IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Macdonald v. The Owners, EPS 522,* 2023 BCSC 1215

Date: 20230717
Docket: S213271
Registry: Victoria

2023 BCSC 1215 (CanLII)

Between:

David Macdonald

Petitioner

And:

The Owners, EPS 522 and
B.C. Civil Resolution Tribunal

Respondents

Before: The Honourable Madam Justice Young

Reasons for Judgment

The Petitioner Appearing in Person:	D. Macdonald
Counsel for The Owners, EPS 522:	B. L. Scheidegger
Counsel for the B.C. Civil Resolution Tribunal:	Z. N. Rahman
Place and Dates of Trial/Hearing:	Victoria , B.C. March 9 -10, 2023 April 13, 2023 April 25 - 26, 2023
Place and Date of Judgment:	Victoria, B.C. July 17, 2023

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Overview

[1] The Petitioner applies for an order to quash and set aside the Civil Resolution Tribunal ("CRT") decision of September 17, 2021 (the "Decision"), and asks the Court to substitute its decision for that of the CRT's. Alternatively, the Petitioner asks for the Court to decide the issues where the CRT found that it lacked jurisdiction, and to send the rest of the matters back to the CRT for review.

[2] The Petitioner is an owner of a unit in the 15-storey condominium building known as The 834, located in the 800 block of Johnson Street in Victoria, British Columbia.

[3] The Owners, EPS 522 is a strata corporation. Its shares are owned by the individual or corporate strata lot owners. I will refer to the corporation as "the Respondent".

[4] The Respondent is governed by a Strata Council of elected members. I will refer to it as the Strata Council.

[5] The CRT filed a response to this petition and made submissions. I will add the CRT as a party to this petition and direct that the style of cause be amended to include the CRT as a respondent. The CRT was represented at the hearing before me. The CRT takes no position on the outcome of the substantive issues in this judicial review, but provided submissions about the legislated standard of review applicable to CRT decisions, the legal test for procedural fairness, and bias.

[6] The Petitioner made eleven complaints to the CRT, but is only seeking judicial review of seven of those complaints. They include a complaint that the Respondent breached the *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*] by improperly allowing a non-owner to act as a Strata Council member; by altering resolutions after they were voted upon; by preventing his nomination to Strata Council; by improperly using Strata resources to affect Strata Council elections; by failing to provide reasons for its Council meeting decisions; by failing to properly

amend minutes when a resolution was raised to do so; and by failing to consider his complaints about barbecue smoke.

[7] This is the second judicial review this Court has heard initiated by the Petitioner against the Respondent. By coincidence, I have heard both judicial reviews. My earlier decision is referenced by the CRT, is reported at *Macdonald v. The Owners, EPS 522*, 2019 BCSC 876 [*Macdonald*], and has some marginal relevance to Claim #1 because the Respondent submits that the decision had already been made by me in para. 96 of *Macdonald*, and is therefore now moot.

[8] CRT Member Richard McAndrew (the "Tribunal Member") dismissed all of the Petitioner's claims. The Petitioner seeks review of all of his decisions. The Respondent supports the Decision in its entirely.

Standard of Review

[9] The standard of review was amended with retrospective effect after the petition was filed. This occurred with the passing of the *Miscellaneous Statutes Amendment Act (No. 2), 2021*, S.B.C. 2021, c. 27, ss. 1 and 23, which said that the patently unreasonable standard of review now applies to findings of fact or law or an exercise of discretion by the CRT for claims in respect of which the CRT is "considered to have specialized expertise".

[10] This Court considered the amended legislation in *Downing v. Strata Plan VR2356*, 2022 BCSC 590 [*Downing* BCSC], aff'd 2023 BCCA 100 [*Downing* BCCA]. At para. 61 of that decision, Justice Warren noted that before October 28, 2021, the standard of review for strata property decisions of the CRT was correctness, citing *The Owners, Strata Plan BCS 435 v. Wong*, 2020 BCSC 1972 at paras. 51 and 61, and *West v. The Owners, Strata Plan BCS 2637*, 2021 BCSC 824 at para. 34. After October 28, 2021, the patently unreasonable standard of review now applies to findings of fact or law or an exercise of discretion by the CRT for claims in respect of which the CRT is "considered to have specialized expertise", while questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all the circumstances, the CRT acted fairly:

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Downing BCSC at para. 62. Sections 116 and 121(2) of the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 [*CRTA*] stipulate that the CRT has specialized expertise in strata claims.

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[11] The patently unreasonable standard of review is the most highly deferential standard to the decision-maker. The Court, on reviewing the tribunal's decision, is not to ask whether it is persuaded by the tribunal's rationale for its decision, but to merely ask whether, assessing the decision as a whole, there is a rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational: see *College of Physicians and Surgeons of British Columbia v. The Health Professions Review Board*, 2022 BCCA 10 at para. 129, leave to appeal to SCC ref'd, 40106 (24 November 2022).

[12] The Respondent and the Petitioner agree that the standard of review is now one of patent unreasonableness.

