



Civil Resolution Tribunal

Date Issued: September 27, 2024

File: ST-2023-006624

Type: Strata

Civil Resolution Tribunal

Indexed as: *Culley v. York*, 2024 BCCRT 968

BETWEEN:

JANICE CULLEY

APPLICANT

AND:

SCOTT YORK and The Owners, Strata Plan LMS 811

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

David Jiang

INTRODUCTION

1. This dispute is about smoking. The applicant, Janice Culley, owns and lives in strata lot 69 (SL69) in the respondent strata corporation, The Owners, Strata Plan LMS 811 (strata). The other respondent, Scott York, own and lives in strata lot 68 (SL68) in the strata.

2. Ms. Culley says that Scott York smokes excessively on their outdoor balcony, which is next to Ms. Culley's own balcony and window. She also says Scott York smokes in SL68 with the balcony door open. She says the secondhand smoke is an ongoing health hazard and nuisance that has aggravated her health issues. Ms. Culley alleges that the strata has failed to enforce its nuisance bylaws. She claims \$5,000 against both respondents for pain and suffering. She also seeks an order for Scott York to stop smoking next to her balcony.
3. The respondents deny liability. The strata says it acted on Ms. Culley's secondhand smoke complaints to fine both Scott York and another resident. Scott York says they have taken steps that include smoking outside behind the strata's building during the summer months and using a fan while smoking on the balcony. They deny smoking inside the strata's building.
4. Ms. Culley and Scott York represent themselves. A strata council member represents the strata.
5. For the reasons that follow, I find Ms. Culley has only proven a small part of her claims.

JURISDICTION AND PROCEDURE

6. 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)*. The CRT also has jurisdiction over small claims brought under section 118 of the 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. To some degree, the parties in this dispute each question the other's credibility

(truthfulness) about what occurred. In *Downing v. Strata Plan VR2356*, 2023 BCCA 100, the court recognized that oral hearings are not necessarily required where credibility is in issue. It depends on what questions turn on credibility, the importance of those questions, and the extent to which cross-examination may assist in answering those questions. Here, the parties have provided their recollections of what occurred and extensive documentary evidence. No party requested an oral hearing, and I find it unlikely that cross-examination would reveal any inconsistencies in any party's evidence. I have largely decided this dispute based on the documentary evidence, discussed below.

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.
9. Under CRTA section 123, 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.

ISSUES

10. The issues in this dispute are as follows:
 - a. Is Ms. Culley entitled to nuisance damages of \$5,000 for pain and suffering?
 - b. Did the strata fail to accommodate Ms. Culley's disability, contrary to the *Human Rights Code* (Code)?
 - c. Should I order Scott York to stop smoking next to Ms. Culley's balcony?

BACKGROUND, EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, Ms. Culley as the applicant must prove her claims on a balance of probabilities (meaning more likely than not). I have read all the parties' submissions and evidence but refer only to the evidence and argument that I find necessary to explain my decision.

12. As noted above, Ms. Culley lives in SL69. The strata plans shows that SL69 is on the third floor of a low-rise building. It has an outdoor balcony. Scott York lives in SL68. SL68 also has an outdoor balcony. The 2 strata lots and their balconies are both directly adjacent to each other.
13. The strata repealed and replaced all its bylaws by filing new bylaws in November 2001. The subsequent amendments are not relevant.
14. There are no bylaws that are specifically about smoking. However, bylaw 4.1 says in part that a resident must not use a strata lot, the common property, or common assets in a way that (a) causes nuisance or hazard to another person, or (c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets, or another strata lot.

Issue #1. Is Ms. Culley entitled to nuisance damages of \$5,000 for pain and suffering?

15. Ms. Culley says that the strata failed to enforce bylaw 4.1(a) and (c). She says that Scott York continually smokes on their balcony or in SL68 with the balcony door open. She says this causes smoke to enter SL69. She complains in particular that from June 2022 to April 2023, the strata did not fine Scott York.
16. The strata disagrees and says that it fined both Scott York and another resident in response to Ms. Culley's complaints.
17. I will first outline the background facts. It is undisputed that Scott York moved into SL68 around February 2021. In April and June 2022, Ms. Culley sent emails to the strata complaining about Scott York smoking on SL68's balcony, causing secondhand smoke to enter SL69. The strata replied in June 2022 that the secondhand smoke was likely prohibited under bylaw 4.1. It said it would send letters to the neighboring units that occupants should refrain from smoking on their balconies.
18. Ms. Culley emailed further complains to the strata about Scott York smoking on SL68's balcony and secondhand smoke entering SL69 in July and September 2022.

