Civil Resolution Tribunal

Date Issued: February 12, 2021

File: CS-2020-005528

Type: Societies and Cooperatives

Civil Resolution Tribunal

Indexed as: *Kirkwood v. Arlington Grove Housing Co-operative*, 2021 BCCRT 174

B E T W E E N :

LINDA KIRKWOOD, LYNN WILSHIRE, PIOTR TYLOCH, ANNA TYLOCH

APPLICANTS

A N D :

ARLINGTON GROVE HOUSING CO-OPERATIVE

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Herb Morton

INTRODUCTION

1. This dispute is about basketball noise in a housing co-operative.

2. The applicants are Linda Kirkwood, Lynn Wilshire, Piotr Tyloch, and Anna Tyloch. They are members of the respondent Arlington Grove Housing Co-operative (the Co-op).

3. The applicants seek the permanent removal of a basketball hoop from its current location. They say that their lives have been disrupted by noise due to the playing of basketball close to their residences.

4. The Co-op acknowledges there is noise generated by the basketball activity, but says the noise is not unreasonable. The Co-op says that a basketball hoop has been used in the same location since at least 2003. The Co-op says that it supports providing play opportunities for children inside the Co-op. The Co-op also says that it attempted to negotiate the hours of basketball activity, the height of the net, and the possibility of moving the net to another area.

5. The applicants are self-represented. The Co-op is represented by a director.

JURISDICTION AND PROCEDURE

6. These are the formal written reasons of the Civil Resolution Tribunal (CRT).

7. The CRT has jurisdiction over certain cooperative association claims under section 125 of the *Civil Resolution Tribunal Act* (CRTA).

8. The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.

9. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, email or a combination of these. I am satisfied an oral

hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.

10. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The CRT may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

11. Under section 127 of the CRTA and the CRT rules, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.

ISSUE

12. The issues in this dispute are whether:

    a. the Co-op's refusal to remove the basketball hoop from its current location was contrary to Rule 7.02 of the *Occupancy Agreement*, and,

    b. if so, should the CRT order a permanent removal of the basketball hoop from its current location.

EVIDENCE

13. The background facts are not in dispute. The applicants and the Co-op have provided evidence, and have not disputed the accuracy of the others' evidence.

14. The Co-op was incorporated in 1981, with a change of name in 1984.

15. A basketball hoop has been in use at the Co-op since at least 2003. The Co-op provided a 2003 photograph showing a basketball hoop at its current location.

16. The Co-op provided a 1997 photograph showing that this location was previously used as a playground for children.

17. The first basketball hoop was purchased by a member. At a March 31, 2015 meeting, the Board of Directors (the directors) approved the expenditure of up to $400.00 to replace the basketball hoop as a playground expense.

18. The directors' meeting minutes of May 29, 2018 noted a complaint about noise from basketball activity. The directors passed a motion to move the basketball hoop to an area where the compost bins were located, behind the common building.

19. A petition dated June 21, 2018, signed by a majority of residents in the Co-op, asked the directors to reconsider their decision and keep the basketball hoop in the same location.

20. The 2018 petition noted that there were posted hours for basketball play of 9:00 a.m. to 9:00 p.m., which were generally followed. The petition stated that on the rare occasion of after hours play, a simple reminder "out the window" was all it took to stop the play. The petition further stated that children and teenagers should be free to enjoy an activity within their community, rather than being forced to go to another location away from the Co-op.

21. An aerial photograph of the site was provided by the Co-op, marked with arrows to show that members in 21 of the 28 units closest to the basketball area had signed the petition to keep the basketball hoop in its current location.

22. On June 26, 2018, the directors reversed their May 29, 2018 decision to move the basketball hoop. The hoop remained in its current location.

23. On September 16, 2018, the general membership defeated a motion to move the basketball hoop to the other side of the entrance to the community building (approximately 20 metres north from the current location).

24. The applicants say that in June 2020, they became aware of Rule 7.02 of the *Occupancy Agreement*. Rule 7.02 is entitled "Good neighbour provision". It prohibits conduct that interferes with or disturbs other members' quiet or peaceful enjoyment of the Development, or unreasonably annoys or interferes with other members of the Co-op by sound.

25. By letter of June 8, 2020, the applicants asked the Co-op to remove the basketball hoop based on Rule 7.02. The applicants further asked that if the directors selected an alternate location, that it not be within hearing range of their units.

26. The applicants participated in an online meeting with the directors on July 15, 2020, to discuss the basketball noise. The minutes of that meeting stated that three noise mitigation strategies were proposed by the directors.

