CLEVELAND DOAN
Barristers & Solicitors

BYLAW ENFORCEMENT

NOVEMBER 2020

By SHAWN M. SMITH

Bylaws are an important tool for the effective management of a strata corporation. They help to form the type of community in which the owners wish to live. They establish which activities and conduct are permitted and what are not. They serve to regulate the behaviour of the residents of the strata corporation

However, bylaws are only as good as the willingness of owners to abide by them and the resolve of the strata corporation to make them. Both the will and the ability to effectively enforce the bylaws are key to the proper operation of a strata corporation.

To effectively enforce the bylaws, a strata council must be familiar with the options available to it for doing so. The strata council (and the strata manager on whom they often rely) must also be aware of the proper procedures for enforcement under the *Strata Property Act* (the "SPA"). A failure to follow the correct procedures can lead to problems with the enforcement steps taken by the strata corporation.

In this paper we will review the duty of the strata council to enforce the bylaws and the options available to it for so doing.

THE DUTY TO ENFORCE THE BYLAWS

The duty of the strata council to enforce the bylaws is a positive duty imposed on it by section 26 of the SPA, which reads as follows:

> "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 the bylaws and the rules."
>
> [emphasis added]

That duty was acknowledged early on by the court in *McGowan* v. *Strata Plan NW1018*, 2002 BCSC 673 where the court said:

> "…Council is obliged under s. 26 of the *Act* to deal with breaches of its bylaws provided the conditions of s. 135 of the *Act* are met. Should a complaint be made under that section, Council must undertake its duty to enforce the bylaw in accordance with the legislation."

That sentiment has been echoed in the decisions rendered by the Civil Resolution Tribunal (CRT). In *Link et al v. The Owners, Strata Plan KAS 828*, 2017 BCCRT 128 it said:

> 48. Once it has been determined that a bylaw contravention has occurred, council does not have the discretion to choose not to enforce a bylaw, as having such discretion would destroy the predictability provided by giving notice to owners of the bylaws by filing them in the Land Title Office. Enforcement of bylaws is mandatory, as set out in section 26 of the SPA. The strata does have discretion as to the amount of a fine, up to the maximum set out in the strata's bylaws.

It has been recognized on more than one occasion that an owner has a reasonable expectation that the strata corporation will enforce its bylaws - *A.P.* v. *The Owners, Strata Plan ABC* 2017 BCCRT 94. That includes an expectation of consistent enforcement (provided that has been the case in the past) - *Ding v. Kang et al*, 2019 BCCRT 774.

In *Strata Plan LMS3259* v. *Sze Holding Inc.* 2016 BCSC 32 the court summarized the expectation of owners as follows:

> [238] That said, I find that a strata corporation's discretion not to enforce the bylaws is limited. In this case, when considered objectively, the defendants, like other owners, had a reasonable expectation that the bylaws would be consistently enforced within the parameters established in the *Act*; *Strachan v. Strata Corp. VR 574* (1992), 28 R.P.R. (2d) 279 (B.C.S.C.). This expectation would include an expectation that any fines would not be imposed in a discriminatory or unfairly prejudicial manner.

However, a strata corporation is not obligated to enforce a bylaw merely for the sake of doing so - *Abdoh* v. *Owners of Strata Plan KAS2003* 2013 BCSC 817 affirmed 2014 BCCA 270. That principle has been applied by the CRT. In *Curtain* v. *The Owners, Strata Plan VIS4673* 2018 BCCRT 100 the CRT said the following:

> 51. Further, even if there is a clear breach of a bylaw, if the effect of the breach is unimportant or trivial to the strata owners in general, it is reasonable for the strata not to enforce it, provided the strata acted reasonably in doing so.

In several decisions the CRT has cited and the applied the following test:

> "… the strata has discretion to not enforce its bylaws in limited circumstances. …in exercising its discretion, the strata must be reasonable, and consider the expectations of the owners with respect to prior enforcement of the bylaw".

That is to say, if the strata corporation has consistently enforced a bylaw, it would be unreasonable for the strata to not continue to enforce it. - see *Weinrauch et al v. The Owners, Strata Plan NW 3119 et al*, 2019 BCCRT 257;*Soong et al v. The Owners, Strata Plan NW 2583*, 2019 BCCRT 879; *Ireland et al* v. *The Owners, Strata Plan VIS6016*, 2019 BCCRT 974;

That discretion does not, however, extend to granting a permanent exemption in a certain case (i.e. pet prohibition bylaw). Unless the bylaw itself grants discretion to exempt an owner from compliance, the council has no authority to do so. The only exception to that is where there is a duty to accommodate under the *Human Rights Code* - see *Ottens* v. *The Owners, Strata Plan LMS2785 et al* 2019 BCCRT 997.

