



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Nicholl-Smith v. The University Women's Club of Vancouver, British Columbia*, 2022 BCCRT 1108

B E T W E E N :

SHELLEY NICHOLL-SMITH aka SHELLEY NICHOLL

APPLICANT

A N D :

THE UNIVERSITY WOMEN'S CLUB OF VANCOUVER, BRITISH
COLUMBIA

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Sherelle Goodwin

INTRODUCTION

1. The applicant, Shelley Nicholl-Smith (aka Shelley Nicholl), is a member of the respondent society, The University Women's Club of Vancouver, British Columbia

(UWCV). Ms. Nicholl-Smith is creating a book about Hycroft House (Hycroft), a historical building which UWC owns and uses as a clubhouse.

2. Ms. Nicholl-Smith says UWCV has acted in an unfairly prejudicial manner in denying her access to Hycroft photos and otherwise interfering with her ability to complete her book. Ms. Nicholl-Smith seeks an order that UWCV stop denying photo access and interfering with her collaboration with UWCV members and staff.
3. UWCV denies any unfairly prejudicial conduct and says Ms. Nicholl-Smith's expectations about the photos are unreasonable. It denies any interference with the book. UWCV also says Ms. Nicholl-Smith's requested order is too vague and ambiguous to be enforceable.
4. Ms. Nicholl-Smith represents herself. UWCV is represented by its president.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over certain society claims under section 129 of the Civil Resolution Tribunal Act (CRTA). CRTA section 2 says 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. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, both parties here call into question the credibility, or truthfulness, of the other. In these circumstances, I find that I am able to assess and weigh the documentary evidence and submissions before me. In *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not necessarily required in every case where credibility is at issue. 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 and fairness.

7. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, even where the information would not be admissible in court. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
8. Under CRTA section 131, 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.

PRELIMINARY ISSUE

9. In its Dispute Response, UWCV argued the CRT has no jurisdiction over this dispute.
10. In a May 3, 2022 preliminary decision another tribunal member found the CRT has jurisdiction to consider claims of unfairly prejudicial conduct by a society under sections 129 and 131 of the CRTA. I agree with that tribunal member's decision and adopt the reasoning at paragraphs 27 to 31 of my non-binding decision *Pang v. Little Mountain Residential Care & Housing Society*, 2021 BCCRT 947.
11. Ms. Nicholl-Smith originally made a second claim that UWCV did not properly handle a complaint made against her by the president and that its policy effectively prevented members from complaining about UWCV directors. Ms. Nicholl-Smith asked the CRT to order the UWCV to create a "non-biased" complaints process, including a review process. She also sought an order that the UWCV investigate its own actions, presumably about both the photo access and the president's complaint, with the goal of expelling any director who was found to have acted "with malice".
12. In the May 3, 2022 preliminary decision, the tribunal member found that Ms. Nicholl-Smith's request for an investigation potentially resulting in expulsion was a matter relating to the termination of a member. The CRT has no jurisdiction over membership termination, under section 130(2)(a) of the CRTA. The tribunal member also found the CRT has no jurisdiction to make an order that could make a society's process fairer in future, hypothetical situations. While the preliminary decision refusing to

resolve this second claim is not binding on me, I agree with and adopt the tribunal member's reasoning.

ISSUES

13. The remaining issues in this dispute are:

- a. Has UWCV acted in a prejudicially unfair manner by denying photo access or otherwise interfering with Ms. Nicholl-Smith's book?
- b. If so, what is the appropriate remedy?

EVIDENCE AND ANALYSIS

14. In a civil claim like this one the applicant has the burden of proving her claims on a balance of probabilities (meaning "more likely than not"). I have read the parties' submissions and weighed the relevant evidence, but only refer to that which is necessary to explain and give context to my decision.
15. Under its constitution, the UWCV is tasked with maintaining, improving and managing Hycroft and other assets, to provide bursaries and scholarships, and to promote membership interest in education, public affairs, and other intellectual matters.
16. In 2018 UWCV filed an amended set of bylaws with the BC Registrar of Companies, which I find apply to this dispute. Although UWCV later filed further amendments, I find those amendments do not relate to the issues in this dispute.
17. UWCV is governed by a Board of directors (Board). Under bylaw 7.1 the Board includes the president, a member relations director (MRD), and the House Committee Chair (HCC), among other directors. From Board minute meetings, I find the House Committee is responsible for managing and maintaining Hycroft.
18. Ms. Nicholl-Smith says she has been working on her book about Hycroft for approximately 4 years. Based on Ms. Nicholl-Smith's emails, I find she was working with the Archives Committee Chair (ACC) to identify photos for the book in January

of 2021. While some photos were in UWCV's archives, some were displayed on Hycroft's walls. It is undisputed the ACC had some of the inspected photos digitally scanned.

