



# Civil Resolution Tribunal

Date Issued: August 15, 2022

File: ST-2021-009489

Type: Strata

Civil Resolution Tribunal

Indexed as: *Karnik v. Kulasik*, 2022 BCCRT 923

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

MITHILA KARNIK and KARAN ADARKAR

**APPLICANTS**

**A N D :**

KAZIMIERZ KULASIK and The Owners, Strata Plan BCS 4206

**RESPONDENTS**

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## **REASONS FOR DECISION**

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Tribunal Member:

Chad McCarthy

## **INTRODUCTION**

1. This dispute is about smoking in violation of strata bylaws. The applicants, Mithila Karnik and Karan Adarkar, own strata lot 3 in the respondent strata corporation, The Owners, Strata Plan BCS 4206 (strata). The applicants' strata lot shares a wall with strata lot 2, which is owned by the respondent, Kazimierz Kulasik. The applicants say that Mr. Kulasik continues to smoke in his strata lot despite being fined numerous

times for violating a strata bylaw prohibiting smoking anywhere in the strata. The applicants say Mr. Kulasik's second hand smoke enters their strata lot, causing a nuisance and a health hazard for them and their young child.

2. The applicants claim \$353.39 for the cost of an air purifier for their bedroom, plus \$150 for the projected electricity cost of using the purifier. They also request an order that Mr. Kulasik "completely stop smoking in his unit" and pay unspecified damages for the "health hazard faced" and costs of preventing second hand smoke from entering their strata lot.
3. Mr. Kulasik admits he continued to smoke occasionally in his strata lot despite his ongoing attempts to stop, which he says have been mostly successful. He says he has paid \$1,400 in smoking bylaw fines, and has been harassed by the applicants and assaulted by Mr. Adarkar. He says he has agreed "all along" to pay the claimed air purifier and electricity costs, and takes no clear position on the other dispute claims.
4. The strata largely agrees with the applicants. It says that Mr. Kulasik has continued to smoke in his strata lot despite being fined many times. However, the strata does not clearly say whether it is responsible for any of the applicants' claimed remedies.
5. Ms. Karnik represents the applicants in this dispute. A strata council member represents the strata. Mr. Kulasik is represented by a lawyer, Mark McDonald.
6. For the reasons set out below, I allow the applicants' \$353.39 claim for the air purifier cost and \$150 claim for the electricity cost, and I order Mr. Kulasik not to smoke in his strata lot.

## **JURISDICTION AND PROCEDURE**

7. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA), and over small claims brought under CRTA section 118.

8. 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.
9. 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. Although the parties' submissions question other parties' credibility in some respects, the credibility of interested witnesses cannot be determined solely by whose personal demeanour in a proceeding appears to be the most truthful. The most likely account depends on its harmony with the rest of the evidence. Further, in the decision *Yas v. Pope*, 2018 BCSC 282, the court recognized that oral hearings are not always needed where credibility is in issue. Keeping in mind that the CRT's mandate includes proportional and speedy dispute resolution, I find I can fairly hear this dispute through written submissions.
10. 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.
11. Where permitted by sections 118 (for small claims) and 123 (for strata property claims), in resolving this dispute the CRT may order a party to pay money or to do or stop doing something. The CRT may include in its order any terms or conditions the CRT considers appropriate.
12. The applicants provided late evidence, namely new witness accounts of recent events. I find the evidence is relevant, the respondents had an opportunity to respond to it, and the respondents did not object to it. I allow the late evidence because I find it would not be unfair to do so.