27. These proposals were not acceptable to the applicants who were firm in their opinion that the basketball hoop had to be removed from the Co-op.

28. The applicants requested a written response from the directors.

29. By letter of August 8, 2020, the directors summarized the history relating to the basketball hoop and advised that they were limited to the location of the basketball activity area due to space constraints and also because of the wishes of a majority of the members. The directors noted that of the 66 residential units, there were approximately 30 children and just as many young adults, many of whom enjoy “shooting hoops”.

30. The directors further noted that adults sometimes use the basketball area as well as friends and guests. The present basketball playing area was originally a large playground.

31. The directors say that the Co-op had always been “family friendly”, which has meant a good deal of playing in and around common areas during its 35-year history.

32. A map has been provided, with markings to show the location of a basketball hoop on a near-by cul-de-sac. The map also showed the location of a nearby elementary school which has six basketball hoops on its grounds.

33. A letter has been provided by a Co-op member, stating that one of the applicants has called her on many occasions over the last few years to inquire if the playing of basketball had finished so that she could return to her unit.

34. A medical note was provided by Dr. Yap to document concerns expressed by one of the applicants about the adverse effects of the basketball noise on her health.

35. The applicants say that their lives have been continuously disturbed and disrupted by the playing of basketball in close proximity to their homes. They say that the alternate location considered by the directors was 12 metres from one of them and 20 metres from another.

ANALYSIS

36. In a civil proceeding like this one, the applicants must prove their claim on a balance of probabilities.

Rule 7.02 binding

37. CRTA section 125(1)(c) says that the CRT has jurisdiction over a claim about a decision of the Co-op or its directors in relation to a member. CRTA section 125(1)(a) says that the CRT has jurisdiction concerning the interpretation or application of the *Cooperative Association Act* (CAA) or a rule under the CAA.

38. The dispute about the basketball hoop must be addressed based on the Co-op's binding rules.

39. Section 18 of the CAA says that the Co-op's Rules are binding on the Co-op and its members. Rule 1.4 says that the terms and conditions of the *Occupancy Agreement* are "binding upon each member and the Co-op with respect to the occupancy of the Unit by the member." The *Occupancy Agreement* is attached as Schedule A to the Rules.

40. Section 25.01 of the *Occupancy Agreement* similarly states that it is Schedule A to, and forms part of, the Rules of the Co-op and is binding on the member and the Co-op.

41. The applicants rely on Rule 7.02 of the *Occupancy Agreement*. This provides that a member shall not engage in conduct which interferes with or disturbs other members'

quiet or peaceful enjoyment of the Co-op, or unreasonably annoys or interferes with the other members of the Co-op by sound, conduct or other activity.

42. A preliminary question is whether the applicants may make a claim against the Co-op, based on a provision setting out the obligations of members.

43. I find that the applicants are entitled to expect the directors to enforce the Rules, and may dispute the August 8, 2020 decision of the directors in relation to the interpretation and application of the Rules.

Protection from "Unreasonable" Noise

44. I accept the applicants' evidence as genuine, about the effects of the basketball noise in negatively impacting their quiet and peaceful enjoyment of their units.

45. The wording of Rule 7.02(a) might be read as supporting a subjective test as to whether a person has engaged in conduct which interferes with or disturbs other members' quiet or peaceful enjoyment of the Co-op. This provision does not contain the term "unreasonably".

46. However, I consider it significant that Rule 7.02(b), which expressly refers to sound, prohibits conduct which "unreasonably" annoys or interferes with the other members of the Co-op. Reading Rule 7.02(a) and (b) together, I find that the protection provided to members for their quiet or peaceful enjoyment is from sound or noise which unreasonably annoys or interferes with them.

Common law on Nuisance

47. The question as to whether the basketball noise was unreasonable is appropriately addressed by the common law on nuisance.

48. To illustrate, a decision of the CRT in *Newnes v. Bicknell*, 2020 BCCRT 1407, concerned strata corporation by-laws which said that a resident must not use their strata lot in a way that causes unreasonable noise, or in a way that unreasonably interferes with the right of another person to use or enjoy their strata lot. The CRT

found that the applicant must prove that the noise was unreasonable based on the common law of nuisance. The CRT found that in the strata context, a nuisance is an unreasonable interference with an owner's use and enjoyment of their property: *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.* (*Triple P*), 2018 BCSC 1502. Whether or not an interference, such as noise, is unreasonable depends on several factors, such as its nature, severity, duration and frequency.