<u>Procedural Fairness and Bias</u>

[13] In *Downing* BCSC, Warren J. also made findings in relation to the standard of review for questions of procedural fairness. She noted at para. 93 that administrative decision-makers are bound by the rules of natural justice and procedural fairness. She also cited the five non-exhaustive factors that influence the procedural rights afforded to participants in administrative processes, as cited in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 21–28, 1999 CanLII 699. Justice Warren noted the need for balance between procedure and timeliness and accessibility: *Downing* BCSC at para. 96. The mandate of the CRT, as expressed in the *CRTA*, is to enjoy a significant degree of procedural flexibility, which further accords with the proportionality principle: *Downing* BCSC at para. 96.

[14] The CRT submits that issues of credibility are routinely addressed on written records, not only by the CRT, but by a host of other administrative boards, tribunals and commissions across multiple disciplines: *Yas v. Pope*, 2018 BCSC 282 at para. 35.

[15] The CRT submits that procedural fairness also requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker: *Baker* at para. 45. The test is: What would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude; would they think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly: *Baker* at para. 46.

[16] The CRT further submits that bias is a serious allegation. There is a strong presumption of judicial impartiality that is not easily displaced, and corresponds with the high burden of proving the claim on the party alleging bias: (*Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 25–26.

[17] Counsel for the CRT urges the Court to consider *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at para. 142, where the Supreme Court of Canada found that, in limited scenarios, remitting the matter to the decision-maker would stymie the timely and effective resolution of matters. The Court said that declining to remit a matter may be appropriate where it becomes evident to the Court that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: *Vavilov* at para. 142. The Court listed elements that may influence the exercise of a court's discretion to remit a matter, including concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision-maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources: *Vavilov* at para. 142.

[18] The Respondent agree with the submissions of the CRT on procedural fairness as articulated in *Downing* BCSC.

[19] In *Downing* BCSC, the CRT denied the Petitioner an oral hearing. Our Court of Appeal upheld this decision in *Downing* BCCA, finding that it was open to the Vice Chair to determine that credibility was not so central to the case as to require an oral

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hearing or cross-examination: para. 63. When exercising its discretion, the tribunal is required to weigh the advantages of an oral hearing and cross-examination against efficiency: *Downing* BCCA at para. 47. The advantages of an oral hearing must be balanced against the CRT's statutory mandate to resolve disputes in an "accessible, speedy, economical, informal and flexible" manner: *Downing* BCCA at para. 47.

[20] The tribunal must consider the extent to which the dispute before it hinges upon credibility, and the extent to which cross-examination may assist in resolving the issues: *Downing* BCCA at para. 47.

[21] The Court of Appeal noted at para. 65 of *Downing* BCCA that the legislature decided to move strata corporation disputes into the CRT dispute resolution process in order to balance the competing claims of efficiency and fairness.

[22] At para. 68 of *Downing* BCCA, Justice Willcock said the key question for a reviewing court is "whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly": *Baker*, at para. 30.

[23] The Petitioner takes issue with para. 45 of the CRT's petition response where it stated that the CRT's particular context indicates that a lower level of procedural fairness is required in strata property disputes. He submits these submissions are inconsistent with the nature of the claims being considered; all relate to democratic principles and rights, and are not only of great importance to the Petitioner, but in many cases could have an effect on some of the tens of thousands of strata corporations in British Columbia.

[24] The Petitioner agrees that the CRT does indeed provide a lower level of procedural fairness than would otherwise be found in the courts. The Petitioner submits that the factors justifying proportionality (accessibility, speed, economy, informality and flexibility) do not exist, and therefore a lower standard of fairness is not warranted.

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[25] The Petitioner submits that the CRT's online process is arduous. He submits that a petition to the Supreme Court can be resolved in less time, and that parties have more options with respect to scheduling. The dispute under consideration took seven months. The Petitioner says the cost of resolving a CRT dispute is identical to the cost of filing a Supreme Court petition and affidavit. The Petitioner also submits the general absence of an oral hearing in the CRT is a clear disadvantage, and the CRT process requires a great deal of waiting. The Petitioner agrees that the CRT does have specialized expertise in the subject area.

[26] The Petitioner submits that the Tribunal Member addresses credibility in para. 5 of the Decision and finds that an oral hearing is not required. The Petitioner submits that when assessing credibility, a decision-maker must explain why important evidence was rejected and include an explanation of findings of credibility. He says it must be explained why one party was found to be credible and the other not: *Wiebe v. Olsen*, 2019 BCSC 1740 at para. 38.

[27] The Petitioner objects to the fairness of the respondent being permitted to include an identical 540-word disparagement of the Petitioner as a preface to each of its seven claim arguments. He submits that the effect sought by the respondent, and validated in the Respondent's response, is scientifically known as the "illusory truth effect". According to the Petitioner, it is best known for the "stolen election" mistruth that gained traction with tens of millions of American citizens, simply by its repetition and despite there being no evidence to support that claim. The Petitioner submits that this disparagement is procedurally unfair because the contents are unrelated to any of the specific claims, and the content is replete with untruths and inferences that are unsupported by the evidence, and to which the Petitioner had no opportunity to provide evidence. The Petitioner is concerned that the Tribunal Member was influenced by the repetitive disparagement.