## ***Strata Property and Small Claims Jurisdictions***

13. The applicants brought this dispute under the CRT's strata property jurisdiction. However, I find the applicants' claims against Mr. Kulasik include claims for expenses and damages for nuisance, which is a common law tort. As explained below, I find that those claims are not claims "in respect of the *Strata Property Act*" so they cannot be decided under the CRTA's section 121 strata property jurisdiction, and should be decided under the CRTA's section 118 small claims jurisdiction. In making this finding, I agree with and adopt the reasoning in the noteworthy CRT decision *Alameer v. Zhang*, 2021 BCCRT 435 at paragraphs 11 to 23, although it is not binding on me.
14. As noted in *Wolfram v. Urban Nook Investments Ltd.*, 2022 BCCRT 801 at paragraphs 9 to 12, the CRT regularly has separate small claims and strata property disputes about the same incidents. These disputes typically travel together through the CRT's process. This situation is somewhat different, because there is only one dispute, but I find the claimed remedies must be addressed under 2 different areas of CRT jurisdiction. Regardless, the CRT's past practice was to publish separate small claims and strata property decisions when claims about the same incident fell under those different areas of jurisdiction. This was because small claims and strata disputes used to have different processes for post-decision review.
15. However, since July 1, 2022, strata property disputes and small claims disputes are both subject to judicial review. Further, although the applicants do not claim a specific amount of damages for facing a health hazard and second hand smoke prevention costs, I find the evidence shows their claims likely do not total more than the \$5,000 maximum CRT small claim amount. Also, the CRT's mandate includes being quick, economical, flexible, and fair. For these reasons, I find I may decide all of the applicants' claims in this single written decision, under CRT sections 118 and 121 as applicable.

## **ISSUES**

16. The 2 issues in this dispute are:

- a. Should I order Mr. Kulasik to stop smoking in his strata lot?
- b. Are the respondents liable for nuisance damages of \$353.39 for an air purifier cost, \$150 for projected electricity costs, and an unspecified amount for health hazard and second hand smoke prevention costs?

## **EVIDENCE AND ANALYSIS**

17. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities (meaning “more likely than not”). I have read and weighed the parties’ evidence and submissions, but I refer only to that which I find necessary to explain my decision.
18. The strata repealed and replaced all of its bylaws at the Land Title Office (LTO) on February 3, 2012. It also filed bylaw amendments at the LTO on November 15, 2018 and August 13, 2020. Submitted correspondence shows the disputed smoking incidents and related bylaw violation fines imposed on Mr. Kulasik all occurred after August 13, 2020. No party disputed the validity of any bylaws.
19. Under bylaw 1.1, a resident or visitor must not use a strata lot in a way that causes a nuisance or hazard to another person (1.1(a)), or that unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets, or another strata lot (1.1(c)).
20. Further, bylaw 1.15 says, “An owner, tenant, occupant or visitor must not smoke in the building (strata lots, common property and limited common property) and must not smoke on the strata corporation grounds.” The bylaw says smoking includes inhaling, exhaling, burning, or carrying a lighted cigarette, cigar, pipe, hookah pipe, or other lighted smoking equipment that burns tobacco or other weed substances, including marijuana.
21. Submitted correspondence shows the strata fined Mr. Kulasik \$200 for each of 11 times he allegedly violated bylaw 1.15 between September 26, 2020 and January 3, 2022. The strata also sent Mr. Kulasik letters alleging that he smoked in his strata lot

on 38 separate occasions in January 2022. I find those 38 allegations are consistent with the applicants' complaints to the strata in evidence. The applicants say Mr. Kulasik continues to smoke in his strata lot on a regular basis, and that second hand smoke enters the applicants' strata lot bedroom through electrical outlets and baseboards, causing a frequent nuisance and health hazard.

22. Mr. Kulasik admits that he occasionally smoked in his strata lot until January 1, 2022. He says that he stopped smoking in the strata lot on January 1, 2022, and has only smoked there once since then, on May 15, 2022. Except for the January 3, 2022 violation, I find Mr. Kulasik does not deny smoking on each of the 11 occasions for which the strata imposed a bylaw fine for smoking. On the evidence before me, I find Mr. Kulasik broke bylaw 1.15 on each of those 11 occasions, and also on May 15, 2022.
23. Mr. Kulasik submitted a written statement from a friend, AJ, who said Mr. Kulasik stopped smoking in his strata lot on January 1, 2022 and that he now leaves his cigarettes in his truck. Although this is consistent with Mr. Kulasik's submissions, AJ did not explain how they know Mr. Kulasik stopped smoking in the strata lot, except that they did not see him smoking there. AJ said they could not confirm that they were with Mr. Kulasik on every occasion for which the strata received complaints about smoking in his strata lot. Given that nothing before me shows AJ lived in Mr. Kulasik's strata lot or visited often, I find AJ's statement does not support a finding that Mr. Kulasik stopped smoking there.
24. In a March 10, 2022 written statement, a strata council member, SB, confirmed that she observed Mr. Kulasik smoking in his strata lot on several occasions after the no-smoking bylaw was implemented. She said she has not directly observed Mr. Kulasik smoking in his strata lot since January 2022. However, in an April 28, 2022 email SB said she detected an increasing cigarette smoke odour in the applicants' bedroom after they removed a wet towel from the baseboards on the wall shared with Mr. Kulasik. I find this evidence supports that Mr. Kulasik smoked in his strata lot on April 28, 2022, contrary to bylaw 1.15.

