



# Civil Resolution Tribunal

Date Issued: December 19, 2024

File: SC-2024-004066

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *WK v. Wilson*, 2024 BCCRT 1292

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

WK, JK and WK as Litigation Guardian of BK, Minor

**APPLICANTS**

**A N D :**

JOYCE WILSON

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Amanda Binnie

## INTRODUCTION

1. This dispute is about smoking. The parties are former neighbours. The applicants, WK and JK, are the parents of the applicant BK, who is a minor. They say the respondent, Joyce Wilson, smoked in her apartment directly below theirs, which caused smoke to come into their apartment. The applicants claim \$5,000 in damages for physical and emotional distress, and ask for an order that the respondent stop smoking in her apartment.

2. The respondent says she followed the strata's former bylaws about smoking, which said she could smoke in her apartment. She says the applicants moved in knowing it was a smoking building. She also says she was not the only smoker in their building, and she made efforts to maintain safe air quality. Finally, she says Mr. K harassed her about her smoking.
3. Mr. K represents the applicants. The respondent is self-represented.
4. I anonymized the applicants' identities in the published version of this decision to protect the identity of BK.

## **JURISDICTION AND PROCEDURE**

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that 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.
6. Section 39 of the CRTA says the CRT has discretion to decide the hearing's format, 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. I also find credibility is not a central issue in this dispute, as the background facts are mostly undisputed. 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.
7. Section 42 of the CRTA says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court.
8. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

### ***Limitation Period***

9. The respondent raised the issue of the limitation period in submissions. Despite this, the applicants provided no submissions on this issue.
10. The courts have found that a nuisance for so long as the state of things causing the nuisance is suffered and the associated claims were not barred by the limitation period (see: *K&L Land Partnership v. Canada (Attorney General)*, 2014 BCSC 1701 at paragraph 58). I find this reasoning applies here, as the applicants allege the smoking has been ongoing, though sometimes worse, since January 2022. Therefore, even though the applicants first became aware of the smoke more than 2 years before filing this dispute, I find their claims are not out of time.
11. However, the BC Court of Appeal found that in situations involving a continuing civil wrong, such as nuisance, damages for a continuing injury are recoverable only for the period within the applicable limitation period (*Brockman v. Valmont Industries Holland B.V.*, 2022 BCCA 80). The applicants filed this claim and paid fees on April 11, 2024. So, I find that any claim for damages in early 2022 is out of time. However, nothing turns on this because I have found the respondent did not cause a nuisance during that time.

### ***Injunctive remedy***

12. The applicants ask for an order that the respondent stop smoking in her apartment. An order that someone do, or not do, something is called injunctive relief. With certain limited exceptions that do not apply here, CRTA section 118 does not give the CRT jurisdiction to grant injunctive relief under its small claims jurisdiction.
13. So, I find I have no jurisdiction to make this order. In any event, I find this claim is moot as the respondent no longer lives in the applicants' building. This means there is no live controversy between the parties. So, I dismiss the applicants' claim for an order that the respondent stop smoking in her apartment.

### ***Applicants' behaviour***

14. The respondent says Mr. K harassed her in the common spaces of their building and in other public spaces. She also says someone in the applicants' apartment repeatedly stomped on her ceiling. Mr. K acknowledges approaching the respondent, but says these interactions were not harassment. The applicants deny stomping on the floor.
15. The respondent has not made a counterclaim about any harassment or nuisance. To the extent that she is claiming a set-off for either, I find it unproven on the evidence. So, I will not consider Mr. K's alleged harassment or the applicants' nuisance any further, except to the extent it is part of the dispute's background.

### **ISSUE**

16. The remaining issues in this dispute are:
  - a. Did the respondent's smoking cause a nuisance to the applicants?
  - b. If so, what remedy, if any, is appropriate?