[28] The disparaging comments the Petitioner refers to are set out below. The Respondent starts all of its submissions with the following passage which is included

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in the Petition Record at Tab 9 entitled ST-2020-009532 respondent strata arguments formatted:

> **Submissions from Respondent to EPS522**
>
> Before addressing all of the [Petitioner's] arguments, the Strata Corporation wishes to make three general comments, applicable to all claims made by the [Petitioner], regarding significant unfairness, which is the main theme of all the claims in this dispute:
>
> 1) The [Petitioner] has already litigated many of these issues in the BCSC in Macdonald v The Owners, EPS 522, 2019 BCSC 876. The only significantly unfair act that the BCSC found in 2019 BCSC 876 was with respect to the chair of an AGM turning his back to the [Petitioner] and cutting off the [Petitioner] from speaking (see para 143). There is no evidence of similar behaviour uploaded in these proceedings. Moreover, Madam Justice Young found that the [Petitioner's] urging that the council was dishonest and fraudulent was incorrect and egregious (see paras 156-157).
>
> 2) The [Petitioner] spends much time thinking about and researching governance of strata corporations. He has never been nominated to run for council, despite at least one owner suggesting that he does and knowing that he could nominate himself. The [Petitioner] should be aware that council members can be removed from council at general meetings. Moreover the [Petitioner] should be aware that he can seek support from other owners to force the Strata Corporation to consider a resolution at a general meeting (s. 43). He has never taken such action or attempted to martial the democratic process of the SPA to bring about the change he says he wants. The [Petitioner] has not used the democratic process of the SPA to attempt to make change or participate in governance either by attempting to vote in a new council or bring a resolution to change bylaws. He consistently harasses, belittles, and slanders the council as dishonest and incompetent without making any effort to persuade other owners to take action to make changes in accordance with the process set out in the SPA. Instead the [Petitioner] cries foul and fancies himself the victim of unfairness, “punitive” processes and bias without any persuasive evidence. The Strata Corporation says that none of his claims disclose any unfairness. In most instances the [Petitioner's] expectations are unreasonable and the conduct of the Council is reasonable, fair and in line with its obligations under the Act.
>
> 3) The [Petitioner] has made a number of very general claims and then provided one specific incident to support broad allegations. The Strata Corporation says that this is inappropriate and the CRT should only consider resolving specific disputes that effect [sic] the owner and that the evidence is generally deficient to support specific claims but is overwhelmingly insufficient to support the broad generalizations that the [Petitioner] is seeking.

[29] The Petitioner submits that the Tribunal Member makes no mention of credibility outside of para. 5. Since all of the claims raised by the Petitioner were

dismissed, he concludes that any assessment of credibility went against him. He submits a lack of explanatory reasoning is procedurally unfair.

[30] The Petitioner submits that he has not made an allegation of actual bias, but of the appearance of bias.

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Ruling

[31] I find that the parties did have a meaningful opportunity to present their cases fully and fairly. I accept the Petitioner's complaints about the CRT software being cumbersome and inflexible. Once the submission is made, it is virtually impossible to amend it. The text of argument I have read is in large blocks of unformatted text, which is extremely difficult to read. However, these complaints about software are beyond the scope of my judicial review. I focus my decision on procedural fairness on the fact that the parties had an opportunity to be heard and were heard.

[32] There is no indication in the Decision that the Tribunal Member was influenced by the disparaging comments repeatedly made by the Respondent. The Petitioner himself makes disparaging comments about the Respondent's honesty and integrity as well, and the Tribunal Member does not appear to be influenced by those comments.

[33] The suggestion by the Respondent that the Petitioner has already litigated these claims without much success in *Macdonald* is inaccurate. The Petitioner was successful in many of the claims that he raised in *Macdonald*. Presumably, the Tribunal Member read the 2019 decision and formed his own conclusion.

[34] The Tribunal Member had the discretion to determine whether to hold an oral hearing or not to assess credibility. In para. 5 of the Decision, he decided that he could properly assess and weigh the documentary evidence in the submissions before him without the necessity of an oral hearing and cross-examination. He made that choice in the interest of proportionality.

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[35] Generally speaking, I show deference to the Tribunal Member and will not interfere with that exercise of discretion. On review of the Decision, it appears to me that the only decision that might have been influenced by an assessment of credibility is the decision relating to whether or not the Petitioner was nominated as a Council member. All the other decisions are based on legal principles. I will consider the claim regarding the Petitioner’s nomination in further detail below.

[36] The fact that all the decisions were ruled in favour of the Respondent is not proof of bias. I accept the CRT’s submission that there is a strong presumption of judicial impartiality that is not easily displaced, and a high burden of proving the claim on the party alleging bias. Bias is fact-specific, and the mere fact that the tribunal ruled against a party is not a basis for bias or impartiality: *Slosar v. The Owners, Strata Plan KAS 2846*, 2021 BCSC 1174.

Procedural History

[37] The executive director of the CRT, Richard Rogers, swore an affidavit setting out the record that was before the CRT Tribunal Member (the “Rogers Affidavit”).