19. In a February 10, 2021 email the HCC invited Ms. Nicholl-Smith to discuss her book and recent photo request at the upcoming March 2, 2021 Board meeting. The HCC said: "Board approval is needed before you proceed". Based on emails between the ACC and Ms. Nicholl-Smith in April 2021, I find this meant Ms. Nicholl-Smith was not provided any further access to UWCV's archives and was not provided with copies of the photos scanned by the ACC.
20. Based on the parties' emails and meeting minutes, I find Ms. Nicholl-Smith attended the July 22, 2021 Board meeting to discuss her book. In August emails the president asked for further information and Ms. Nicholl-Smith provided a requested photo list.
21. In a September 22, 2021 report, Ms. Nicholl-Smith provided a description of her coffee-table style book. She asked UWCV to:
 - a. Grant permission to use 18 photos she said UWCV had copyright over,
 - b. Provide the name of the former staff member that had taken some of the requested photos which I infer Ms. Nicholl-Smith believed UWCV had copyright over,
 - c. Provide digital copies of 17 photos the ACC had already scanned, which Ms. Nicholl-Smith said were no longer covered by copyright, and
 - d. To adjust, finalize and sign the draft permission form Ms. Nicholl-Smith provided.
22. The report included copies of the 18 photos that Ms. Nicholl-Smith asked for permission to use. It is unclear whether UWCV has physical possession of those photos in its archives, on its walls, or in some other manner such as a photo album. I understand Ms. Nicholl-Smith requires permission from UWCV to use the photos in her book, rather than requiring digital copies of those photos.

23. The report also included photos of the 17 “Archives photos”, some of which appear to be framed. Ms. Nicholl-Smith says these 17 photos are “in the public domain”, meaning the copyright has expired, and so she does not need UWCV permission to use the photos in her book. I understand that she seeks digital copies of these 17 photos, rather than permission to use them.
24. In an October 6, 2021 letter, the Board denied Ms. Nicholl-Smith’s request to use and inspect the UWCV’s photos, under bylaw 17.2. Bylaw 17.2 allows all members to inspect certain listed UWCV records, upon request. It also says the Board has discretion to allow, or deny, a member’s request to inspect or copy any records not listed in the bylaw.
25. I find this is not a request for society records under sections 20 and 24 of the *Society Act* (SA). This is because photos are not a record which the SA requires societies to keep or provide access to. Further, neither party referred to the records request provisions of the SA.

Unfairly Prejudicial Conduct

26. To succeed in her claim, Ms. Nicholl-Smith must establish that the society failed to meet her reasonable expectations and that, on an objective basis, that failure involved prejudicial consequences (see *Dalpadado v. North Bend Land Society*, 2018 BCSC 835). The focus is on the effect of the allegedly unfairly prejudicial conduct on the society member, rather than on the intention of the society in its conduct (see *Surrey Knights Junior Hockey v. The Pacific Junior Hockey League*, 2018 BCSC 1748, citing *Nystad v. Harcrest Apt. Ltd.*, 1986 CanLII 999 (BC SC). It is not enough for Ms. Nicholl-Smith to prove the conduct was prejudicial to her. There must also be an element of inequity or unfairness to the conduct’s effect (see *Dalpadado*).
27. Factors relevant to determining reasonable expectations include the size, nature and structure of the society, the society’s general practice, the parties’ relationship, past practice, steps the member could have taken to protect themselves, any representations or agreements made, and the fair resolution of conflicting interests

between the parties (see *Fusion Football Club Soccer Association v. Vancouver Youth Soccer Association*, 2021 BCSC 1336, citing *Surrey Knights*).

28. Ms. Nicholl-Smith says she expected UWCV to act fairly and justly in making a decision and responding to her September 22, 2021 request, and not to hinder her book.

