



# Civil Resolution Tribunal

Date Issued: November 12, 2021

File: SC-2021-002998

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *McNab v. Oberlander*, 2021 BCCRT 1201

**B E T W E E N :**

DAVID MCNAB and RAYNELLE MCNAB

**APPLICANTS**

**A N D :**

JASON OBERLANDER and DAWN OBERLANDER

**RESPONDENTS**

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## **REASONS FOR DECISION**

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Tribunal Member:

Kristin Gardner

## **INTRODUCTION**

1. This small claims dispute is about water damage in a strata lot.

2. The applicants, David McNab and Raynelle McNab, own 2 strata lots (units 803 and 804) in a strata building. The respondents, Jason Oberlander and Dawn Oberlander, own unit 904, which is above units 803 and 804. The McNabs say on January 15, 2021, water leaked from the Oberlanders' shower and damaged the ceilings in units 803 and 804. The McNabs seek \$1,000 for repair costs.
3. The Oberlanders deny liability for the water damage. They say the strata corporation (strata) failed to properly repair their bathroom after a roof leak, which they say ultimately caused their shower to leak. So, the Oberlanders say the strata is responsible for any water damage, not them. The strata is not a party to this dispute.
4. The McNabs are represented by Mr. McNab. The Oberlanders are represented by Mr. Oberlander.

## **JURISDICTION AND PROCEDURE**

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.
6. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.
7. Section 42 of the CRTA says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would

be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

8. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

## **ISSUE**

9. The issue in this dispute is whether the Oberlanders are liable for the water damage, and if so, whether they owe the McNabs \$1,000 for the claimed repair costs.

## **EVIDENCE AND ANALYSIS**

10. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities. I have considered all the parties' evidence and submissions, but I refer only to what I find is necessary to provide context for my decision.
11. As noted, the McNabs own 2 strata lots, which they say are connected to create a 2-bedroom unit in a "lock-off" set up. It is undisputed that on January 15, 2021, the McNabs discovered a large amount of water flowing out of the ceilings in their 2 strata lots. It is also undisputed that the water leak came from the Oberlanders' shower. The McNabs say the Oberlanders failed to properly maintain their shower, so they are responsible for the leak.
12. I find the McNabs are alleging the Oberlanders were negligent, though I note the private law of nuisance may also apply. A nuisance occurs when a person unreasonably interferes with the use or enjoyment of another person's property. Where a respondent does not actively create the nuisance, they can only be found liable in nuisance if they knew or ought to have known about the potential nuisance through the exercise of reasonable care and failed to take reasonable steps to remedy the situation (see *Theberge v. Zittlau*, 2000 BCPC 225).

13. In order for the Oberlanders to be found negligent, the McNabs must prove the Oberlanders owed them a duty of care, that the Oberlanders breached the standard of care, and the McNabs sustained damage that was caused by the Oberlanders' breach (see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27).
14. I find that as neighbours and fellow owners in a multi-unit building, the Oberlanders owed the McNabs a duty of care. The applicable standard of care is reasonableness (see the non-binding but persuasive decision *Burris v. Stone et al.*, 2019 BCCRT 886 at paragraph 28).
15. The McNabs say that when they discovered water coming into their strata lots, they immediately called the building manager, who called the strata's plumber, BM. In a January 15, 2021 email, BM advised the strata that he had observed a "substantial amount of water" trapped under the seat of the Oberlander's shower and a water puddle 2 inches deep, in the space below the seat. BM also stated he observed loose tiles on the shower seat that had started to delaminate.
16. I note that the photos of the Oberlanders' shower in evidence show that there is a tiled ledge inside the shower stall, that I infer is the "shower seat" BM referred to. The photos show over 30 tiles had fallen off the top and front of the seat. The evidence also shows the Oberlanders' shower was equipped with a steam function, though it is disputed whether the steam function was operational at the time of the water leak.
17. BM stated that because he knew the Oberlanders personally, and he was aware the Oberlanders were claiming the strata was responsible for retiling their shower, he arranged for an independent investigation to take place. It is undisputed that Total Restoration Services Ltd. (Total Restoration) investigated the Oberlanders' shower on January 18, 2021.
18. Total Restoration prepared a Preliminary Report following its inspection of the Oberlanders' shower. The report included photos of the shower, showing a meter with elevated moisture readings within the shower stall. The report stated that several failures of "routine" maintenance could have led to the water leak, including failing to

replace or repair caulking around the shower seams, failing to replace tiles and grout that became dislodged, and failing to put a cover plate over the steam shower opening. The report also specifically stated the water damage was not caused by the Oberlanders' bathroom fan not working, a point discussed further below.

19. I note that Total Restoration's report does not meet the criteria for an expert report under CRT rule 8.3 because it does not state who authored it or set out the author's qualifications. However, I accept that Total Restoration is generally in the business of investigating and repairing water and other damage. The Oberlanders did not question Total Restoration's qualifications. I find it appropriate to exercise my discretion under CRT rule 1.2(2) to waive the requirements of rule 8.3(2) to promote the fair and efficient resolution of this dispute. For that reason, I accept Total Restoration's report as expert evidence.
20. The Oberlanders deny that they failed to properly maintain their shower. They say they regularly sealed the bathroom tile, though they did not say when they last performed that work before the leak. In any event, they blame the strata for the leak because they say in 2017 the strata ran a pipe through a hole where their ceiling fan had been, to drain a roof leak. The Oberlanders say they had no working fan in their bathroom for almost 4 years, when the strata finally replaced it in December 2020.
21. The Oberlanders say that some shower tiles popped off in January 2021, and they contacted the strata to fix them. There is no evidence before me that the Oberlanders stopped using their shower in the meantime. They say it was a few days after reporting the popped tiles that they learned of the water leak in the units below them. The Oberlanders say they then installed poly over the damaged tiles. The Oberlanders agree that the leak likely came from the area where the tiles popped off, but say they came off due to the lack of a working ceiling fan for so long, for which the strata is responsible.
22. The Oberlanders provided their own report from Ernie Hurd, a carpenter who stated he had over thirty years' experience as a building contractor, and 10 years of bathroom renovation experience. I am satisfied that Mr. Hurd's report meets the