[38] On December 11, 2020, the Petitioner submitted an application for dispute application to the CRT. The CRT issued a dispute notice on December 15, 2020. The Respondent submitted a dispute response on January 29, 2021: Exhibit B of the Rogers Affidavit. The CRT staff directed the parties to develop the tribunal’s decision plan for adjudication of the dispute. This plan contains a list of the evidence submitted by the parties in the dispute, as well as their written arguments, responses and replies for each claim.

[39] On September 17, 2021, the Tribunal Member issued the Decision.

[40] The Petitioner filed this petition for judicial review of the Decision on October 27, 2021. The CRT responded on November 29, 2021. The Petitioner filed an amended petition on September 2, 2022. The Respondent responded on October 13, 2022.

[41] The hearing of this judicial review took place over five days, some of which were partial days due to court scheduling issues.

[42] The CRT's information technology system does not retain formatting of the parties' written arguments after the dispute is closed. This creates a fairly unwieldy document. To assist the Court, the Petitioner and the respondent provided formatted submissions, which all parties agree are identical in content but much easier to follow because they are formatted. I have chosen to only rely on those formatted versions of the evidence and argument, but I have reviewed the exhibits to the Rogers Affidavit as well.

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[43] The numbering system is also confusing for the various claims. I will deal with the claims in the same order that the Tribunal Member did, in reference to the claim ID and claim number used in the Decision.

<u>Preliminary Matters</u>

New evidence

[44] The Petitioner filed a second affidavit in this judicial review proceeding ("Affidavit #2 of the Petitioner"). The Petitioner is aware that new evidence is rarely accepted, and cites the four factors for admission of fresh evidence stated in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, 1979 CanLII 8, relied on in *Golder Associates Ltd. v. North Coast Wind Energy Corp.*, 2010 BCCA 263 at paras. 33–36, as cited in *Albu v. The University of British Columbia*, 2015 BCCA 41 at para. 29:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases...
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that it believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. …

[45] The CRT and the Respondent oppose the admission of Affidavit #2 of the Petitioner.

[46] Affidavit #2 of the Petitioner attaches minutes of the EPS 522 2022 Annual General Meeting ("AGM"), an August 8, 2022 email from the property manager, proxy forms from the 2022 AGM, legal bills from Hamilton & Company to EPS 522 from 2019 to 2021, an email dated February 17, 2022 from T.O. to BC Housing, a webpage describing Robert's rules for amending general meeting minutes, a letter dated June 13, 2022 from the Assistant Chief of the Victoria Fire Department related to the use of barbecues, the true copy of the 2022 EPS 522 notice of AGM including some of the new 2022 bylaws, and a true copy of the 2021 EPS 522 notice of AGM including some of the new 2021 bylaws.

[47] During the hearing, I ruled that Affidavit #2 of the Petitioner was inadmissible. The purpose of the judicial review is to consider the record as it stood before the Tribunal Member and to determine whether the Decision is patently unreasonable. Adducing evidence of events that took place after the fact is not relevant to this judicial review, nor will it affect the outcome.

<u>The Dispute Claims</u>

Claim #1 [C-076519] — Should T.O. be Removed from Council?

The Petitioner's submissions

[48] The Petitioner submits that this claim centres around the *SPA*, s. 28 (eligibility for council) and the certification required for "individuals representing corporate owners" to be eligible for council. That section says:

> 28(1) The only persons who may be council members are the following:
>
> (a) owners;
>
> (b) individuals representing corporate owners;
>
> (c) tenants who, under section 147 or 148, have been assigned a landlord's right to stand for council.
>
> …

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[49] The Petitioner submits that s. 145 of the British Columbia *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*] applies to this situation, and that BC Housing must, by its enabling statute, accord with the *BCA* and specifically assign owners' rights for the corporate representative appointed by a governing group, such as a board of directors, to attend meetings of a corporation.

[50] The Petitioner asserts that a proxy for an owner does not make a proxy holder eligible for Council, and a proxy for a corporation should not be treated any differently, as a corporation that owns one unit can surely not have superior rights to an individual owner.

[51] The Petitioner submits that these submissions are different than the submissions of the Petitioner made in *Macdonald*, and that issue estoppel does not apply.

[52] BC Housing is the registered owner of Strata lots 8 through 19. The BC Housing rental units in the building are managed by Beacon Community Association ("Beacon"). In *Macdonald*, the Petitioner questioned whether a senior rental housing provider's employee could hold proxies for BC Housing.

[53] The Seniors' Rental Housing Initiative Operator Agreement is attached at page 519 (epage 41/838) of Exhibit F of the Rogers Affidavit (the "Operator Agreement"). It is the same agreement referred to in *Macdonald*.

[54] Clause 10 of Part B of Schedule A of the Operator Agreement (epage 49/838) says:

> **10. Strata Council**. BC Housing may appoint the Society (defined as Beacon Community Association to the Strata Council on its behalf as set out in the bylaws. If the Society represents BC Housing on the Strata Council, they are responsible for carrying out the duties of a Strata Council member on BC Housing's behalf with the goal of providing affordable and well-managed rental housing for eligible Tenants.