Expectations About the Photos

29. I infer Ms. Nicholl-Smith expected UWCV to give her digital copies of the requested photos (17 photos), and permission to use those photos still covered by copyright (18 photos). For the sake of completeness, I also infer Ms. Nicholl-Smith asks to have access to the UWCV archives to inspect further photos for possible use in her book. As noted above, it is up to Ms. Nicholl-Smith to prove this expectation is a reasonable one.
30. First, Ms. Nicholl-Smith says UWCV has no legal authority to deny her copies of those photos which are no longer copyrighted. She says this includes the 17 photos already scanned by the ACC, because the photos are over 50 years old. Given Ms. Nicholl-Smith's undisputed statement that Hycroft House was built in 1909, and my observations of the "Archives photos" photos provided by Ms. Nicholl-Smith, I find it likely that those photos are much older than 50 years.
31. The *Copyright Act* (CA) says photo copyright expires at the end of the 50th year following the photographer's death, with some exceptions. So, I find those 17 photos are no longer copyrighted, given their age. However, there is no requirement under the CA that the owner of a work no longer under copyright must provide access to or copies of the work if asked. Rather, the expiration of a copyright simply means that copying that work no longer contravenes the CA. So, I find UWCV is not required to give Ms. Nicholl-Smith access to, or copies of, its archived photos simply because they are no longer under copyright.
32. Second, Ms. Nicholl-Smith says that, if bylaw 17.2 applies to the photos, it entitles her to inspect and copy them.

33. Bylaw 17.2 says all members are entitled to inspect certain identified UWCV “documents and records”, including UWCV’s constitution, minutes, resolutions, annual financial statements, registers, court orders, and incorporation documents. As the requested photos are not listed as documents or records UWCV must allow members to inspect, I find the bylaw does not require UWCV to allow Ms. Nicholl-Smith to inspect or copy the photos.
34. Third, Ms. Nicholl-Smith says UWCV created an expectation that she would receive access to the requested photos. I infer she means access to the archives, permission to use the copyrighted photos, and digital copies of the identified archived photos. Although she says that former UWCV presidents and directors, and current members, supported the book, Ms. Nicholl-Smith provided no supporting evidence, such as witness statements, emails, or letters. Further, even if former directors supported the book, I do not find that means those directors expressly or impliedly agreed to provide Ms. Nicholl-Smith with access to, permission to use, or digital copies of UWCV photos.
35. Ms. Nicholl-Smith says the UWCV president promised at a June 24, 2021 meeting to give Ms. Nicholl-Smith access to any requested photos after she attended a Board meeting. However, in a June 27, 2022 statement the president denied this. Further in the HCC’s February 10, 2021 email, she said Ms. Nicholl-Smith needed the permission of the Board to proceed, which I find inconsistent with a promise to provide access after Ms. Nicholl-Smith merely attended a meeting. Such a promise is also inconsistent with the Board’s July 22, 2021 meeting minutes, which indicate the Board was to discuss Ms. Nicholl-Smith’s request and “let her know what is needed as next steps”. Finally, I find it unlikely that the president would make an unequivocal promise to allow Ms. Nicholl-Smith access to any requested photos without Ms. Nicholl-Smith providing something in return. On balance, I find it unlikely that the president made the promise Ms. Nicholl-Smith alleges.
36. Based on Ms. Nicholl-Smith’s emails, I find she was working with the ACC to identify UWCV photos to be used in the book in January 2021. From the Board meeting minutes and bylaws, I find the ACC is not a UWCV director and so cannot make

decisions on behalf of the Board. So, I find the fact that ACC helped Ms. Nicholl-Smith with the photos does not mean that UWCV agreed to provide access to, permission to use, or copies of any such photos.

37. I acknowledge that the HCC, who is a UWCV director, did not initially object to Ms. Nicholl-Smith's access to, and use of the photos when Ms. Nicholl-Smith emailed her on January 6, 2021. However, the HCC advised Ms. Nicholl-Smith that she needed Board approval to proceed with her photo inspection and use on February 10, 2021. Board and House Committee meeting minutes show this was due to concerns about the UWCV brand, copyright issues, and Board approval. I do not find that allowing access for 1 month created a reasonable expectation of continued access to UWCV's photo archives, or entitlement to digital copies or permission to use the requested photos in her book.
38. Fourth, Ms. Nicholl-Smith says UWCV has provided permission to other authors to use its photos and refers to the 2001 book "Merchant Prince". UWCV says it had a financial agreement with the authors to buy the book and resell it for profit. Based on Ms. Nicholl-Smith's emails to the president, I find no such financial agreement was proposed here. Rather, Ms. Nicholl-Smith expressly says she worked on the book as an independent project, for her own commercial gain. Further, only 2 of the Merchant Prince photos in evidence are found in Ms. Nicholl-Smith's group of 17 archived photos she asks for copies of. So, I find the situations are different, meaning Ms. Nicholl-Smith cannot have reasonably expected UWCV to give her access to, permission to use, or digital copies of the requested photos based on a prior financial agreement made with a different author for mostly different photos.
39. UWCV says the Merchant Prince authors were not UWCV members, which Ms. Nicholl-Smith does not dispute. Based on the ACC's June 27, 2022, I find UWCV has not previously provided archive photo access to members for their personal use. So, I find UWCV is not treating Ms. Nicholl-Smith any differently than any other member in this matter.