25. I find SB's statements are more persuasive than AJ's, as they are based on direct personal observations of Mr. Kulasik's smoking practices and the cigarette odours emanating from the shared strata lot wall. Having weighed the evidence, I find it is more likely than not that Mr. Kulasik has continued to smoke in his strata lot in 2022 in violation of bylaw 1.15, including at minimum on April 28, 2022 and May 15, 2022.

***Should I Order Mr. Kulasik to Stop Smoking in his Strata Lot?***

26. As noted, the applicants request an order that Mr. Kulasik completely stop smoking in his strata lot. I find this is essentially a request for Mr. Kulasik to comply with bylaw 1.15, and potentially bylaw 1.1(a). Given that the SPA authorizes the creation and enforcement of bylaws, I find this is a request "in respect of the SPA" and falls under the CRT's section 121 strata property jurisdiction.

27. I found above that Mr. Kulasik has continued to smoke in his strata lot in violation of bylaw 1.15, despite being fined for smoking numerous times over a period of more than 1 year. I find that although Mr. Kulasik says he largely stopped smoking in his strata lot on January 1, 2022, he has done so on multiple occasions since then. In the circumstances, I find it appropriate to allow the applicants' requested order. I order that Mr. Kulasik not smoke in his strata lot. I note again that bylaw 1.15 prohibits smoking anywhere on the strata's premises, not just in a strata lot.

***Are the Respondents Liable for the Claimed Nuisance Damages?***

28. The applicants say that Mr. Kulasik's smoking is a nuisance, which is a common law tort. As noted above, strata bylaw 1.1(a) also prohibits owners from causing a nuisance. In the context of strata living, a nuisance is an unreasonable, substantial, and non-trivial interference with an owner's use and enjoyment of their property (see *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.*, 2018 BCSC 1502 at paragraph 33). Courts have said that some "give and take" is necessary among strata corporation neighbours (see *Sauve v. McKeage et al.*, 2006 BCSC 781 at paragraph 22). However, I am satisfied that cigarette smoke entering a strata lot may be considered a nuisance. See for example the CRT decision *Bahmutsky v. Petkau*, 2020 BCCRT 244, which is not binding on me but which I find persuasive.

29. So, are the respondents liable in nuisance? I will first consider the strata. The applicants do not allege that the strata broke any bylaws or caused a smoking nuisance. However, I agree with the reasoning in paragraph 53 of *Bahmutsky*, that a strata corporation may be liable for damages under the CRT's section 121 strata property jurisdiction where it takes insufficient steps to investigate nuisance complaints and enforce its bylaws, resulting in significant unfairness to an owner.
30. I find that is not the case here, for the following reasons. As noted, the strata imposed many smoking fines on Mr. Kulasik and sent him additional warning letters. I find the evidence does not show the strata could have reasonably done much more to discourage Mr. Kulasik from smoking in his strata lot. Further, the applicants do not allege that the strata failed to adequately investigate their complaints or enforce strata bylaws, or that the strata acted significantly unfairly toward them. So, I dismiss the applicants' claims against the strata.
31. Turning to Mr. Kulasik, I find that the nuisance tort claim against him is not "in respect of the SPA" simply because there is a parallel bylaw 1.1(a) nuisance prohibition (see paragraphs 19 and 20 of *Alameer*). Further, the SPA and bylaws do not require an owner to pay damages and expenses to another owner for breaking a bylaw. So, I find the applicants' nuisance claims against Mr. Kulasik are independent of the SPA, and fall under the CRT's section 118 small claims jurisdiction.
32. Based on the applicants' complaints and the submitted witness evidence, I find that the applicants have regularly smelled cigarette smoke in their strata lot since September 2020. I find the evidence shows that this cigarette smoke came from Mr. Kulasik smoking in his strata lot contrary to strata bylaws. The applicants say they find the smell unpleasant, and are concerned about its health effects. I find there is no controversy that second-hand smoke can pose serious health risks, although the evidence does not show whether the smoke concentration in the applicants' strata lot was harmful. For all of these reasons, I find that the smoke from Mr. Kulasik's strata lot was an unreasonable, substantial, and non-trivial interference with the applicants' use and enjoyment of their strata lot, and was a nuisance.