### **EVIDENCE AND ANALYSIS**

17. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities. I have read all the parties' submissions and evidence but refer only to the evidence and argument that I find relevant to provide context for my decision.
18. The background of this dispute is relatively straightforward and undisputed between the parties.
19. The applicants Mr. K and Ms. K moved into the apartment directly above the respondent's some time before the respondent.

20. The respondent purchased her apartment in February 2022, but says she did not move in until November 2022 due to renovations. I find this is supported by the documentary evidence she provided.
21. The building the parties lived in is a strata. Neither party provided much evidence about the strata or its bylaws. However, they agree that before June 3, 2024, the strata's bylaws permitted smoking within strata lots. A change in the bylaws on that date made it against the bylaws to smoke within a strata lot.
22. The parties also agree that bylaw 4 prohibits a resident or visitor from causing a nuisance or hazard to another person. Unlike the smoking bylaw, this bylaw was in place at all relevant times.
23. BK was born mid-March 2024. Just before her birth, Mr. K says he discovered it was the respondent who was causing the smoke in their apartment due to a conversation he overheard in the building's lobby.
24. Mr. K then made 56 complaints to the strata of smoke coming into their apartment between March 24 and April 11, 2024.
25. While the strata sent letters to the respondent about her smoking, it never fined her.
26. The respondent moved out of her apartment in June 2024 and sold it in August 2024.

***Did the respondent's smoking cause a nuisance to the applicants?***

27. 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).
28. The respondent says the applicants have not proven she was the source of the smoke, and that she mitigated as best she could with filters, an air conditioning unit

and opening her patio door to allow fresh air to circulate. I find implicit in this argument is the respondent's agreement that cigarette smoke can be a nuisance.

29. While the applicants say smoke was coming into their apartment in January 2022, the respondent bought her apartment in February 2022, and did not move in until November 2022. Further, the respondent says it was a "smoking building".
30. The applicants do not dispute the respondent did not move in until November 2022, but instead say she is still responsible for smoke coming from her apartment before that period. They also say the smoke got worse in December 2022.
31. The difficulty for the applicants is they say the smoke was severe enough in their unit in January 2022 they told the property manager about it. In submissions, they say they were "feeling health impacts" at that time.
32. The applicants do not address this inconsistency, even though the respondent raised it in her submissions. They only say smoking got worse in December 2022. I find this shows the respondent was not the initial, or only, source of smoke in the applicants' apartment, which is consistent with the respondent's argument the building allowed smoking within strata lots.
33. The applicants provided a video they say shows smoke coming up around the pipes in their ensuite, under what I infer is a bathtub. The applicants say this video is dated March 17, 2024. While I agree with the respondent that no smoke is visible in the video, I accept smoke is difficult to film. So, I find it likely there was smoke at the time the video was filmed, because otherwise the applicants would have had no reason to film.
34. The respondent does not directly address the smoke coming from the drains, but says the building's circulation system is such that it could have come from anywhere. She provides no evidence in support of this.
35. I have already accepted there was likely smoke coming from other sources. However, I also find as a matter of common sense that smoke likely found a way from the

respondent's apartment directly below into the applicants', particularly since the respondent admits she was smoking inside.

36. I find this case is different from *Foster v. The Owners, Strata Plan LMS 35*, 2023 BCCRT 10, which the respondent refers to. In *Foster*, the smoking occurred on a balcony 5 floors below the applicant's and there were 3 other potential sources. I also find outdoor smoke would have a greater chance of dissipating than where smoke is coming from inside, as is the case here.
37. The other cases the respondent refers to deal with different types of smells, including cooking smells and vaping. I find they are also not helpful in the context of this dispute.
38. Further, the respondent does not specifically dispute that the applicants had smoke in their apartment, just that she was the cause. However, the applicants provided specific dates and times of the smoke in their apartment between March and April 2024, but the respondent does not address these specific incidents.
39. The respondent does not dispute that she started smoking when she moved into her apartment in November 2022. I find this is likely why the applicants noticed the smoke was worse in December 2022.
40. There is no evidence that the frequency of smoke in the applicants' apartment changed between December 2022 and when Mr. K began complaining to the strata in March 2024. The only change was Mr. K says they "discovered" the source of the smoke was the respondent. Mr. K's complaints were roughly 1 to 3 times per day, though there are days where no smoke was reported. I find the amount of smoke was likely similar between December 2022 and June 2024.
41. In *Culley v. The Owners, Strata Plan LMS 811*, 2024 BCCRT 1238, a CRT vice chair found second-hand smoke entering a residence was a nuisance, because a reasonable person tolerated very little smoke second-hand smoke in their home. There was no bylaw prohibiting smoking in that case. While not binding on me, I find that reasoning persuasive and apply it here.