40. Finally, I find Ms. Nicholl-Smith's expectation that she was entitled to the photos is inconsistent with UCWV's rules.
41. Rule 1.1 says that UWCV's brand incorporates the Hycroft name and venue, and is visually expressed through logo, design, typography colours and imagery. The rule prohibits members from using the brand for personal or private purposes, or any purpose not approved by the Board. Based on the rule's wording, I find UWCV's brand includes photos of Hycroft. So, I find Ms. Nicholl-Smith should have reasonably expected that she needed Board approval to use Hycroft photos in her book.
42. Further Rule 3.2 allows non-commercial photography of Hycroft, but any commercial photography must be approved by the Board and may be subject to an advance rental contract. Although not directly applicable to already existing photos, I find this rule indicates that Hycroft photo use must be approved by the Board and is not a right that members are automatically entitled to.
43. In summary, I find Ms. Nicholl-Smith has not established that she is entitled to the photos under the UVWC's bylaws or rules, under any express or implied agreement with UVWC, or on account of UVWC's past business practices or conduct. On balance, I find Ms. Nicholl-Smith's expectation that UWCV would provide access to or digital copies of archived photos or permission to use copyrighted photos for her own personal gain is not objectively reasonable.
44. To the extent Ms. Nicholl-Smith argues UWCV unreasonably interfered with her book by preventing the ACC from speaking or providing information to her, I find such an argument unproven. Ms. Nicholl-Smith provided no evidence of any such interference. Although the Board meeting minutes and emails indicate the Board directed ACC to wait for the Board's permission before providing digital copies of the 17 archived photos, the evidence shows no further "interference" by UWCV.
45. Ms. Nicholl-Smith also says UWCV failed to provide her with the names of staff members who took certain photos, failed to obtain legal advice on copyright law, and failed to sign the permission form, as requested in her September 22, 2022 email. I find such expectations are not objectively reasonable, as explained below.

46. First, I infer Ms. Nicholl-Smith required the photographer's name to provide credit for some of the 18 photos still under copyright. As UWCV declined to give Ms. Nicholl-Smith permission to use the photos, there is no reason to provide the name of the photographer or sign the proposed permission form.
47. Second, there is no obvious reason why UWCV should obtain legal advice on the recommendation of a member. Based on the president's October 9, 2021 email to Ms. Nicholl-Smith, I find the Board decided it did not have the funds to obtain the requested legal advice. I find that explanation reasonable in the circumstances.

Expectation for Board to Act Fairly

48. Ms. Nicholl-Smith also says she expected UWCV to act fairly in considering her September 22, 2021 photo access and copy request. I find that is a reasonable expectation.

Did the Board act in an Unfairly Prejudicial Manner by Failing to Act Fairly?

49. Ms. Nicholl-Smith says the president complained to the MRD (Member Relations Director) about Ms. Nicholl-Smith, in September 2021. She says those 2 directors therefore had a conflict of interest and so should have recused themselves from the October 5, 2021 Board decision about Ms. Nicholl-Smith's photo request. I infer Ms. Nicholl-Smith argues this is a personal conflict, rather than a material conflict of interest in a contract or transaction, which would be governed by SA section 58.
50. She says the Board's decision must have been a result of that complaint, rather than any reasonable basis about the photos.
51. In her June 27, 2022 statement, the MRD said the president telephoned her, upset about Ms. Nicholl-Smith's emails, described as "disrespectful". The MRD said she spoke with Ms. Nicholl-Smith, who was also upset. I find the telephone calls were likely the president's informal complaint to the MRD, and the MRD's attempt at resolving the complaint, both of which I find are permitted under UWCV's Conflict Resolution Policy.