[55] In *Macdonald*, the Petitioner submitted that neither the original nor the most recent bylaws make any mention of BC Housing. The Operator Agreement makes

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no mention of proxies. The Petitioner submitted that T.O., an employee of Beacon, was voting at meetings under a "standing proxy" when none in fact existed. I ruled that s. 56(3) of the *SPA* set out that, subject to the regulation, any person can be a proxy. I saw nothing in the *SPA* or the *Strata Property Regulation*, B.C. Reg. 43/2000, that would prevent a Beacon employee from holding a proxy for BC Housing. Since the Petitioner raised the issue, a proxy form was completed, and I found that the issue was resolved.

[56] The Petitioner did not raise any issues about the *BCA* in *Macdonald*. The Petitioner now argues that the certification for corporate representatives is not the same as a proxy. He submits that certification must assign owners' rights to such an individual. The Petitioner says that s. 145 of the *BCA* does that; it specifically assigns owners' rights for a corporate representative appointed by a governing group, such as a board of directors, to attend meetings of the company/corporation of which it is a shareholder or a creditor of another corporation.

[57] Section 145 of the *BCA* reads as follows:

> (1) A British Columbia corporation may, by a resolution of its directors or other governing body, authorize a person to act as the representative of the corporation,
>
> > (a) if the corporation holds shares of another corporation, wherever incorporated, at a meeting of some or all of the holders of shares of that other corporation, and
> >
> > (b) if the corporation is a creditor of another corporation, wherever incorporated, at a meeting of creditors of that other corporation.
>
> (2) A person authorized under subsection (1) is entitled to exercise the same powers on behalf of the corporation that the person represents as that corporation could exercise if it were an individual who holds shares of the other corporation or is a creditor of the other corporation, as the case may be.

[58] The Petitioner submits that in 2019, the Respondent invented an additional form for T.O. that purported to be a corporate representative certificate, but did not accord with the *BCA*. A proxy form and a corporate representative certificate have

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been provided to T.O. Both forms are automatically certified by the Respondent at its meetings.

[59] The form found at page 559 of Exhibit F to the Rogers Affidavit (epage 81/838) reads:

> **Individual Authorized to Represent the Owner**
>
> TAKE NOTICE that for the purposes of Section 28(1)(b) of the *Strata Property Act*, the owner has appointed [T.O.] to act as its representative on the strata council for the Strata Corporation. This appointment will expire on December 31, 2022, unless renewed in writing.

[60] The form is signed by an authorized signatory for the Provincial Rental Housing Corporation (the "Corporate Authorization").

[61] The Petitioner submits that the Corporate Authorization is improper because it purports to appoint T.O. to Council, whereas T.O. still needs to be elected or affirmed to sit on Council. He says the form should state that T.O. is authorized to stand for election to Council on behalf of the BC Housing. This is a different process than holding a proxy. T.O. did have a proxy, which enabled him to vote at an AGM.

[62] The Petitioner submits that this issue was not resolved in *Macdonald*. *Macdonald* dealt with the issue of whether a proper proxy form was in effect. The Petitioner did not ask about a person holding a proxy being entitled to sit on Council.

The Respondent's submissions

[63] The Respondent submits that s. 10 of Part B of Schedule A of the Operator Agreement does not impose the appointment of someone to sit on Council, but authorizes someone from Beacon to be the representative of Strata lots owned by BC Housing if the bylaws permit it, subject to any restrictions in the bylaws.

[64] The Corporate Authorization appoints T.O. to represent the owner on the Strata Council pursuant to s. 28(1)(b). The Respondent submits that the Corporate Authorization was created to address the concerns of the Petitioner that T.O. was not properly on Council. It says the Corporate Authorization is not required by

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statute, but it is useful because it provides evidence that T.O. was properly authorized to sit on Council if elected.

[65] The proxy appointment form from BC Housing to Beacon, dated February 4, 2021 (found at Exhibit F of the Rogers Affidavit, page 593, epage 115/838), appoints a Beacon Community Associate to vote on behalf of the owner.

[66] Section 147 of the *SPA* provides that a landlord may assign the right to vote to a tenant:

> (1) A landlord may assign to a tenant some or all of the powers and duties of the landlord that arise under this Act, the bylaws or the rules, but may not assign to a tenant the landlord's responsibility under section 131 for fines or the costs of remedying a contravention of the bylaws or rules.
>
> (2) The assignment is not effective until the landlord gives the strata corporation a written notice stating all of the following:
>
> (a) the name of the tenant to whom the assignment is made;
>
> (b) the powers and duties that have been assigned;
>
> (c) the time period during which the assignment is effective.

[67] In order for a tenant to exercise the right to vote, they would need a proxy in writing setting out the written requirements of s. 147(2)(a), (b) and (c).

[68] Section 56 of the *SPA* deals with proxies and requires that it be in writing and signed by the person appointing the proxy. Section 56(3)(c) says that any other person may hold a proxy. The Respondent submits that this section permits BC Housing to appoint Beacon as a proxy to vote at a meeting.

