



Civil Resolution Tribunal

Date Issued: June 30, 2023

File: CS-2022-004142

Type: Societies and Cooperatives

Civil Resolution Tribunal

Indexed as: *Kahn v. The Arbutus Club*, 2023 BCCRT 558

BETWEEN:

SAUL KAHN

APPLICANT

AND:

THE ARBUTUS CLUB

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. The applicant, Saul Kahn, is a member of the respondent society, The Arbutus Club (Club). Mr. Kahn says the Club acted in an unfairly prejudicial manner by barring members who did not provide proof of vaccination against COVID-19. I note that Mr. Kahn frames his claim more broadly to be about “confidential medical information including proof of vaccination” but does not make any allegations about anything

other than proof of vaccination. The Club undisputedly barred Mr. Kahn from its facilities for the period of September 13, 2021 to April 8, 2022 because he refused to provide proof of vaccination for himself.

2. He claims orders for the Club to do the following:
 - a. pay \$1,939.12 for a refund of monthly dues paid under protest for the above-mentioned period of time,
 - b. pay \$1,000 for interest the Club was unjustly enriched by and earned from Mr. Kahn's initial membership entrance fee during the same time period,
 - c. stop barring other Club members who do not provide confidential medical information, including proof of vaccination,
 - d. reasonably accommodate members that do not provide such documentation, including providing access to all areas of the Club not expressly covered by any future governmental edicts, laws, orders or regulations, and
 - e. provide Mr. Khan the names and email addresses of all members barred from the Club from September 13, 2021 to April 8, 2022, or, alternatively to email all members and ask those barred during the noted dates to email Mr. Kahn.
3. The Club disagrees. It says the Provincial Health Officer's (PHO) orders required it to temporarily check for proof of vaccination before allowing members access to its facilities. It denies acting in an unfairly prejudicial manner. The Club also disagrees with Mr. Kahn's other arguments as discussed below.
4. Mr. Kahn represents himself. Brent Elkington, the Club's CEO, represents the Club.
5. For the reasons that follow, I dismiss Mr. Kahn's claims.

JURISDICTION AND PROCEDURE

6. 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.

7. 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. 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 and fairness.
8. 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.
9. 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.

The CRT's Preliminary Decision of November 16, 2022

10. The Club says the CRT lacks jurisdiction over this dispute on the following basis. CRTA section 131(1)(c) specifically excludes from the CRT's jurisdiction those claims that may be dealt with by the BC Supreme Court under Part 8 of the *Societies Act* (SA). The Club says that Mr. Kahn's claims fall under either SA sections 102 or 105. Both sections fall with Part 8 of the SA.
11. In a November 16, 2022 preliminary decision, the CRT declined to refuse to resolve this dispute. It found that the CRT had jurisdiction under CRTA section 131(2) to make an order directed at a society or its directors if the order is necessary to prevent or remedy an unfairly prejudicial action or decision. The CRT held that it

had jurisdiction to order a society not to ban members, to allow members to access facilities, to provide requested information, or email its members. However, the CRT also directed staff to amend the Dispute Notice to remove claims in relation to oppression or the appointment of an investigator, as these were outside the CRT's jurisdiction.

12. I agree with the reasoning in the November 16, 2022 decision and for brevity only summarize it here. I consider the claims in the amended Dispute Notice below.
13. I note that the Club also says that the CRT's preliminary decision did not address whether the CRT lacks jurisdiction over Mr. Kahn's claims about breach of the Club's bylaws and constitution. I find I may consider these allegations as part of my jurisdiction over unfairly prejudicial conduct. As to breach of contract, I find this is essentially another allegation that the Club breached the bylaws for reasons discussed below.

ISSUES

14. The remaining issues in this dispute are as follows:
 - a. Did the Club act in an unfairly prejudicial manner by denying Mr. Kahn access to Club facilities or by refusing to give him a refund?
 - b. Are any remedies appropriate?

BACKGROUND, EVIDENCE AND ANALYSIS

15. In a civil proceeding like this one, Mr. Kahn as the applicant must prove his claims on a balance of probabilities. This means more likely than not. I have read all the parties' submissions and evidence, including cited and uploaded case law, but refer only to the evidence and argument that I find relevant to provide context for my decision.