Where exemptions are granted in relation to a particular incident on the basis of a discretion not to enforce, those exemptions must not "excessively broad, ill-defined, and… inconsistent with the purpose of the bylaw" - *The Owners, Strata Plan LMS 3259* v. *Sze Hang Holding Inc.,* 2016 BCSC 32. In other words, a principled approach should be taken.

When responding to and dealing with bylaw complaints, the strata council must not act in a manner that is significantly unfair to either party. In *Chorney* v. *The Owners, Strata Plan VIS770*, 2016 BCSC 148 the court said the following:

> [52] In addition, I will also state I see no practical utility in recommending any particular procedure for council to follow in the future, as this is not contemplated by the *Strata Property Act* which, in my view, allows strata corporations to deal with matters of complaints pursuant to bylaw violations as it sees fit, as long as it complies with the principles of procedural fairness and not be significantly unfair to any person who appears before it.

In other words, the strata council must act in good faith when assessing whether there has been a bylaw breach - *A.P.* v. *The Owners, Strata Plan ABC* 2017 BCCRT 94.

The strata council does not have the ability to refuse to address a complaint or take the position that it is an issue between two owners. It must not be dismissive of the complainant's concerns – *D.W.* v. *The Owners, Strata Plan BCS XXX* 2017 BCCRT 107. Ignoring legitimate complaints can have consequences. In *LeTexier* v. *The Owners, Strata Plan LMS284* 2019 BCCRT 940 the strata corporation was ordered to pay an owner $1,000.00 as compensation for failing to properly enforce a bylaw.

Lastly, the owners within the strata corporation cannot tell the strata council to not enforce a bylaw in a particular instance. While section 27 of the SPA permits the owners, at a general meeting, to direct or restrict council by way of a majority vote, subsections (2)(b)(i) and (ii) prohibit the owners from interfering with council's discretion to determine whether someone has contravened a bylaw or whether a fine should be

imposed. (It is always open to the owners to repeal a bylaw they no longer wish to have).

TIMELY ENFORCEMENT

Enforcement means taking some step(s) to see that there is compliance with the bylaw. A failure to uphold the bylaws sends the message that compliance with them is optional or that they are mere guidelines. In that same vein, the owners should never pass a bylaw that they are not prepared to take any and all necessary action to enforce.

A failure to enforce a bylaw can have consequences as well. In *Carter* v. *Strata Plan VR380* (1991), 20 R.P.R. (2d) 214 the strata corporation waited for several months to enforce a bylaw that prohibited the rental of strata lots. In the end the court held that the strata corporation had acquiesced to the situation and could not now try to enforce the bylaw. Similarly, in *Condominium Plan No. 8111679* v. *Elkes* 2003 ABQB 219, the fact that a bylaw pertaining to satellite dishes was inconsistently enforced, made it unenforceable.

However, in *Chan* v. *Strata Plan VR151* 2010 BCSC 1725 the court held that a strata corporation can never be estopped (prevented) from fulfilling its statutory duty to enforce the bylaws. Even if that is the prevailing view, s.164 of the SPA (significant unfairness) might still be invoked to prevent the strata corporation from doing so (or at least doing so in the manner it wishes).

In *The Owners, Strata Plan NW 2522 v. Bruce,* 2020 BCCRT 292 the CRT held that it was significantly unfair to the owners to require compliance with a bylaw regulating dogs when the strata had not done so with other owners. Similarly in *N.S.S*. v. *The Owners, Strata Plan ABC XXX*X, 2019 BCCRT 696 the CRT held that it was significantly unfair to fine the owner when other owners in the same situation were not fined. However, much will turn on the facts of each case. Where there is a reason for the unequal enforcement it will not be significantly unfair - *The Owners, Strata Plan EPS 606 v. Campbell*, 2020 BCCRT 41.

The application of the *Limitation Act* is another issue faced by strata corporations when dealing with bylaw contraventions. Its application to bylaw violations is not always clear. In some cases (mostly involving alterations) the CRT has held that it applies and starts to run from the time the strata became aware of the breach - see *The Owners, Strata Plan KAS 510* v. *Nicholson* 2017 BCCRT 48;*The Owners, Strata Plan VR 279 v. Morin*, 2018 BCCRT 483.

However, there have been other decisions that have reached the conclusion that the *Limitation Act* does not apply to a claim to enforce a bylaw because the claim does not relate to “injury, loss or damage” – see *The Owners, Strata Plan BCS 1644 v. Lukovic,* 2018 BCCRT; *The Owners, Strata Plan LMS 515 v. Kendrick et al*, 2019 BCCRT 394. Where the claim relates to an ongoing violation, such as repeated noise, the limitation

period keeps renewing as the noise continues - *Battersby v. The Owners, Strata Plan NW 1868*, 2020 BCCRT 257.