[69] The wording in s. 28(1)(b) of the *SPA* which deals with who can sit on the Strata Council refers to "individuals", as opposed to a person. The Respondent says it must be an individual representing a corporate owner, not a corporation, to sit on the Strata Council.

[70] Section 28(1)(c) of the *SPA* refers to a tenant who has been assigned the landlord's right to stand for council. Whereas s. 147 requires that the assignment of powers and duties of a landlord to a tenant must be put in writing, there is no

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requirement in s. 28(1)(b) that the authority of an individual representing a corporate owner be in writing. The Respondent submits that the corporate representative does not need to give anything in writing. They can just show up and say that they are the representative for the corporate owner. Practically speaking, says the Respondent, in order for the strata to do its due diligence, the corporate representative should provide some proof. They can stand for election and sit on council, and represent the owner and vote, as the physical manifestation of the corporate owner.

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[71] The Respondent submits that if the legislature had intended that a form be used like the one required in Australia, they would have done so in the *SPA*, as they did under ss. 147 and 56. There is no form or requirement for s. 28(1)(b).

[72] According to the Respondent, the Strata Council has ample evidence that T.O. is a corporate representative; there is the proxy, the corporate representative form, and the Operator Agreement.

[73] The Respondent submits that s. 145 of the *BCA* requires a resolution of directors to appoint a person to act as a representative of the corporation. It says the legislature could have incorporated that requirement by reference into the *SPA*, but did not. The Respondent is not required to ask the representative if the directors have met or voted on who can represent them. That is not the Respondent's responsibility.

[74] The Tribunal Member decided that the case should be dismissed because of issue estoppel. Eligibility of Council members was an issue before me in 2019: see *Macdonald* at paras. 5, 85, 89, and 90–96. The issue of T.O. being eligible for Council was already decided in *Macdonald*. The Respondent submits that this matter was dealt with in *Macdonald* at para. 96. It submits it is unfortunate that the reasons at para. 96 appeared to "conflate a proxy with a document nominating a corporate representative".

[75] The CRT was estopped from making a finding because a higher court had made a decision: Decision at para. 16. It is arguable that the door was left open in para. 96 when I said that I had no submissions from BC Housing and Beacon.

[76] The Respondent submits that the Petitioner is seeking a declaration from the CRT. It says the CRT does not have the jurisdiction to give a declaratory order, and this is a reasonable and correct decision. Section 123 of the *CRTA* sets out the orders that are available for the CRT. They can order a party to do something, refrain from doing something or pay money. They cannot make a declaratory order.

[77] The Respondent submits that the wording “may appoint the Society ... to the Strata Council” in s. 10 should be interpreted to mean that BC Housing authorizes a representative to stand for election to Council and to represent them on Council.

Ruling

[78] I find that Clause 10 of Part B of Schedule A of the Operator Agreement properly authorizes someone from Beacon to be the representative of BC Housing on the Strata Council *if elected*.

[79] The Corporate Authorization form makes it clear that T.O. of Beacon is authorized to represent the owner on the Strata Council.

[80] In order to vote at AGMs and Special General Meetings, T.O. needed a valid proxy. The proxy issue was resolved before the ruling in *Macdonald*.

[81] In order to sit on Council, T.O. needed to be elected or acclaimed.

[82] I do not agree that a special form was required to appoint T.O. as a corporate representative. He merely needed to provide the Council with some proof that he was authorized to represent Beacon. I am satisfied that the corporate authorization created by the Respondent for this purpose, and the proxy allowing him to vote, were adequate.

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[83] I do not agree that s. 145 of the *BCA* applies to this situation. It relates to specific shareholder and creditor meetings, and not to strata meetings.

[84] In the Decision, the Tribunal Member found that this issue was resolved in *Macdonald* and that issue estoppel applied.

[85] Para. 96 of *Macdonald* is set out below:

> Section 56(3) of the *SPA* sets out that, subject to the regulations, any person can be a proxy. I see nothing in the *SPA* or the *Strata Property Regulation*, B.C. Reg. 43/2000, that would prevent a Beacon employee from holding a proxy for BC Housing. It appears that [T.O.'s] representation on Council may not have been properly documented prior to the petitioner raising this issue. Now that a proxy form has been completed, and without further submissions from Beacon or BC Housing, I find this issue is now resolved.

[86] I agree with both parties that in my statement, it appears the words T.O.'s representation on Council" conflate the issues of voting at an AGM and representation on Council.

[87] The issue before me in *Macdonald* was whether or not T.O. held a proper proxy for BC Housing to enable him to *vote* at the meeting. The issue before the CRT in this matter was what certification would satisfy the requirements of the *SPA*, s. 28(1)(b).

[88] Given the wording of para. 96 of *Macdonald*, that decision is not patently unreasonable because of the confusing language of para. 96. Even though the issue was not actually before me, it was reasonable for the Tribunal Member to interpret that paragraph to mean that the issue was resolved by the Supreme Court and that the tribunal had no jurisdiction.

[89] I see no reason to send this matter back to the CRT, since the effect of the Decision will not change.

[90] The Tribunal Member was correct in keeping its scope of decision-making confined to its authority under s. 121 of the *CRTA*.