16. The Club is a member-funded society incorporated in BC in September 1960. Photos show that it provides its members with sports and social facilities located in several buildings.
17. Mr. Kahn became a full member under the Club's bylaws on November 21, 2001. He paid an entrance fee of \$22,500 at the time. Several 2022 invoices show he paid monthly dues of \$250.22 during the relevant time period of this dispute. The invoices also show other fees, such as a capital improvement fee, locker fee, and staff appreciation contribution that increased the amount by approximately \$50 each month.
18. On March 17, 2020, the PHO provided notice under the *Public Health Act* (PHA) that outbreaks of COVID-19 were an immediate and significant risk to public health throughout a region or BC. As such, the PHA's emergency powers became available to the PHO.
19. On September 10, 2021, the PHO issued an order under the PHA, titled "Gathering and Events – September 10, 2021". Under part D, the order said that "organizers" must verify proof of vaccination before persons age 12 and over entered a "place" for "events".
20. The order also defined a place to mean a venue that include a recreation centre, workout gym, exercise or dance facility or studio, recreational facility arena, or premises as defined in the *Food and Liquor Serving Premises Order*. It also defined an event to include a gathering of participants in an inside place for the purpose of an adult sports activity, or an exercise, fitness, or dance activity or class. It also defined an organizer to include a person in charge of a place at which an event was held.
21. The order also said the PHO could take enforcement action against anyone that failed to comply with the order under the PHA. It is undisputed that the order applied to the Club as it was an organizer. However, the parties dispute what the order required.

22. The order said that starting on September 13, 2021, an organizer like the Club had to obtain proof in the form of a vaccine card that a participant received at least 1 dose of vaccine against SARS-CoV-2. As noted in the order, SARS-CoV-2 is an infectious agent that causes outbreaks of COVID-19. A participant similarly had to provide such proof to the organizer.
23. Some of the evidence and submissions refer to vaccination against COVID-19 or SARS-CoV-2. For the purposes of this dispute, I find they are the same thing.
24. Organizers also had to bar participants from entering or remaining in a place for the purpose of an event if they did not provide proof of vaccination. Such participants also had to refrain from entering or remaining in a place for the purpose of an event. The order required 2 vaccine doses on October 24, 2021.
25. Item L of the order listed certain exceptions. These included swimming pools unless they were the location of an event, skating rinks when not being used for adult sport, fitness facilities which were part of a hotel or similar establishment, and rehabilitation or exercise therapy programs.
26. The Club's board of directors met on September 9, 2021. The minutes show that the board passed a resolution to adopt a policy to address the proof of vaccination requirement. The policy said that all members and guests over age 12 had to provide proof of their first vaccination dose by September 13, and another dose by October 24, 2021.
27. Bylaw 51 said the Club's board could establish rules and policies, which I find includes the policy in this dispute. Notably, and consistent with the policy, rule 6.1(2) said that the Club would restrict the use of the Club or any of its facilities by members, associates, guests, or special guests at any time.
28. Mr. Kahn objected to the policy in his September 2021 emails to the Club. He, along with others, hired a lawyer to represent them. In an October 5, 2021 letter, their lawyer demanded the Club to provide their clients access to the following facilities without providing proof of vaccination: the pools, skating rinks, physiotherapy and

massage therapy service areas, the retail store, and areas of the Club not expressly covered by the PHO's order. The lawyer wrote that some of the facilities were expressly exempt from the proof of vaccination requirement in the order, such as swimming pools, skating rinks, retail and clothing stores, and health care services, rehabilitation, or exercise therapy programs. Photos show the Club had such facilities. The lawyer alleged that the Club had unnecessarily restricted member rights and privileges while continuing to charge them monthly dues.