Even if the *Limitation Ac*t does not apply to breaches of the bylaws, it can still arguably be used as a benchmark when considering estoppel and acquiescence arguments. In *Condominium Plan No 762 1302* v *Stebbing,* 2015 ABQB 219 the court held that the limitation period was a guideline with respect to whether the strata corporation had acquiesced to the owners conduct.

ENFORCEMENT OPTIONS

The primary methods for enforcing the bylaws of a strata corporation are:

(a) imposing fines against the offending tenant or owner;

(b) taking steps to remedy a contravention pursuant to s.133 of the SPA;

(c) seeking an order of the CRT that the owner comply with the bylaws.

S.134 of the SPA allows the strata corporation to temporarily deny access to a recreational facility where there has been a breach of a bylaw or rule related to that facility.

Although s.173 of the SPA still permits a strata corporation to seek court orders with respect to compliance with the bylaws, it has been eclipsed by the provisions of s.189.1 of the SPA and the *Civil Resolution Tribunal Act.* Those provisions now make the CRT the primary venue for seeking such orders.

Fines

Fines are the primary method of enforcing bylaws. However, “the imposition of fines does not serve to correct, remedy or cure violations of the Bylaws but, rather, their purpose is to discourage violations of the Bylaws” - *Kok* v. *Strata Plan LMS 463 (Owners)*, 1999 CanLII 6382 (BCSC).

In *Wilson* v. *Highlands Strata Corp* (1999), 29 R.P.R. (3d) 280 the court held that “accumulating fines in the amount of $10,000.00 is a form of punishment, not an enforcement of its bylaws and is unreasonable.” A similar conclusion was more recently reached in *The Owners, Strata Plan VR 484* v. *Lawtez* 2017 BCCRT 59 wherein the CRT held that an application for dispute resolution must be brought in a timely manner to enforce the bylaws and that once the dispute notice has been issued by the CRT, the fines should stop.

Section 130(1) of the SPA permits the strata corporation to fine:

> (a) an owner if the owner, a person visiting the owner or an occupant of their strata lot contravenes a bylaw or a rule;
>
> (b) the tenant if a tenant (or a person visiting them or occupying the strata lot which they are renting) contravenes a bylaw or a rule

Where the tenant is the one who is alleged to have breached the bylaw, the strata corporation must write to and fine the tenant, not the owner - *Clark v. The Owners, Strata Plan BCS 2785*, 2017 BCCRT 49; *Lin v. The Owners, Strata Plan EPS3602*, 2020 BCCRT 5. Despite that, the owner of the strata lot is ultimately liable for the payment of any fines incurred by the tenant - s. 131 of the SPA.

The amount of each fine is determined by the strata council based on the bylaws of the strata corporation. The Standard Bylaws under the SPA set the maximum fine at $50 for a contravention of a bylaw and $10 for a rule. This can be increased by amending the bylaws to allow for a maximum fine of $200 for a bylaw contravention and $50 for a rule contravention. (Higher fines are permitted in the case of rental and travel accommodation bylaws – see SPA Regulation 7.1). The strata council may fine an owner or tenant up to that maximum. In other words, there is a range available. The maximum fine is not always appropriate or necessary.

Where fines are unreasonable in their amount, the court has always had the ability to reduce the amount of the fines pursuant to s.24 of the *Law and Equity Act* (see *Drummond* v. *Strata Plan NW2654* 2004 BCSC 1405). In *The Owners, Strata Plan VR 293 v. Bains,* 2019 BCCRT 5 the CRT held that it does not have the jurisdiction to apply s.24. However, in *The Owners, Strata Plan BCS 1644 v. Lukovic,* 2018 BCCRT 219 the CRT reduced fines of $26,000 to $5,000 because they were unreasonable (but it did not rely on the *Law and Equity Act* in doing so).

Standard Bylaw 24 (which most strata corporations have adopted) permits fines to be imposed every seven (7) days for a contravention which “continues without interruption” (i.e. renting a strata lot, having a pet or keeping a prohibited item on common property).

The Owners, Strata Plan VR2000 v. *Grabarczyk* 2006 BCSC 1960 dealt with, amongst other things, the issue of what constitutes a “continuing” contravention. The case involved a series of noise complaints against Ms. Grabarczyk, including thumping, yelling, crying, the moving of furniture and objects being washed in the tub; all at inappropriate times. This went on for approximately five years and a total of $23,000 in fines were levied. The strata corporation relied on section 135(3) of the SPA to routinely impose fines on the basis that her behaviour was a “continuing” contravention. The court considered the issue of whether serial conduct constitutes a continuing contravention of bylaws and concluded it did not, saying:

> “In my view, while given the persistence with which the respondent pursued her campaign of noise making, to treat it as continuing for the purposes of s.135(3) relieving against the need for notice and the right to be heard in circumstances where the contraventions are the product of ongoing but discrete transactions would extend s.135(3) beyond what it was designed to encompass and engage in serial but not continuing conduct.