49. The interference must also be substantial such that it is intolerable to an ordinary person, taking into account many factors including the character of the neighbourhood: *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, at para. 77:

> …Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance (Linden and Feldthusen, at p. 559). The interference must be intolerable to an ordinary person (p. 568). This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity (p. 569). The interference must be substantial, which means that compensation will not be awarded for trivial annoyances (Linden and Feldthusen, at p. 569; Klar, at p. 536).

50. The focus is not on the cause of the noise, but its effect. Several CRT decisions have found that noise was unreasonable even though the resident making the noise was doing normal everyday activities like walking and talking. (See, for example, *Lucas v. The Owners, Strata Plan 200*, 2020 BCCRT 238, *Moojelsky v. The Owners, Strata Plan K 323 et al*, 2019 BCCRT 698, and *Torok v. Amstutz et al*, 2019 BCCRT 386).

51. In *Torok*, the CRT found that there is no requirement that noise reach a certain decibel range in order to be considered unreasonable or a nuisance. Rather, it is an objective determination, which must be made based on a standard of reasonableness, and in consideration of all the relevant facts.

52. In *Moojelsky*, the applicant provided 15 audio and video recordings of the noise disturbances in her unit between March 2018 and February 2019. Some of the videos

showed decibel readers on a cell phone application. The applicant also submitted a log of noise disturbances.

53. In *Suzuki v. Munroe*, 2009 BCSC 1403, the court gave little weight to either the parties' or the witnesses' subjective evidence about how loud the air conditioner at issue was, and instead relied on the objective evidence of noise level measurements.

54. The applicants have expressed concerns about the effects of the noise on them. They have not provided specific evidence about the extent to which the basketball hoop is used, the number of players commonly involved, or the frequency and duration of play.

55. The directors set time limits on the periods for which basketball play is permitted. The applicants' concerns do not relate to the appropriateness of those time limits.

56. This dispute also does not involve an allegation that basketball play was occurring outside of the approved time limits, so as to be unreasonable on that basis.

57. The only objective evidence provided about the level of the noise is a brief cellphone recording taken from the balcony of what is described as the nearest unit. The video recording shows the balcony, but does not show the basketball play. The audio recording contains the sound of banging, which I accept as being caused by a basketball being bounced on a hard surface and by the basketball bouncing off the backboard of the hoop. This recording does not establish the sound levels inside the applicants' three different units.

58. In any event, regard must also be had to any special circumstances, such as the character of the neighbourhood where the nuisance is alleged. In *Triple P*, the court cited the following reasoning from an earlier court decision:

> Consideration must also be given to the character of the neighbourhood where the nuisance is alleged, the frequency of the occurrence of the nuisance, its duration and many other factors which could be of significance in special circumstances. While an owner of land in a quiet residential district may well expect to be protected from the operation of a boiler factory on his neighbour's

> land, he may not be entitled to expect to prevent the boilermaker from pursuing his lawful calling when he seeks to put his residence in an industrial area next to the factory. The conflicting interests must be weighed and considered against all the circumstances.

59. The Co-op describes a long history of permitting outdoor play on its grounds. They say that in early days, this involved a lot of street hockey being played which was louder than the basketball play. I consider that this history involves a special circumstance relating to living in this Co-op.

60. Piotr and Anna Tyloch became members of the Co-op in 1986. They have not contradicted the evidence from the Co-op that the noise from the basketball hoop is less than the noise previously caused by the playing of street hockey in earlier years.

61. By the time Lynn Wilshire became a member in 2015, and Linda Kirkwood became a member in 2016, the basketball hoop had been in use for more than a decade.

62. A comparison may be drawn between the situation of a person becoming a member of a housing co-operative with a history of permitting considerable noise from outdoor play activities, and that of a person moving to a neighbourhood with existing industrial noise. This is not a situation involving a change in use.

63. I find that medical note provided by Dr. Yap simply recorded the concerns expressed by one of the applicants without providing an opinion.

64. I find that in all the circumstances, the evidence before me does not establish that the frequency, duration, and noise level of the basketball play was unreasonable to an ordinary person. In reaching this conclusion, I give weight to the Co-op's history of permitting outdoor play with its resulting noise as a special circumstance.

65. I find that the directors' decision to deny the applicants' request for removal of the basketball hoop did not breach their right to protection from unreasonable noise.

Was the decision unfairly prejudicial to the applicants?