29. The board considered the letter at its October 7, 2021 meeting. The minutes show the following. The board said the Provincial Health Services Authority (PHSA) advised that it considered the Club a single facility. The Board decided that it had to keep its policy in order to comply with the PHO's order. It also rejected reducing or pausing monthly fees or dues because 1) the bylaws did not allow the Club to do so, and 2) the PHO's order was time limited. I note that the Order initially said it expired on January 31, 2022. The PHO issued orders repealing and replacing it over the following months, effectively extending it.
30. The Club's lawyer wrote an October 19, 2021 letter in reply to the October 5, 2021 letter, rejecting Mr. Kahn's request. Mr. Kahn's lawyer responded in a November 2, 2021 letter. They said they had received differing advice from the Ministry of Health. They said the Club could allow members that refused to show proof of vaccination access restricted to the specific facilities noted above.
31. The Club disagreed with this approach. It enforced the policy without pausing or refunding any of Mr. Kahn's fees. There is no indication that Mr. Kahn ever provided the Club proof of vaccination to access its facilities.
32. On April 8, 2022, the PHO removed the proof of vaccine requirement. The Club then rescinded the policy that same day.

Did the Club act in an unfairly prejudicial manner by denying Mr. Kahn access to Club facilities or a refund?

33. I turn to the applicable law. In order to succeed in his claim, Mr. Kahn must prove that the Club failed to meet his reasonable expectations and that, on an objective basis, that failure involved prejudicial consequences. See *Dalpadado v. North Bend Land Society*, 2018 BCSC 835 at paragraph 110.
34. In *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at paragraph 72, the Supreme Court of Canada provided a list of factors to assist in determining whether a shareholder holds a reasonable expectation that has been breached. These include general commercial practice, the nature of the corporation, the relationship between the parties, past practice, preventative steps, representations and agreements, and fair resolution of conflicting interests. In *Dalpadado* the court considered these factors, although within the context of a society dispute. So, I will follow the same approach here.
35. I note that BCSC cases like *Dalpadado* proceed under SA section 102. It allows members to apply to court to remedy either oppressive or unfairly prejudicial conduct. CRTA section 131(2) allows the CRT to make an order to prevent or remedy an unfairly prejudicial action or decision. However, it omits any mention of oppressive conduct.
36. I find nothing significant turns on this. This is because I find an oppressive act will generally be unfairly prejudicial as well. According to case law, the term “unfair prejudice” involves conduct less offensive than oppression. Oppression may describe conduct that is coercive and abusive and suggests bad faith. Unfair prejudicial conduct has a less culpable state of mind, that nevertheless has unfair consequences. See, for example, *BCE Inc.* at paragraphs 67 and 93 and *Dalpadado* at paragraph 104.
37. I first consider what Mr. Kahn’s expectations were. I find that he had 2. First, he expected the Club to allow him and other members access to the following areas: the pools, skating rinks, physiotherapy and massage therapy service areas, the retail store, and areas of the Club not expressly covered by the PHO’s order.

Second, he alternatively expected that if the Club continued to require proof of vaccination, it would not charge him monthly dues for that time period.

38. Mr. Kahn also alleges that the Club should have accommodated him. I note, however, that this is not a situation where Mr. Kahn says he had a disability or medical condition that the Club failed to accommodate. In particular, there is no indication he could not be vaccinated against COVID-19. So, I find the test from *Dalpado* is the one to apply.
39. I find Mr. Kahn's first expectation was unreasonable for the following reasons.
40. First, I find that general practices support the Club's position. The Club provided copies of policies similar to its own policy, dated September 2021, from the Vancouver Club, Terminal City Club, NSWC Club, Hollyburn Country Club, and Glencoe Club. It is undisputed that these clubs offer similar services to the Club.
41. In summary, these policies required all members over age 12 to show proof of vaccination before accessing each club's facilities. I find it clear from their wording that the clubs created their respective policies in response to the PHO's order of September 2021. Notably, there is no indication that any of these clubs allowed members that refused to show proof of vaccination access to facilities like the pools, skating rinks, or physiotherapy and massage therapy service areas.
42. Second, and more crucially, I find the Club's policy was a fair resolution of conflicting interests. As noted in the PHO's order, the Club had an obligation to verify proof of vaccination for persons entering its place. The Club essentially interpreted "place" to mean the entire building, rather than parts of it. I find the Club's interpretation was reasonable, particularly as the order's purpose was to impede the spread of an infectious disease.
43. Mr. Kahn says that PHSA or Ministry of Health advised that centres with mixed use facilities could allow access to its facilities without proof of vaccination, as long as operational controls or barricades prevented access to areas where proof of vaccination was required. The Club says that the PHSA provided the opposite

advice. It says the PHSA said that the Club was a single facility. Both parties provided only summaries of what public health authorities told them, as shown in correspondence and board minutes from October 2021.