What can be taken from *Grabarczyk*, as far as fines go, is that where there are a series of events which are identical in nature, but which each have a clear start and finish, they

are not a continuing contravention, but separate ones. That effectively permits a fine of up to $200 for each incident.

The strata corporation must stop imposing fines once it brings a CRT claim to enforce compliance with the bylaws - *The Owners, Strata Plan VR 939 v. Longine Properties Ltd.,* 2019 BCCRT 740.

Fines are often only effective if the strata corporation takes steps to collect them. If the strata corporation takes no steps to collect the fines levied, they are payable when the owner sells their strata lot. Fines do not expire since they do not fall within the scope of the *Limitation Act* as they are penalties, not "injury, loss or damage" - see *The Owners, Strata PlanKAS3549* v. *073839 BC Ltd. 2015 BCSC 2273*; *The Owners, Strata Plan VR 279 v. Morin*, 2018 BCCRT 483;

A lien cannot be filed for an amount owed as fines. The strata corporation would need to seek judgment against the owner or tenant through the CRT; after which an application could be made to sell the strata lot to collect the judgment.

Remedying a Contravention

The strata corporation is entitled under section 133(1) of the SPA to take specific action to remedy the contravention of a bylaw. It provides:

> "The strata corporation may do what is reasonably necessary to remedy a contravention of its bylaws or rules, including:
>
> (a) doing work on or to a strata lot, the common property or common assets, and
>
> (b) removing objects from the common property"

This section is a very versatile tool for strata corporations. It gives them broad powers beyond simply levying a fine without the need to go to CRT. (Keep in mind that the actions taken by the strata council and/or the strata corporation may end up being reviewed by the CRT should the owner or tenant challenge them).

While the section refers both to doing "work on or to a strata lot, the common property" and to "removing objects from the common property", this is not the extent of the strata corporation's powers under this section. The strata corporation is entitled to "do what is reasonably necessary". The two listed options are merely two common examples. The only constraints imposed by the section are that the steps taken must be *reasonably necessary* and the cost incurred by *reasonable*.

The costs are recoverable from the person who is entitled to be fined in relation to the contravention. Those expenses are recoverable when the owner sells their strata lot or by seeking a judgment through the CRT. However, unlike fines, the *Limitation Act* applies and one of those two things must occur within two years of the date of the bylaw contravention. The strata corporation is not entitled to register a lien against the strata lot in order to recover the costs.

Although the costs can be incurred right away, the requirements of s.135 must be complied with before they can be formally charged back to an owner - *The Owners, Strata Plan VR 2266 v. 228 Chateau Boulevard Ltd.*, 2018 BCCRT 198. Where those costs relate to different incidents of the same nature, there must be compliance related to each incident - *The Owners, Strata Plan LMS 677* v. *Halatsis et al*, 2019 BCCRT 799. In *Wadler v. The Owners, Strata Plan VR 495*, 2018 BCCRT 567 the CRT suggested that compliance with s.135 was necessary even when relying on a chargeback bylaw.

Legal fees incurred in obtaining advice or dealing with an offending owner have been found to be expenses recoverable under s.133. (*Strata Plan VR243* v. *Hornby* [1986] BCJ No. 2353 (BCSC); *Sidhu* v. *Strata Plan VR1886* 2008 BCSC 92). In *The Owners, Strata Plan NWS3075* v *Stevens*, 2018 BCSC 1784 the court sanctioned reliance on s.133 of the SPA as means to fully recover it legal fees in relation to Supreme Court proceedings brought for enforcement, provided they are reasonable; proportionality and degree of success being factors to be considered. There must be compliance with s.135 before doing so - *The Owners, Strata Plan VR19 v. Collins et al.,* 2004 BCSC 1743.

However, the CRT has held that s.133 of the SPA does not apply to proceedings brought before it - *The Owners, Strata Plan VIS 2287* v. *Mullins*, 2020 BCCRT 122; *Hallman et al v. The Owners, Strata Plan KAS 1821*, 2019 BCCRT 1179. That conclusion was reached based on comments made by the judge in *Stevens* questioning whether such recovery would run contrary to the general rule that the CRT does not award legal fees. Although in *The Owners, Strata Plan LMS 3249 v. AAF Holdings Ltd.*, 2019 BCCRT 127 the CRT suggested that s.133 could *possibly* be relied on to collect legal fees (after compliance with s.135 SPA).