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Claim #2 [C-076530] — Did the Respondent Alter a Resolution After the Respondent's Vote? If So, What is the Remedy?

The Petitioner's submissions

[91] The Petitioner claims that the Respondent changed the text of bylaw 19.2 after it was approved at a Special General Meeting on January 15, 2019. A 500-word bylaw appeared twice in the resolution, once for the residential type (12 units) and once for the commercial type (3 units), for a total of 1000 words. In the minutes of the meeting, both occurrences of bylaw 19.2 had been replaced by entirely different wording.

[92] The Petitioner says he brought the substitution to the Respondent's attention; however, the Respondent ignored him.

[93] The Respondent denied the substitution of the minutes in its CRT dispute response by saying "the filed bylaws and minutes accurately reflect the results of the January 2019 meeting": CRT dispute response at page 29.

[94] The Petitioner provided the Respondent with copies of the original bylaws, as approved by the Respondent, and the altered bylaws that were filed with the Land Title Office (the "LTO"). The Respondent did not acknowledge this action until subsequent arguments were filed by its legal counsel.

[95] The Petitioner objects to the wording at para. 22 of the Decision, which says the Respondent admits that there was a "discrepancy" between the bylaws text that was approved at the AGM, and the bylaws text that was filed at the LTO. The Petitioner submits that the issue is more serious than a discrepancy. He alleges wrongdoing on behalf of the Respondent, both by its act and by its denial.

[96] The Petitioner denies that the matter is moot because the issue of the Respondent's wrongdoing has not been dealt with.

[97] The Petitioner submits that the Tribunal Member failed to apply the legal test for mootness or applied it in error, and this was an error of mixed fact and law, and accordingly patently unreasonable.

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The Respondent's submissions

[98] The Respondent submits that the Tribunal Member made no reviewable error and his decision was correct and reasonable based on the evidence and submissions. The Respondent did acknowledge that it had changed the minutes after they were voted on, and did correct its error by repealing two incorrectly filed bylaws and replacing them with correctly filed ones. Therefore, there was no longer a contravention to remedy.

[99] The Tribunal Member found at para. 24 of the Decision that even if the claim was not moot, he could not grant the relief requested, which was an order requiring the Respondent to comply with the *SPA* and stop changing resolutions after they are approved. The Tribunal Member noted the Respondent is already obliged to comply with the *SPA* and that it is unnecessary to repeat this legal obligation, citing *SWS Marketing Inc. v. Zavier*, 2021 BCSC 312 at para. 43, rev'd in part 2021 BCCA 201.

[100] The Respondent submits that, although the Tribunal Member was in error by saying that *SWS Marketing Inc.* was not binding on him, that error does not affect the result. The Tribunal Member should not make an order directing the Respondent to comply with an Act, given that it is already obliged to do so.

Ruling

[101] I find no error in the Decision on this claim. The Respondent did violate s. 128(1) of the *SPA* by filing inaccurate bylaw amendments at the LTO. Once the matter arrived before the Tribunal Member, the Respondent had corrected its error. There is no mechanism to punish the Respondent for its violation. It appears that the Petitioner seeks some recognition for identifying the error. I note that the Tribunal Member did find the Respondent had violated s. 128(1) of the *SPA* by filing inaccurate bylaw amendments at the LTO. There are no further remedies necessary. The dismissal of the claim was correct.

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Claim #3 [C-076531] — Did the Respondent Improperly Use Strata Resources to Prepare for Council Election?

The Petitioner's submissions

[102] The Petitioner submits that the Strata Council used expensive legal resources in order to get T.O. elected. He submits the Strata Council should be neutral and should not attempt to influence Strata Council election results.

[103] The Tribunal Member dismissed this claim because the Petitioner failed to prove that the Strata Council's conduct breached the *SPA* or the bylaws. The Petitioner submits that he is not expected to provide authorities to the CRT; the CRT is the body with expertise under the *SPA*.

[104] The Petitioner says he is entitled to express wrongdoing without locating the section of the *SPA* that has been breached. He says there are many ways to frustrate the voting process that do not show up in the *SPA*.

[105] The Petitioner submits that the legal basis for his complaint is that despite the machinations of the Strata Council, T.O. had not provided a valid proxy form from 2014 to 2021. The Petitioner, in his capacity as scrutineer, objected to the validity of T.O.'s forms. He submits that owners have the discretionary right and duty to attend meetings in person or by proxy and to vote. Owners also have the discretionary right not to attend by either means. The Petitioner says the Strata Council has no place in interfering with a particular owner's rights and duty, and especially for the purpose of increasing the Strata Council's voting power.

[106] The Petitioner cites *Norenger Development (Canada) Inc. v. The Owners, Strata Plan NW 3271*, 2016 BCCA 118 at para. 63, which summarizes the principles enunciated in previous cases interpreting the enactment of s. 174 of the *SPA*, which relates to the appointment of an administrator. The principles the Petitioner wishes to emphasize from that paragraph are as follows:

> …
>
> - The powers and duties of a strata corporation are independent from the powers and duties of the owners who are members of that strata

> corporation. The right to vote on and pass a resolution at an annual or special general meeting is an individual right possessed by the owner of a strata lot (or an assignee or mortgagee under s. 54 of the *Act*).