44. I find it likely that the parties received contradictory information. I find this was likely the case because the order was still relatively new. So, its exact boundaries were untested. In such circumstances, I find the Club was entitled to err on the side of caution and conclude the use of operational control or barriers, such as signs and checkpoints, would be insufficient.
45. Even if the Club's interpretation was wrong, I find the Club was entitled to enforce a policy that required a stricter level of compliance to show proof of vaccination. I say this for 2 reasons.
46. First, the Club says that it would have been onerous and impractical to restrict members that refused to provide proof of vaccination from some areas and not others. Overall, I find the undisputed facts and evidence support the Club's position. The Club undisputedly has approximately 8,500 members and indoor facilities. The October 7, 2021 board meeting minutes said that support facilities, like washrooms, were shared between facilities. The board also concluded that there were no alternative main entrances to the Club that would be practical or safe to use to provide direct access to facilities like the pool or rinks, and support facilities. I find the board was likely familiar enough with the Club's layout to make such comments in an informed manner. I find that these factors would likely make it impractical to keep members from comingling and defeating the purpose of the proof of vaccination program.
47. Mr. Kahn disagrees. He provided various suggestions like the use of distinctive wristbands and facial recognition software paired with security cameras to keep individuals out of certain areas to comply with the PHO's order. However, aside from providing photos of the facilities, Mr. Kahn provided little evidence about the cost or practicality for the Club to do what he proposes. For example, he provided no specifics about whether existing staff would be adequate to check the

wristbands, or how many more employees would be required. Presumably, there would also need to be staff to enforce the policy against members that became uncooperative and entered areas they were prohibited from, and not merely posted at the Club's entrance. He provided no evidence about the feasibility or cost of the use of facial recognition software. I do not find his submissions or evidence persuasive without more.

48. Second, I find the Club was entitled to interpret the policy more strictly in order to protect its members. Item H of the PHO's order said that programs that require proof of vaccination had been shown to increase vaccination uptake in populations, thereby reducing the public health risk of COVID-19. At item L, the order said that unvaccinated people could be a source of viral transmission to other unvaccinated people, and also to vaccinated people who were not completely immune consequent to their vaccination, either because of a reduced immune response or only having had 1 dose. It said that these infections could result in serious illness, hospitalization, intensive care unit admission for care and death.
49. As noted in its October 19, 2021 letter to Mr. Khan's lawyer, the Club said, and I accept, that it had a significant number of vulnerable members in 2 groups. The first was children under 12 who could not get vaccinated at the time. The second was seniors. The Club's constitution says one of its purposes is to contribute to the welfare of its members and their children. The Club's undisputed submission is that it had 1,000 members that were too young to be vaccinated and 1,500 seniors. Even if the actual number is lower than that, I find the Club's actions were consistent with protecting the welfare of these 2 subsets of members.
50. Mr. Kahn says that the PHO's order was itself unnecessary and "scientifically unwarranted". In particular, he says that in January 2022 he emailed the Club about a group of individuals in Antarctica that showed vaccines against SARS-CoV-2 were ineffective. However, under PHA sections 64 and 66 of the, the PHO is the senior public health official for all of BC and burdened with the duty to independently advise the government on public health issues. With respect, I find that Mr. Kahn could not reasonably expect the Club to prefer his conclusions over the PHO's.

These included the PHO's conclusion that vaccination uptake would reduce the public health risk of COVID-19, and requiring proof of vaccination would encourage uptake, as stated in the order.