Where s.133 does not apply in relation to legal proceedings, the strata corporation must rely on a bylaw requiring the offending owner to pay them – see *The Owners, Strata Plan VR 293 v. Bains,* 2019 CCRT 504; *Cheung* v. *The Owners, Strata Plan VR1902*, 2004 BCSC 175. In *Wadler v. The Owners, Strata Plan VR 495*, 2018 BCCRT 567 the CRT held that such a bylaw is “an extraordinary circumstance” displacing the general rule of no costs.

Evicting Problem Residents

Under s. 138 of the SPA the strata corporation is granted the power to evict tenants pursuant to the *Residential Tenancy Act* for violating the bylaws; but only in exceptional circumstances. The section sets out a specific test that must be met:

(i) the tenant must have contravened “a reasonable and significant bylaw”;

(ii) the contravention must be repeated or continual;

(iii) they must have done so in a manner which “seriously interferes with another person’s use and enjoyment of a strata lot, the common property or a common asset”

A single incident, no matter how horrendous, will not allow the strata corporation to invoke s.138.

The bylaw that has been breached must be "significant"; in other words a bylaw that is fundamental to the proper operation of the strata corporation. As such, not all bylaws (regardless of their repeated contravention) will permit use of this remedy.

Lastly, the violation must "seriously" interfere with another person's use or enjoyment of the complex. A mere annoyance or agitation is not enough.

If the strata council terminates a tenancy without proper grounds (i.e. the preconditions of section 138 have not been met) and the owner suffers a financial loss, damages might be awarded against the strata corporation. As such, this remedy should be used carefully and after proper legal advice.

A notice issued under s.138 must be enforced through the B.C Supreme Court as the CRT has determined that it does not have jurisdiction – *The Owners, Strata Plan BCS 4207 v. Dhaliwal*, 2018 BCCRT 467. The Residential Tenancy Branch will also refuse to enforce it.

The SPA does not expressly provide the strata corporation with a similar power to evict a problem owner. However, this does not mean that it cannot be done. Section 173 of the SPA permits the court to order that an owner stop contravening the Act and/or the bylaws. It also permits the court to make any other orders it considers necessary to give effect to that particular order, which would include evicting an owner. The court is not entitled, however, to make an immediate order for eviction. It must first order compliance with the bylaws, failing which the strata corporation can return to court and ask for the eviction order. In *Owners Strata Plan LMS 2768 v. Jordison, 2013 BCCA 484* the Court of Appeal sanctioned just such a "terminal remedy" where "the subjects of the order have demonstrated an unwillingness to comply with an injunction".

The process set out in *Jordison* remains essentially the same under the CRT. While the CRT has jurisdiction to order an owner comply with the bylaws, it does not have the power to order the sale of strata lot or evict an owner. Contempt proceedings would need to be brought in B.C. Supreme Court and an order of that nature sought in those proceedings.

Enforcement Orders

Where fines fail to bring an owner into compliance, the next step would be to seek the assistance of the CRT or the court. Unless the Supreme Court grants an order (based on the criteria under s.16.2 of the CRTA) that it should have jurisdiction, bylaw enforcement must be pursued through the CRT. A ¾ vote is not required to bring a complaint regarding a bylaw breach before the CRT – see s.189.4 SPA.

Under s.123(1) of the *Civil Resolution Tribunal Act* the CRT can:

(a) order a party to do something;

(b) order a party to refrain from doing something; or

(c) order a party to pay money.

However, it cannot grant general or blanket "restraining orders," "no contact orders," "cease and desist orders" as those fall outside of the tribunal's jurisdiction - *The Owners, Strata Plan NW 2275 v. Siebring*, 2018 BCCRT 734.

Where there is a reasonable apprehension that an owner will breach a bylaw, the Supreme Court can grant an order restraining their conduct - *The Owners, Strata Plan NW 1245* v. *Linden*, 2016 BCSC 619

An order made by the CRT can be registered in the BC Supreme Court and enforced as if it were an order of that court. A failure to comply with order can bring severe consequences. The *Civil Resolution Tribunal Act* contains the following provision in that regard:

> Enforcement of tribunal orders by proceeding for contempt
>
> **60** (1)A person who fails or refuses to comply with an order of the tribunal is liable, on application to the Supreme Court, to be punished for contempt as if in breach of an order or judgment of the Supreme Court.
>
> (2)Subsection (1) does not limit the conduct for which the Supreme Court may make a finding of contempt in respect of a person's conduct in relation to a tribunal proceeding.

In *Bea v. The Owners, Strata Plan LMS 2138*, 2014 BCSC 826 affirmed 2015 BCCA 31 the court ordered that an owners' strata lot be sold as a remedy for the contempt of the court's order. It is a remedy of last resort - *The Owners, Strata Plan VR812* v *Yu*, 2019 BCSC 693.