In October 2022 the strata said it would tell Ms. Culley's neighbours to smoke using a fan or to smoke away from the building. Ms. Culley replied that Scott York was using a fan, and it did not help.

19. Correspondence and Scott York's submissions show that in August 2022, the strata also held a strata council meeting. Both Ms. Culley and Scott York attended. Scott York said they would smoke at the back of the building instead of the balcony when the weather was warmer, when Ms. Culley would have her windows open.
20. Ms. Culley emailed further complaints in April 2023. The strata replied that it told Scott York to smoke at the back of the building and never on the balcony. I accept this is the case.
21. I turn to the law. The CRT has authority to make orders remedying a strata corporation's significantly unfair acts or decisions under CRTA section 123(2). The legal test for significant unfairness is the same for CRT disputes and court actions. See *Dolnik v. The Owners, Strata Plan LMS 1350*, 2023 BCSC 113. The BC Court of Appeal has confirmed that significantly unfair actions or decisions are those that are burdensome, harsh, wrongful, lacking in probity and fair dealing, done in bad faith, unjust, or inequitable. See *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173. In applying this test, the owner's objectively reasonable expectations are a relevant factor, but are not determinative.
22. Section 26 of the *Strata Property Act* (SPA) requires the strata to enforce its bylaws except in limited circumstances, such as if the breach is trivial. Previous CRT decisions have concluded that it is significantly unfair for a strata corporation to fail to reasonably investigate and enforce its bylaws. See, for example, *Chan v. The Owners, Strata Plan BCS2583*, 2021 BCCRT 456 and *Dhanani v. The Owners, Strata Plan NW 2265*, 2021 BCCRT 282. While CRT decisions are not binding, I agree with their reasoning.
23. With that in mind, I first consider whether Scott York breached bylaw 4.1. Scott York admits to smoking on the balcony at various times. There are also undated photos

of Scott York smoking on the balcony, and a pile of leftover cigarette butts in the same area.

24. In *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.*, 2018 BCSC 1502, the BC Supreme Court defined nuisance in the strata setting as a substantial, non-trivial, and unreasonable interference with use and enjoyment of property. See paragraph 33.
25. The test of whether a potential nuisance is unreasonable is objective and is measured with reference to a reasonable person occupying the premises. See *Sauve v. McKeage et al.*, 2006 BCSC 781. The test for nuisance depends on several factors, such as its nature, severity, duration, and frequency. See *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64.
26. I will first determine whether Scott York breached the nuisance bylaws, and if so, how many times. Ms. Culley sent email and letter complaints about Scott York's smoking to the strata that include the following dates: June 11, 16, July 4, 10, 14, 18, 2022, and April 13, 2023. She also included photos of Scott York on the balcony in her June 11, 16, and July 17, 2022 emails, and numerous cigarette butts in the June 11, July 4 and 10, 2022 emails.
27. The correspondence shows the strata sent the following correspondence to Scott York at SL68:
 - a. a June 16, 2022 letter asking Scott York to refrain from smoking on their balcony, otherwise fines might apply,
 - b. a July 11, 2022 letter about Ms. Culley's July 10, 2022 complaint about smoking on the balcony, again asking Scott York to refrain from smoking on the balcony or to use a fan or "smoke-eater" if they do so,
 - c. an October 5, 2022 letter about Ms. Culley's September 29, 2022 complaint about smoking on the balcony that also applied a \$200 fine under the bylaws, and