51. Further, I find it was unclear to the Club in September 2021 how long the proof of vaccination requirements would last. The order itself said that it was temporary. In its October 19, 2021 letter, the Club noted that it would adjust and re-evaluate its policy as circumstances changed. I find this occurred when it ended the policy on April 8, 2022, on the same day the PHO ended the proof of vaccine requirement. So, I find the Club's temporary use of the policy was a reasonable and rational response to changing events and a fair resolution of conflicting interests.
52. I also find the nature of the Club and its relationship to Mr. Kahn supports the Club's position. As noted in its constitution, the Club's purpose includes managing a club for athletic, recreation, social, visual and performing arts. Mr. Kahn was free to decline providing proof of vaccination until the order ended at a yet to be determined date. This would not affect his employment or other such interests. While he had a financial interest in the Club, the policy did not cause him to lose his initial entrance fee, or the ongoing membership connected with it.
53. I next consider Mr. Kahn's second expectation, namely that he expected the club to refrain from charging him monthly dues for a period of time. I find it was unreasonable as well for the following reasons.
54. Bylaw 4(2) said that no portion of the entrance fee is refundable. There is no indication that any previous version of the bylaws allowed for refunds. Bylaw 56 said the Club's board of directors may establish rules about monthly dues. Having read both the bylaws and rules, I find there is nothing that says a member is entitled to a refund if they do not or cannot use the facilities. Instead, the monthly dues are payable so long as a member wishes to maintain their membership.
55. Further, as noted in the board's February 1, 2022 minutes, Mr. Kahn could also change his membership to the social category to save fees. Rule 4.6(1)(a) said that full and senior members could apply to the membership committee for social

membership status. Rule 4.6(2) said that social members were restricted from using certain facilities or using them only once per month. However, rule 8.1(1)(b) also said that a social member's monthly fee was only \$76.20, as compared to Mr. Kahn's full member fee of \$250.22. Rule 4.6(1)(b) said that a social member could also reapply to become a full member.

56. Given this, I find Mr. Kahn was free to apply for a social membership and reapply for full membership at a later date. However, as he did not do so, I find this is another reason that he could not reasonably expect the Club to refund his fees. At a minimum he did not take reasonable measures to mitigate his loss.
57. The Club also says that it has a reasonable explanation for why its rules and bylaws do not provide for refunds. It says that it has significant operating expenses that must be paid regardless of how much members use them. Given the extensive facilities the Club operates, I find this to be obviously true. Consistent with my conclusion, the board's minutes mention ongoing expenses that cost many thousands of dollars. I find this is another reason why Mr. Kahn's expectation is unreasonable.
58. Finally, case law holds that to show oppression, an applicant must establish harm to their peculiar interests, and that harm must be distinct from the interests of others. See *Jaguar Financial Corp. v. Alternative Earth Resources Inc.*, 2016 BCCA 193 at paragraph 179. There is no indication that Mr. Kahn suffered any peculiar prejudice distinct from other members, as they all had to comply the proof of vaccination policy. The only exceptions were young persons that were expressly exempt from complying with the PHO. Mr. Kahn does not need to show oppression to prove a claim based in unfairly prejudicial conduct, but I find this reinforces my conclusions above.
59. Mr. Kahn also refers to other legal bases for his claims and I turn to them now. He alleges a breach of contract. The bylaws of a society may be considered a contract between it and its members. See *Whittall v Vancouver Lawn Tennis & Badminton Club*, 2004 BCSC 877 at paragraph 25. However, I have already found that the

Club acted within both its bylaws and constitution in this dispute. As mentioned previously, rule 6.1(2) already allowed the Club's board to restrict members from the facilities at its discretion. So, I find the alleged breach unproven.

60. Mr. Kahn also alleges unjust enrichment by the Club for not returning any portion of his entrance fee or interest notionally earned on it. To prove unjust enrichment, Mr. Kahn must show that a) the Club was enriched, b) Mr. Kahn suffered a corresponding loss, and c) there was no juristic reason or valid basis for the enrichment. See *Moore v. Sweet*, 2018 SCC 52. Here, I find that the Club had a juristic reason and valid basis to keep the entrance fee and not pay Mr. Kahn any compensation. This is because the Club's bylaws and rules allow it to keep the fees. So, I find this claim unproven as well.

61. For all those reasons, I find the Club did not act in an unfairly prejudicial manner or otherwise breach any obligation to Mr. Kahn in this dispute. So, I dismiss all of Mr. Kahn's claims. These include, as noted above, claims for remedies about his monthly dues, interest on the membership fee, and orders for the Club to take any actions about members' email addresses or how the Club must handle members' medical information.

CRT FEES AND EXPENSES

62. 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. I see no reason in this case not to follow that general rule. I dismiss Mr. Kahn's claim for reimbursement of CRT fees. The Club did not pay any CRT fees. The parties did not claim any specific dispute-related expenses.

ORDERS

63. I dismiss Mr. Kahns' claims and this dispute.

David Jiang, Tribunal Member