requirements for an expert report set out in CRT rule 8.3. Mr. Hurd stated that inadequate ventilation in bathrooms results in high humidity, which causes moisture to get behind tiles, so they eventually loosen and fall off. He stated that this is what happened in the Oberlanders' shower due to the lack of a working exhaust fan for 3 years.

23. I note that Mr. Hurd also stated he observed no reason to question the grout integrity generally, as only a small section of tiles had come loose and fallen off, but most of the tiles appeared still sound and secure. I find this statement is somewhat inconsistent with Mr. Hurd's opinion that the extended period of high humidity caused the tiles to fall off, as he did not explain why the alleged high humidity caused only a small section of tiles to loosen. Therefore, I place limited weight on Mr. Hurd's statement about what caused the tiles to come loose, and generally prefer Total Restoration's evidence that the lack of a bathroom fan did not contribute to the leak.
24. In any event, I find it is unnecessary to determine who was at fault for the tiles in the Oberlanders' shower falling off. I say this because regardless of why the tiles fell off, I find the Oberlanders had a duty to act reasonably in response to the situation. The Oberlanders admit they knew tiles had popped off. I find it somewhat improbable that all 30 tiles came off at once, and it is more likely that this happened over time. While the Oberlanders say they contacted the strata to fix the tiles, they provided no evidence about this alleged communication such as how it took place or whether it was after the first tile fell off or the last.
25. The Oberlanders also submit that there are 4 occupants of their strata lot, and that each of them showers daily. Yet, they do not say they changed their shower routine in any way when tiles started coming off. They also do not say they made any attempt to repair the tiles themselves or to cover the area to prevent water from leaking through the exposed section. I find the Oberlanders ought to have known that showering with tiles broken off could likely result in a leak. I find the Oberlanders' failure to take any action to prevent a leak when multiple tiles came off in their shower stall was unreasonable in the circumstances.

26. I find the Oberlanders' actions breached the standard of care, which caused water to leak into the McNabs' strata lots below, resulting in substantial and unreasonable damage. Therefore, I find the Oberlanders are liable for the McNabs' damages under the laws of both negligence and nuisance.

### ***Damages***

27. As noted, the McNabs claim \$1,000 for repair costs. I infer they based the claimed amount on the initial estimate they received for \$1,000, though the final repair bill ended up being somewhat less.

28. The evidence shows the McNabs paid a \$436.15 invoice to repair the water damage to their ceilings on June 21, 2021, an amount I find reasonable. I order the Oberlanders to pay the McNabs \$436.15 for the ceiling repairs.

29. The McNabs also claim \$340.83 for gas expenses. I infer that the McNabs do not live full-time in the water-damaged apartment, and that it is likely a seasonal vacation property. They say they had to make a special trip from their other home, which I note is over 700 kilometres away, to obtain an estimate and coordinate repairs with the restoration company. I find it was reasonable for the McNabs to reassess the damage in-person and to ensure no further damage had taken place during their absence. I accept the McNabs' evidence that they would not have made this return trip to their seasonal property, but for the water damage. Therefore, I order the Oberlanders to pay the McNabs \$340.83 for gas expenses.

30. The evidence also shows the McNabs paid \$70 for a building escort to supervise the workers while they were completing the ceiling repairs, after the McNabs returned home. I find this amount reasonable and order the Oberlanders to pay the McNabs \$70 for the building escort.

31. Finally, the McNabs claim \$12.48 for sending the Oberlanders a March 8, 2021 letter by registered mail. They say they made several attempts to contact the Oberlanders by email about their responsibility for their ceiling repairs, without response. I find the

claimed \$12.48 expense is proven and it was reasonable under the circumstances, so I order the Oberlanders to pay that amount.

32. In summary, I order the Oberlanders to pay the McNabs \$859.46 in damages for their ceiling repairs and other expenses related to the water damage.
33. The *Court Order Interest Act* applies to the CRT. The McNabs are entitled to pre-judgment interest on the \$859.46 from June 21, 2021, the date of they paid the repair invoice, to the date of this decision. This equals \$1.53.
34. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I find the McNabs are entitled to reimbursement of \$125 in CRT fees. They did not claim any dispute-related expenses.

## **ORDERS**

35. Within 30 days of the date of this decision, I order the Oberlanders to pay the McNabs a total of \$985.99, broken down as follows:
  - a. \$859.46 as reimbursement for ceiling repairs and other expenses related to the water damage,
  - b. \$1.53 in pre-judgment interest under the *Court Order Interest Act*, and
  - c. \$125 in CRT fees.
36. The McNabs are entitled to post-judgment interest, as applicable.
37. Under section 48 of the CRTA, the CRT will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the CRT's final decision.

38. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

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Kristin Gardner, Tribunal Member