- d. an April 14, 2023 letter about Ms. Culley's April 10, 2023 complaint about smoking on the balcony, providing notice of a potential \$200 fine under section 135 of the *Strata Property Act*.
28. There may be other complaints, but as they are undocumented, I find them unproven.
29. Scott York says they are not responsible for all of Ms. Culley's smoke complaints. They say that other people caused secondhand smoke to enter SL69. The evidence shows Ms. Culley complained that another owner, BB, caused smoke to enter SL69. BB is in a different strata lot located on the first floor of the strata. BB is not a party to this dispute. The strata sent correspondence to BB that includes the following:
 - a. a June 16, 2022 letter asking BB to refrain from smoking on their patio, otherwise fines might apply,
 - b. a July 11, 2022 letter about Ms. Culley's July 10, 2022 complaint about smoking on the patio, again asking BB to refrain from smoking on the patio or to use a fan or "smoke-eater" if they do so,
 - c. an October 5, 2022 letter about Ms. Culley's September 29, 2022 complaint about smoking on the patio that also applied a \$200 fine under the bylaws,
 - d. an April 25, 2023 letter about Ms. Culley's April 24, 2023 complaint about smoking on the patio, providing notice under section 135 of the *Strata Property Act* of a potential \$200 fine, and
 - e. a May 31, 2023 letter about Ms. Culley's May 30, 2023 complaint about smoking on the patio, providing notice under section 135 of the *Strata Property Act* of a potential \$200 fine.
30. The evidence also shows that Ms. Culley complained to the strata about both Scott York and BB, during the same months, and sometimes on the exact same dates. I find this raises the possibility that some of Ms. Culley's complaints about Scott York may have been attributable to BB's alleged secondhand smoke.

31. Given this, I have scrutinized Ms. Culley's complaints to the strata and find the following. Ms. Culley's complaints about Scott York were particularly detailed and included photos of them and cigarette butts for the following dates: June 11, 16, 17, and July 4 and 10, 2022. Given this evidence, I find Scott York smoked on these 5 occasions and created the secondhand smoke Ms. Culley complained of. Further, as SL68's balcony is directly adjacent to SL69's balcony, I am satisfied that secondhand smoke from SL68's balcony entered SL69 and also rendered the SL69 balcony unusable at times. I find from Ms. Culley's submissions that the odour was unpleasant, and I also take notice of the fact that secondhand smoke is notoriously dangerous.
32. Given these facts, I conclude that Scott York breached bylaw 4.1. by both creating a nuisance or hazard and unreasonably interfering with Ms. Culley's right to use and enjoy SL69 and the common property. 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 secondhand smoke in this instance was both a breach of the bylaws and a common law tort of nuisance as it was a substantial, non-trivial, and unreasonable interference with use and enjoyment of property.
33. I next consider whether the strata failed to enforce bylaw 4.1.
34. I find from the correspondence that the strata accepted Ms. Culley's complaints about smoking as true. This is because the strata did not express any doubt about Ms. Culley's allegations or otherwise ask for further proof.
35. I note that Ms. Culley filed her application for dispute resolution on April 24, 2023. The dates of the strata's letters show that the strata took active steps about Ms. Culley's complaints before then.
36. I also find the strata took reasonable steps to enforce the bylaws. In particular, it responded to Ms. Culley's complaints by sending letters to Scott York with minimal delay. I acknowledge that from November 2022 to March 2023 there is no indication

that the strata took any action about smoking. However, there is also no indication that Ms. Culley complained about smoking during those months.

37. I am also mindful of the fact that the strata told Scott York that they cannot smoke on their balcony at all. I find this would potentially provide a lasting solution to Ms. Culley's complaints about Scott York.
38. Given the above, I find the strata acted reasonably. I find it did not act in a manner that was burdensome, harsh, wrongful, unjust, or otherwise in a significantly unfair manner. I dismiss this claim against the strata.
39. This leaves Ms. Culley's tort claim against Scott York. I have already found that Scott York created a nuisance of ongoing secondhand smoke. I find Ms. Culley's damages claim against Scott York falls under the CRT's CRTA section 118 small claims jurisdiction. See *Karnik v. Kulasik*, 2022 BCCRT 923 at paragraph 31. As she claims specifically for pain and suffering, I find this does not include any out-of-pocket expenses.
40. In *Bahmutsky v. Petkau*, 2020 BCCRT 244, a CRT vice chair awarded an owner \$1,000 for a strata corporation's failure to enforce its smoking bylaws for 16 months. The strata and respondent owners were each responsible for paying half this amount. In *Dhanani v. The Owners, Strata Plan NW 2265*, 2021 BCCRT 282, the CRT awarded an owner \$400 for enduring 6 months of smoke odours because the strata stopped investigating her complaints.
41. CRT decisions are not binding. Nonetheless, I find they provide an appropriate range for compensation. The proven incidents of secondhand smoke occurred in June and July 2022. As this is only 2 months, I order Scott York to pay Ms. Culley \$100.