THE DUTY TO INVESTIGATE

A number of cases involving complaints of a failure on the part of the strata corporation to enforce bylaws have gone so far as to impose an obligation on the strata corporation to take active steps to investigate bylaw complaints. Those have included a duty to investigate complaints regarding:

- An odour coming from another strata lot – *Connell* v. *The Owners, Strata Plan BCS3438* 2018 BCCRT 784
- Second hand smoke – *Foulds Kennedy* v. *The Owners, Strata Plan LMS1495* 2019 BCCRT 1098
- Noise, including that caused by hard surface flooring – *Mastroianni* v. *The Owners, Strata Plan EPS2878 et al* 2019 BCCRT 691; *Torok* v. *Amstutz et al* 2019 BCCRT

What an "investigation" might look like will depend on the circumstances of each complaint. In *LeBlanc* v. *The Owners, Strata Plan LMS 600*, 2020 BCCRT 783 the

strata corporation was found to have met its duty by sending someone to investigate the alleged odours concurrent with the complaint being made. Sometimes that duty might involve hiring an expert, as was the expectation of the CRT in *Moojelsky v. The Owners, Strata Plan K323 et al* 2019 BCCRT 698.

Absent a bylaw addressing when and how the investigation costs can be charged back to an owner, they would be borne by the strata corporation.

DUE PROCESS – THE RIGHT TO ANSWER THE COMPLAINT

S.135 of the SPA is important because it provides protection to owners. It establishes a procedure to ensure due process. The purpose of s.135 was summarized in *Yang* v. *The Owners, Strata Plan VR732*, 2020 BCCRT 361:

> 70 Section 135 of the SPA sets out a procedure for investigating a complaint, which includes providing the subject owner or tenant the opportunity to be heard, before any fine is levied. This protection is for the benefit of the owner or tenant that is the subject of the complaint, not the person making the complaint. Notably, there is otherwise no particular complaint procedure set out in the SPA and a strata council is permitted to deal with complaints of bylaw violations as the council sees fit, so long as it complies with the principles of procedural fairness and is not "significantly unfair" to any person who appears before the council (*Chorney v. Strata Plan VIS770*, 2016 BCSC 148 (B.C. S.C.) (CanLII)).

The successful enforcement of any bylaw rests on following the process laid out in s.135 of the SPA, which provides as follows:

> 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
>
> (c) deny a person the use of a recreational facility
>
> 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
>
> (f) if the person is a tenant, given notice of the complaint to the person's landlord and the owner.
>
> (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 contravening of that bylaw or rule without further compliance with this section.

A strata council cannot simply impose a fine against a person or charge them the costs of remedying a bylaw contravention. There are certain steps which must be taken first.

In *Terry* v. *The Owners, Strata Plan* NW309 2016 BCCA 449 the Court of Appeal reviewed s.135 and held that strict compliance is required. Correspondence after the fact about the alleged breach did not save fines which were improperly imposed. It said the following with respect to s.135 in general:

> [28] In my view, an owner or tenant who may be subject to a fine must be given notice that the strata corporation is contemplating the imposition of a fine for the alleged contravention of an identified bylaw or rule, and particulars sufficient to call to the attention of the owner or tenant the contravention at issue. In addition, the owner or tenant must be given a reasonable opportunity to answer the complaint. What constitutes a reasonable opportunity to be heard in response is a case-specific inquiry that must take account of the nature of the alleged contravention, the context in which the violation is said to have occurred, and the time that might reasonably be required to gather information or evidence needed to answer it.

In order to take action, the strata corporation must first have received a complaint about a breach of the bylaw. The complaint does not need to be in writing – *The Owners, Strata Plan NW3075* v. *Stevens* 2018 BCPC 2. Strata council members can make complaints - *Himmelmann v. The Owners, Strata Plan LMS 2064*, 2018 BCCRT 426. The complaint can even be from a strata manager - *The Owners, Strata Plan VR2690 v. Simpson*, 2018 BCCRT 782.

When a strata corporation does receive a complaint about a bylaw violation, it must first write to the offending party and provide details about the complaint. Care must be taken when writing the letter to ensure all the requirements of s.135 are met. It is also important not to appear to have prejudged the matter. In *McLachlan* v. *Burrard Yacht Club*, 2008 BCCA 271 the court said “the right of an opportunity to be heard pre-supposes that the issue is not determined and that a reasonable person would not conclude it is determined”. The board’s decision to expel Mr. McLachlan was overturned because its correspondence to him indicated his guilt had been predetermined.