66. Section 127 of the CRTA further provides that the CRT may make an order directed at the association or its directors, if the order is necessary to prevent or remedy an "unfairly prejudicial" action or decision.

67. There are no prior CRT co-operative association decisions about noise. While strata property decisions are provided in a different context, they concern similar words or phrases and may thus provide helpful guidance.

68. The CRT has jurisdiction to determine claims of significant unfairness by a strata corporation under section 123(2) of the CRTA (formerly section 48.1(2): *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164.

69. As well, under section 164 of the *Strata Property Act* (SPA), the court may make any order it considers necessary to prevent or remedy a significantly unfair action by a strata corporation.

70. I consider that the term "unfairly prejudicial" is similar to the term "significant unfairness", so that a similar test may be applied.

71. The courts and the CRT have considered the meaning of "significantly unfair" and have largely followed the interpretation adopted by the BC Court of Appeal (BCCA) in *Reid v. Strata Plan LMS 2503*, 2003 BCCA 128. In *Reid,* the court said that actions are "significantly unfair" when they are burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust or inequitable.

72. In *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, the BCCA established an expectation test, restated in *Watson* at paragraph 28 as follows:

    a. What is or was the expectation of the affected owner or tenant?

    b. Was that expectation on the part of the owner or tenant objectively reasonable?

    c. If so, was that expectation violated by an action that was significantly unfair?

73. In *Kunzler v The Owners, Strata Plan EPS 1433*, 2020 BCSC 576, the BC Supreme Court said that consideration of an owner's expectations is not always necessary when determining significant unfairness. The court found the "reasonable expectation" test from *Dollan* may make sense when a strata council is exercising its discretionary authority, but found in a situation where it could result in an order that a bylaw does not apply to a particular owner, it would be unreasonable to apply the "reasonable expectation test". The court said this would create a "grandfathering regime", which is not contemplated in the SPA except for restrictions on pets, age and the rental of strata lots. In circumstances involving an owner being exempt from a bylaw, the court found the appropriate test is whether the disputed action falls within the definition of significant unfairness as described in *Reid*.

74. The directors' decision not to remove the basketball hoop from its current location involved an exercise of discretionary authority. Accordingly, I have considered it in relation to the "reasonable expectation" test from *Dollan.* As set out above, Dollan was about section 164 of the SPA, which is analogous but not the same as the provision considered here.

75. The basketball hoop was in use for many years prior to Lynn Wilshire and Linda Kirkwood becoming members of the Co-op in 2015 and 2016, respectively. I do not consider that they would have any objectively reasonable expectation that the basketball hoop would be removed.

76. Piotr and Anna Tyloch became members of the Co-op in 1986, when the area in question was used as a children's playground prior to the introduction of the basketball hoop. However, by the time the noise concerns were raised with the directors in 2018, the basketball hoop had been in use for 15 years. As well, there was a long history of the Co-op permitting outdoor play including street hockey. I do not consider that they would have any objectively reasonable expectation that the basketball hoop would be removed.

77. Based on Rule 7.02, the applicants have an objectively reasonable expectation that they would be protected from unreasonable noise. For the reasons set out earlier in this decision, I do not consider that this expectation was violated.

78. As well, the burden associated with the noise from the playing of basketball was not experienced by the applicants alone. This was not a case in which only a minority of members were exposed to the noise, so as to involve a disproportionate imposition on their interests. The majority of the members living in close proximity to the basketball hoop signed the 2018 petition opposing a move of the basketball hoop.

79. I find that the continued use of the basketball hoop in its current location is not unfairly prejudicial to the applicants. The burden of the noise associated with such play is borne by members generally. The applicants were not singularly adversely affected. The directors acted reasonably in respecting the wishes of the majority to maintain the basketball hoop in its current location. I also find that their decision to deny the request for removal of the basketball hoop was not done in bad faith or unjust or inequitable, in relation to the test set out in *Reid*.

80. I dismiss the applicants' request for an order that the Co-op remove the basketball hoop from its current location. I find that the August 8, 2020 decision of the directors did not breach Rule 7.02 of the *Occupancy Agreement*.

81. It remains open to the directors to further consider whether any noise mitigation measures would be appropriate.

CRT Fees and Expenses

82. No expenses are claimed apart from CRT fees.

83. Under section 49 of the CRTA and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses.

84. I find the applicants are not entitled to reimbursement of their CRT fees, as they were unsuccessful in this dispute. I make no order about reimbursement of CRT fees.

ORDER

85. I dismiss the applicants' claims and this dispute.

Herb Morton, Tribunal Member