42. So, I find after moving in, the respondent contributed to the second-hand smoke in the applicants' apartment, and that smoke constituted a nuisance. As a result, I do not accept the respondent's argument she was allowed to smoke in her apartment because it was permitted by the strata's bylaws. This is because bylaw 4 prohibits a resident from causing a nuisance to another person.
43. This is consistent with past CRT decisions where even in a strata that allowed smoking, an owner could still breach a nuisance bylaw (see, for example, *The Owners, Strata Plan VIS 4266 v. Johanson*, 2018 BCCRT 844). While CRT decisions are not binding on me, I find them persuasive and apply that reasoning here.
44. In correspondence with strata after the complaints started, the respondent admitted she had not stopped smoking in her apartment. Instead, she said she was smoking more due to the stress the complaints caused. So, I find the respondent's contribution to the nuisance continued until she moved out in June 2024.

***What remedy is appropriate?***

45. The applicants claim \$5,000 for physical and emotional distress. While Mr. K alleges he has severe allergies to smoke, he provided no evidence in support of this. I also find there is no support for the applicants' emotional distress claim.
46. However, I find Mr. K and Ms. K are entitled to damages for the nuisance of second-hand smoke from November 2022 to June 2024.
47. The applicants' provided evidence from Dr. Laura Riley, who I infer is BK's family doctor. Dr. Riley says that newborns are particularly vulnerable to second-hand smoke. I accept this, which I find is a matter of general knowledge.
48. So, while BK is understandably unable to complain about nuisance due to her age, I find she is entitled to damages for exposure to second-hand smoke from her birth to June 20, 2024.
49. I turn now to the appropriate compensation.



50. In *Bahmutsky v. Petkau*, 2020 BCCRT 244, a CRT vice chair awarded \$1,000 for 16 months of ongoing exposure to smoke exposure. 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. Finally, in *Culley*, a CRT vice chair found \$500 was appropriate for 7 months of intermittent second-hand smoke.
51. While CRT decisions are not binding on me, I find they are a useful guide. However, I must also take into account my finding the respondent was not the only source of cigarette smoke.
52. Based on the facts of this case and similar CRT decisions, I find Mr. K and Ms. K are each entitled to \$600 in compensation. I find BK is entitled to \$200 in compensation due to her shorter exposure to the smoke.

## **INTEREST, FEES AND EXPENSES**

53. The *Court Order Interest Act* applies to the CRT. However, the applicants explicitly do not claim pre-judgment interest, so I make no order for it.
54. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. As the applicants were partially successful, I find they are entitled to reimbursement of \$87.50, which is half their paid CRT fees. Neither party claimed any dispute-related expenses.

## **ORDERS**

55. Within 30 days of the date of this order, I order the respondent to:
- a. Pay \$687.50 to Mr. K, which is \$600 in damages and \$87.50 in CRT fees he paid;
  - b. Pay \$600 in damages to Ms. K, and

c. Pay \$200 in damages to BK.

56. The applicants are entitled to post-judgment interest, as applicable.

57. I dismiss the applicants' remaining claims.

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Amanda Binnie, Tribunal Member