owner suspected was making the complaints about her. The owner advised that she did not want to receive special treatment but did not want to be treated unfairly. The resident advised the CRT that she intended to continue to breach the bylaws.

The tribunal considered that the owner admitted that she smoke and drank on common property and limited common property, as prohibited by the bylaws. The tribunal found that the owner had the objectively reasonable expectation that the strata's bylaws would apply to all residents. The tribunal took into account that there was no indication that the strata had received complaints about the smoking activities of other residents. As a result, the tribunal did not find that the owner was treated in a significantly unfair manner. The tribunal ordered that the owner "...comply with the

strata's bylaws and, in particular, to immediately cease smoking on CP or LCP, including her balcony.”

The fines were another matter. The strata corporation had not followed the procedure under section 135 that requires the council to give the owner or tenant the particulars of the complaint and a reasonable opportunity to answer the complaint, including a hearing if requested, before imposing fines or otherwise enforcing the bylaws. The tribunal found that each complaint must be communicated to the owner and she must be given an opportunity to respond before a fine is imposed regarding that complaint. The tribunal further found that the owner was not provided with a reasonable opportunity to answer the complaints and to request a hearing before each fine was imposed. As a result, the tribunal dismissed the strata corporation's claim for fines. The owner was ordered to pay the strata corporation's tribunal fees and dispute-related expenses.

1. Tip for Owners and Tenants

Owners and tenants will likely not be successful defending themselves at the CRT by pointing out to the CRT that other individuals are also breaking the same bylaw that they are and are not subject to bylaw enforcement proceedings, particularly if no complaints have been made about these other individuals. The CRT tribunal may find that the council's obligation to enforce bylaws, particularly in nuisance matters, is complaint based. Owners and tenants must realize that the CRT considers all the facts before making a decision. Holding one card, such as the fact that some other residents may also be breaching the bylaws, usually does not make for a winning hand.

2. Tip for Council

Councils need to follow the process under section 135 of the *Strata Property Act* if they want the CRT to order that an owner or tenant will pay fines. There is no way of taking a “short cut” in the process. In fact, bylaw enforcement often times involves much more than following the basic process under section 135 as outlined in this case. In certain instances, council has an obligation to perform significant investigations. Council may also have an obligation to consider how to accommodate a resident with a physical or mental disability, including exchanging information with the resident and working with him or her to explore proper accommodation.

C. Conclusion

Councils and owners can look to the CRT decisions involving marijuana smoking for basic guidance about how the CRT is likely to deal with bylaw enforcement matters. For legal advice about a particular matter, a lawyer should be consulted.