52. I do not find the president's informal complaint about Ms. Nicholl-Smith's behaviour to the MRD created a conflict of interest in voting on whether the UWCV should allow Ms. Nichol-Smith to have access to, use, or have digital copies of the requested photos. To find so would mean that any director who complained about any member would be unable to address any business that member might have before the Board.
53. In her September 4, 2021 emails to the president, Ms. Nicholl-Smith referenced an email she received from the ACC, about UWCV archive photos Ms. Nicholl-Smith had "copied". Ms. Nicholl-Smith accused the president of harassing the ACC behind Ms. Nichol-Smith's back. She said, "the inference is appalling" and "This is absolutely despicable behaviour". I find the tone and words used in the email were the source of the president's complaint, rather than Ms. Nicholl-Smith's photo request or book plans. In other words, I find the complaint and Ms. Nicholl-Smith's request are not the same matter. So, I find Ms. Nicholl-Smith has not proven that either the president or the MRD were in a conflict of interest in discussing or voting on Ms. Nicholl-Smith's photo request.
54. Contrary to Ms. Nicholl-Smith's argument, I find UWCV provided reasons for denying her request to access, use or receive copies of photos. In the October 6, 2021 letter, UWCV relied on bylaw 17.2. Even if UWCV's analysis of bylaw 17.2 was incorrect or mistaken as Ms. Nicholl-Smith argues, the reasons were still provided in UWCV's letter denying the photo request.
55. Further, the February 4, 2021 Board meeting minutes show that UWCV considered Ms. Nicholl-Smith's general request for photo and archive access in the context of Rule 1.1. and the requirement for Board approval to use the UWCV brand, including Hycroft. Although I accept that concern was not initially conveyed to Ms. Nicholl-Smith I find it would have been reasonable for her to anticipate the concern upon review of the UWCV rules which she undisputedly had access to, as a member. So, I find Ms. Nicholl-Smith either knew, or should have known, UWCV's concerns about her book request and therefore I find UWCV's decision making process was not procedurally unfair.

56. To the extent Ms. Nicholl-Smith argues that UWCV did not adequately consider her photo request, I find that is unproven. The minutes in evidence show the Board considered her photo use request in some way on February 9, July 22, August 3, and October 5, 2022 and the House Committee considered the request on February 4, 2021. The minutes show that UWCV considered Ms. Nicholl-Smith's proposals, the UWCV bylaws and rules, copyright issues, and the best interests of UWCV.
57. Contrary to Ms. Nicholl-Smith's argument, I find the Board's consideration of her request "in camera" (meaning in private) does not mean the decision was made on a personal basis, rather than in the best interests of the UWCV. There is no requirement under either the SA or UWCV's bylaws to document any details about discussions at Board meetings, other than Board resolutions and votes.
58. On balance I find the Board acted fairly by giving Ms. Nicholl-Smith the opportunity to be heard, and by considering her proposal, UWCV bylaws and rules, and UWCV's best interests, before making its decision about the photo request. So, I find Ms. Nicholl-Smith has not proven UWCV failed to meet her reasonable expectation for a fair consideration of her photo request.

Remedy

59. Given I have found Ms. Nicholl-Smith has not proven UWCV acted in an unfairly prejudicial manner, I need not consider whether the requested order was too vague to be enforceable.

CRT FEES and EXPENSES

60. 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. As Ms. Nicholl-Smith was unsuccessful in her claim she is not entitled to reimbursement of her paid CRT fees.
61. As the successful respondent, UWCV claims reimbursement of \$7,800 in legal fees, as dispute-related expenses. Under CRT rule 9.5(3), the CRT will not generally order

reimbursement of legal fees in society disputes like this one, except in extraordinary circumstances. CRT rule 9.5(4) sets out factors to consider in determining whether extraordinary circumstances exist. These include the complexity of the dispute, the degree of the lawyer's involvement, whether the other party or representative's conduct has caused unnecessary delay or expense, and any other factors the CRT finds appropriate.

62. Although there was a large volume of evidence and submissions in this dispute, they were provided by both parties. Contrary to UWCV's submissions, I find bylaw interpretation and jurisdiction are issues the CRT regularly considers under its society jurisdiction and are not overly complex in this dispute. I also find Ms. Nicholl-Smith's alleged failure to properly file a member conduct complaint did not delay or otherwise affect this dispute.
63. On balance, I find this is not an extraordinary dispute which justifies ordering reimbursement of legal fees. I dismiss UWCV's claim for dispute-related expenses.

ORDERS

64. I dismiss both parties' claims and this dispute.

Sherelle Goodwin, Tribunal Member