33. Text messages in evidence show that the applicants repeatedly and forcefully demanded that Mr. Kulasik stop smoking, and once called the police with their smoking complaints. Mr. Kulasik says this amounted to harassment. Mr. Kulasik also says that Mr. Adarkar assaulted him by pushing past him into his strata lot at one point to look for cigarettes. I make no findings about harassment or assault because I find nothing turns on it, and Mr. Kulasik made no counterclaims about those matters.
34. Having created a nuisance, the question is whether Mr. Kulasik is liable for the claimed damages and expenses. I find the applicants' text messages show they likely purchased an air purifier on December 13, 2021. As noted, Mr. Kulasik agrees to pay \$353.39 for the air purifier and \$150 for its electricity costs. There are no receipts or other evidence showing the air purifier's purchase price or likely electricity consumption, or its effectiveness in removing cigarette smoke. However, I accept that it was reasonable to purchase an air purifier in the circumstances, to address the long-standing and ongoing cigarette smoke nuisance. I am particularly persuaded by the fact that Mr. Kulasik agrees to pay for those things, and does not dispute that the air purifier was necessary and effective, or its alleged electricity consumption. So, I allow the applicants' claim for \$353.39 for the air purifier and \$150 for electricity costs.
35. The applicants also claim an unspecified amount in damages for "the health hazard faced and other costs incurred to prevent second hand smoke." I find these requested remedies are not general claims for nuisance damages. I find they are specific damage claims for the alleged negative health effects of Mr. Kulasik's second hand smoke, and for out-of-pocket expenses for preventing the smoke from entering the applicants' strata lot. I address these specific remedy requests below.
36. The applicants submitted no evidence showing the concentration of second-hand cigarette smoke in their strata lot. They submitted no medical evidence detailing the likely health effects of that amount of smoke. They also submitted no medical evidence showing they suffered any health problems from the smoke, or that they spent anything to address such health problems or hazards, other than the air purifier discussed above. I find that it would be too speculative to award damages for a vague "health hazard" that is not supported with adequate evidence.

37. The applicants also did not submit any receipts or other documentary proof of costs incurred to prevent Mr. Kulasik's second hand smoke from entering their strata lot. They only submitted photos that showed tape covering what appears to be a small hole in a wall and an electrical outlet, and a towel beside a baseboard. I find the applicants have not proven they incurred any costs to prevent second hand smoke.
38. I dismiss the applicants' claim for unspecified health hazard and smoke prevention damages.

### ***CRT Fees, Expenses, and Interest***

39. The *Court Order Interest Act* (COIA) applies to the CRT. I find that under the COIA, the applicants are entitled to pre-judgment interest on the \$503.39 owing, reasonably calculated from the December 13, 2021 air purifier purchase date to the date of this decision. This equals \$2.32, which I find Mr. Kulasik alone must pay.
40. 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. The applicants were partly successful against Mr. Kulasik, so I find he must reimburse half of the CRT fees they paid, which equals \$112.50. No other party paid CRT fees, and no party claims CRT dispute-related expenses.

## **ORDERS**

41. Effective immediately, I order that Mr. Kulasik not smoke in strata lot 2.
42. I order that, within 30 days of the date of this decision, Mr. Kulasik must pay the applicants a total of \$618.21, broken down as follows:
- a. \$503.39 in damages,
  - b. \$2.32 in pre-judgment interest under the COIA, and
  - c. \$112.50 in CRT fees.

43. The applicants are also entitled to post-judgment interest under the COIA, as applicable.

44. I dismiss the applicants' remaining claims.

45. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court if it is an order for financial compensation or return of personal property under \$35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

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Chad McCarthy, Tribunal Member