The particulars of the complaint must be provided. However, the SPA is not clear as to what those exactly are. They should also specify the bylaw or bylaws which have been contravened. It is not necessary for particulars to set out every detail - *Schuler* v. *The Owners, Strata Plan BCS 4064* 2018 BCCRT 794. In *The Owners, Strata Plan NW3075* v. *Stevens* 2018 BCPC 2 the court said they must be “sufficient to make the alleged

bylaw violator aware of what his or her alleged breach is." Those should include the date, time, place, bylaw(s) alleged breached and the nature of the violation.

There is nothing in section 135 addressing whether the complainant can or even must be identified. However, the Guidelines established the Office of the Information and Privacy Commissioner with respect to the *Personal Information Protection Act,* suggest the strata corporation not reveal the complainant's identity unless doing so is necessary to allow the person to answer the complaint. However, if the accused owner asks for a copy of the complaint they are entitled to it, without redaction - *Ottens et al v. The Owners, Strata Plan LMS 2785 et al*, 2019 BCCRT 730.

A failure to cite the correct bylaw caused the fines to be dismissed in *Figure Ski Enterprises Inc. v. The Owners, Strata Plan K 838,* 2018 BCCRT 46. Allegations of causing a nuisance must contain examples of the conduct in question - *Lenahan v. The Owners, Strata Plan NW 976*, 2019 BCCRT 462. A failure to clarify allegations can amount to a failure to provide particulars - *The Owners, Strata Plan LMS 3671 v. Turner et al*, 2018 BCCRT 834. Along similar lines, a failure to let an owner see the evidence against them (in this case a video) was held to be significantly unfair in *The Owners, Strata Plan LMS 447 v. Best*, 2019 BCCRT 178.

Where appropriate to the nature of the breach, a standardized form can be used – *Strata Plan LMS3259* v. *Sze Hang Holding Inc.* 2016 BCSC 32. (Parking violations is an example).

If the strata corporation intends to fine for a continuing contravention starting as of a particular past date that must be made clear in the letter – see *The Owners, Strata Plan LMS 677* v. *Halatsis et al,* 2019 BCCRT 799. Conversely, a warning that further fines will be imposed for similar conduct in future does not equate to compliance with s.135 with respect to those future breaches - *Castle v. The Owners, Strata Plan NW 723*, 2019 BCCRT 761

The letter sent to the accused owner/tenant must also set a reasonable time for providing an answer to the complaint. Two weeks is probably sufficient (given that this is the time frame used for a number of other deadlines under the SPA). In *The Owners, Strata Plan NW3075* v. *Stevens* 2018 BCPC 2 it was found to be. However, the complexity of the complaint could dictate a longer period - *Terry* v. *The Owners, Strata Plan NW309* 2016 BCCA 449. Extensions can be granted but should not be unless there is a legitimate reason such as matter being complex or an opportunity to consult with legal counsel is requested. Otherwise a short time line should be kept.

S.61 of the SPA applies to the delivery of a letter send under s.135. The letter is to be sent to the same place and by the same method the strata corporation would deliver a notice of a general meeting to the owner. Note, however, that notice by email is only permitted under this section if the owner has provided the strata an email address for the purpose of receiving the notice, record, or document - Schuler v. *The Owners, Strata Plan BCS 4064*, 2018 BCCRT 175. Merely having the owner's email address is

not enough to assume it was provided for the purposes of notice. In that case the letter could be emailed and mailed.

If an owner intends to contest a complaint, they should do so at the time they receive the letter and present their evidence then - *The Owners, Strata Plan BCS 2103 v. Zeng,* 2019 BCCRT 1236; *The Owners, Strata Plan BCS 3625 v. Wiltsey et al*, 2018 BCCRT 155

The owner or tenant can also request a hearing before the council. The right to request a hearing need not be set out in the letter - *The Owners, Strata Plan NW3075* v. *Stevens* 2018 BCPC 2. If requested, a hearing must be granted - *The Owners, Strata Plan NW3075* v. *Stevens* 2018 BCPC 2. A failure to hold a hearing was found to make any fines imposed, invalid - see *The Owners, Strata Plan NW 2170 v. Broadbent*, 2017 BCCRT 114.

Although s.135 does not specify at time frame for holding the hearing, section 34.1 of the SPA arguably applies. It requires a hearing before the council to be held within four weeks of the request and a decision to be issued one week after the hearing. However, that deadline can be moved by agreement. If the hearing needs to be rescheduled the onus lies with the council to see that this is done is a timely manner. A failure to do so may result in a reduction of the fines by the court -*Strata Plan NW391* v. *Forsberg* 2010 BCSC 1301.

A hearing is an opportunity to appear in person before the council and argue against the complaint. It is not an overly formal process. The SPA does not require the person making the complaint to be present and available for cross examination. It is merely an “opportunity to be heard” - SPA Regulation 7.2; *Eastman v. Strata Plan PGS217*, 2019 BCCRT 655.