Issue #2. Did the strata fail to accommodate Ms. Culley's disability, contrary to the Code?

42. Section 8 of the Code prohibits the strata from discriminating against owners in the services it provides. For Ms. Culley to succeed she must first show that she has a

disability, that she was adversely impacted with respect to the strata's service, and that her disability was a factor in the adverse impact. If Ms. Culley establishes a prima facie case of discrimination, the burden shifts to the strata to establish a bona fide reasonable justification for its conduct. This includes whether the strata satisfied its duty to accommodate Ms. Culley to the point of undue hardship. See, for example, *Jacobsen v. Strata Plan SP1773 (No. 2)*, 2020 BCHRT 170 at paragraphs 75 to 79.

43. I first consider whether Ms. Culley has a disability, which is not a defined term in the Code. Overall, I find the medical evidence falls short of proving that Ms. Culley has a disability that was a factor in the alleged adverse impact.

44. Ms. Culley's medical evidence includes the following:

- a. a January 2023 allergy medication invoice,
- b. a June 6, 2022 doctor's certificate that says Ms. Culley had COVID-19 with secondary depression,
- c. June 27 and 30, 2022 receipts for hyperbaric oxygen therapy,
- d. a June 29, 2022 ambulance invoice that has remarks written by someone about trouble breathing,
- e. a July 21, 2022 ambulance invoice that has remarks written by someone on it about coughing and difficulty breathing, and
- f. a July 25, 2022 medical note that says Ms. Culley could not work temporarily from July 25 to August 7, 2022.

45. I find the evidence shows that Ms. Culley had COVID-19 and depression in June 2022. However, there is no medical evidence that says her diagnoses were a factor in any adverse impact she suffered due to the secondhand smoke. For example, the medical evidence does not say whether the secondhand smoke aggravated either her COVID-19 symptoms or her depression. It also does not comment on any effects it might have had on a pre-existing allergy.

46. I acknowledge that Ms. Culley received hyperbaric oxygen therapy and required an ambulance in June and July 2022. However, there is nothing that says secondhand smoke either caused or aggravated her condition so that the treatment and ambulance were necessary. I find it unproven that Ms. Culley required the treatment and ambulance because of secondhand smoke, rather than, for example, COVID-19 alone.
47. For those reasons, I find Ms. Culley has not proven that the strata failed in its duty to accommodate her under the Code. I dismiss this claim.

Issue #3. Should I order Scott York to stop smoking next to Ms. Culley's balcony?

48. As noted earlier, Ms. Culley says that Scott York occasionally smoked on the SL68 balcony. She says that, more recently, they smoke in SL68 with the balcony door open.
49. Scott York says they acted reasonably. They say that in 2022, they only smoked on the balcony during the wet months. For the spring and summer, they went outside behind the strata's building to smoke. They say they suggested this to the strata as a compromise. Scott York also denies smoking in SL68. As noted earlier, they suggest that some of the smoke Ms. Culley smells comes from another resident or is imagined.
50. I find the requested order, on the face it, is vague to the point that it would be unenforceable. I say this because it is unclear what distance "next to my balcony" means. I considered ordering Scott York to refrain from smoking on the SL68 balcony or only within SL68 with the doors and windows closed. However, given that the proven complaints only took place in June and July 2022, I find it would be premature and unnecessary to make this order. Further, as Scott York maintains that they stopped smoking on the balcony or in their strata lot, I find it unproven that the more recent complaints are about him and not secondhand smoke from BB. I dismiss this claim.

INTEREST, CRT FEES. AND EXPENSES

51. The *Court Order Interest Act* (COIA) applies to the CRT. COIA section 2(e) says pre-judgment interest must not be awarded on non-pecuniary (pain and suffering) damages resulting from personal injury. I find this can include mental distress. So, I make no order for pre-judgment interest on the \$100 damages award.
52. 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 find Ms. Culley was largely unsuccessful. So, I dismiss her claim for reimbursement of CRT fees. The parties did not claim any specific dispute-related expenses. So, I order none.

ORDER

53. Within 30 days of the date of this order, I order Scott York to pay Ms. Culley \$100 in damages for pain and suffering.
54. Ms. Culley is entitled to post-judgment interest, as applicable.
55. I dismiss Ms. Culley's remaining claims.
56. This is a validated decision and order. 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.

David Jiang, Tribunal Member