If the complainant is a council member, they should ideally excuse themselves from the hearing to avoid allegations of a conflict of interest under s.32 of the SPA. If the complaint is against them, they must do so pursuant to s.136 of the SPA.

Where an owner does not respond to the complaint letter it is reasonable to assume their “guilt” - *The Owners, Strata Plan NW 3164 v. Wondga et al*, 2018 BCCRT 145

Where there is conflicting evidence from the complainant and the accused owner/tenant it is appropriate to make further inquiries in an attempt to reconcile the matter – *Chorney* v. *The Owners, Strata Plan VIS770* 2016 BCSC 148. In *Mason* v. *The Owners, Strata Plan BCS4338* 2017 BCCRT 47 the strata council enforced a smoking bylaw based on email complaints which lacked detail as to the dates and times the alleged smoking took place. When the owner denied the allegations, the strata council failed to take steps to further investigate those allegations and took the complaints on face value. The CRT was of the view that in light of that denial the council should have requested photos or witness statements from the complainant.

Decisions to impose a fine must be made at a duly convened meeting (see *Dimitrov* v. *Summit Square Strata Corp.*, 2006 BCSC 967) and should be recorded in the minutes, identifying the strata lot or unit in question.

It is also important to remember the obligation under s.135(2) to give notice in writing, as soon as feasible, of the strata council's decision. A failure to comply with that provision could also invalidate the fines - *Tantillo v. The Owners, Strata Plan NW 317,* 2018 BCCRT 54. In *Figueroa v. The Owners, Strata Plan NW53*, 2020 BCCRT 40 the CRT made the following observations:

> I find that the strata failed to comply with section 135(2) of the SPA. None of the strata's letters to Mr. Figueroa directly mention a fine. None of the strata's letters to Mr. Figueroa or his lawyer specify the amount of any fine. To provide meaningful notice, such a letter should explain that the strata decided to fine Mr. Figueroa, the reason for the fine and the amount of the fine. Had the strata not withdrawn its monetary claim, based on the evidence filed in this dispute I would have set aside the fines for the strata's failure to comply with the SPA section 135(2)

Once there has been compliance with s.135(1), additional fines for a continuing contravention can be imposed without further notice - *Dimitrov* v. *Summit Square Strata Corp*., 2006 BCSC 967; s.135(3) SPA.

In countless decisions, the CRT has set aside the fines because there had not been complete compliance with s.135. Little leeway is given. A similar result will occur with respect to costs charged back under s.133 of the SPA if there is no compliance. In *The Owners, Strata Plan NW 307* v. *Desaulniers*, 2019 BCCA 343 the court refused to allow the strata to collect costs incurred to correct a dangerous situation in a strata lot.

Where a strata corporation has not complied with s.135, it can reverse the fines and start the process over – *Cheung v. The Owners, Strata Plan VR1902*, 2004 BCSC 1750, *S.M. v. The Owners, Strata Plan ABC*, 2017 BCCRT 23. In *Fortunato* v. *The Owners, Strata Plan EPS1232*, 2020 BCCRT 87 a hearing granted after the fact but without reversing the chargeback and that was held to be sufficient to comply with s.135. Even where the matter has gone to the CRT it appears to be open to the CRT to allow the strata corporation to go back and start over – *The Owners, Strata Plan VR 2266* v. *228 Chateau Boulevard Ltd.*, 2018 BCCRT 198.

When in comes to compliance with s.135 the following points can be taken from the case law as best practices:

1. The owner (or tenant) must be given an opportunity to answer the allegations against them before the fine is imposed.
2. If writing to the tenant, copy the owner.
3. Provide sufficient details with regard to the allegations (dates, times, etc.) and identify the bylaw breached.

4. Offer the option of responding in writing or requesting a hearing and set a deadline to do so;
5. A fine must not be imposed or costs charged back until the person has either responded to the allegations or the time for doing so has passed.
6. The decisions of council to impose a fine and the reasons why should be clearly recorded in the minutes.
7. Write the owner (or tenant and copy the owner) and advise them of the outcome and whether a fine has been imposed.

CONCLUSION

Bylaw enforcement is an integral part of the operation of a strata corporation. It can be difficult at times and seem an unpleasant task. Nonetheless if must be done. If done with proper care and attention to the legal requirements (and assistance where needed) it can be successful.

This article is intended for information purposes only and should not be taken as the provision of legal advice. Shawn M. Smith is lawyer whose practice focuses on strata property law. He can be reached at (604)536-5002 or shawn@clevelanddoan.com. He can be followed on Twitter @stratashawn.

Addition by VISOA:

Go to canlii.org to find the court and tribunal decisions mentioned in this paper.