…

[107] The Petitioner submits that "[f]rom an administrative law perspective, centuries ago Lord Coke commented upon discretion as":

> ... a science or understanding to discern between falsity and truth, between right or wrong [sic], between shadows and substance, between equity and colourable glosses and pretences, and not [to do] according to their wills and private affections ...
>
> [Emphasis in original.]

[108] The Petitioner submits that the *SPA* is founded on democratic principles.

[109] The Petitioner submits that the Tribunal Member incorrectly limits tribunal authority to the letter of the law in the *SPA*, while disregarding the democratic principles and societal norms upon which the enactment rests. He says it is wrong to interfere with a single owner's voting rights and duty, and it is wrong if you do so secretly, and to do so to the advantage of the Strata Council but with no gain and arguably with harm to the owners. That harm can include the substantial cost to owners for lawyers' fees for each of the past four years; the fact that a place on Council taken up by T.O. has been unavailable to other owners; that the Respondent has inappropriately certified the very forms that it created; and that the Respondent has employed different rules for T.O. and BC Housing, as opposed to every other owner.

[110] The Petitioner says the Tribunal Member found no wrongdoing with the Respondent secretly expending corporate funds to ensure that a sitting Council member remains on Council along with his 12 votes, and with that practice including Council certifying the very forms it creates.

[111] The Petitioner asserts that the finding of no legal basis is patently unreasonable because there is indeed a legal basis.

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[112] The Petitioner submits that the Tribunal Member “sanitized” his allegation of wrongdoing to “confirming voting rights” in paras. 27 and 28 of the Decision, which read as follows:

> 27. The strata says that it was not improper to use the services of its lawyer and its property manager to confirm voting rights. The strata says that council members are volunteers and sometimes engage professional advisors to ensure the strata is being managed properly. There is no evidence before me showing that the strata spent unbudgeted funds for the legal services.
>
> 28. There are multiple provisions in the SPA about voting at annual meetings. Section 53 says each strata lot gets 1 vote at annual meetings, unless otherwise set out in the Schedule of Voting Rights. SPA section 56 permits voting by proxy. SPA section 25 says the strata council is elected by the person’s [sic] present or by proxy at each AGM. Based on these voting provisions in the SPA I do not find that it was unreasonable, or a breach of the SPA or the bylaws, for the strata to confirm the owners’ voting rights and proxies in preparation for annual general meetings.

[113] The Petitioner submits that there is no reasoning in the Decision as to how “confirm voting rights” can encapsulate and replace the Petitioner’s claim, and in so doing remove all aspects of the alleged wrongdoing.

The Respondent’s submissions

[114] The Respondent submits that the Tribunal Member correctly found that there was no legal basis in the *SPA* or bylaws to make the order sought by the Petitioner, and that his decision to dismiss the claim was reasonable and should not be disturbed by this Court.

[115] The Respondent submits that the Petitioner did not cite any section of the *SPA*, bylaws or other statute in support of the relief he is seeking. He did not claim significant unfairness or consider the test for significant unfairness that could have provided him some relief through s. 123(2) of the *CRTA*. His concern seemed to be about one owner having 12 votes at the meeting. The Respondent says this is out of its control, and is a reality of the type of democracy in residential stratas where each owner has one vote.

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[116] The Respondent says the Petitioner himself admits that he had no legal basis for the claim, as allegations are based on his perception of "moral" wrongs committed by the Respondent. The Petitioner is asking the Court to overturn the decision of a statutory decision-maker with limited jurisdiction to decide strata property claims by ignoring the letter of the law, and instead relying on ill-defined "but noble" ideas of democratic principles and centuries-old statements made by English lords.

[117] The Respondent submits that the CRT was correct in keeping its scope of decision-making confined to its authority in s. 121 of the *CRTA* and the *SPA*. When one looks at s. 121 of the *CRTA*, the tribunal is restricted to making the decisions enumerated in that section, which reads:

> 121(1) Except as otherwise provided in section 113 [*restricted authority of tribunal*] or in this Division, the tribunal has jurisdiction over a claim, in respect of the *Strata Property Act*, concerning one or more of the following:
>
> (a) the interpretation or application of the *Strata Property Act* or a regulation, bylaw or rule under that Act;
>
> (b) the common property or common assets of a strata corporation;
>
> (c) the use or enjoyment of a strata lot;
>
> (d) money owing, including money owing as a fine, under the *Strata Property Act* or a regulation, bylaw or rule under that Act;
>
> (e) an action or threatened action by a strata corporation, including the council, in relation to an owner or tenant;
>
> (f) a decision of a strata corporation, including the council, in relation to an owner or tenant;
>
> (g) the exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.
>
> …

[118] The Respondent submits that there is no evidence of wrongdoing. It says it has taken the Petitioner's concerns seriously, and has retained a lawyer to assist in properly documenting its corporate representative certificate. The Respondent also

argues there is no evidence that the funds were improperly spent, and it is entitled to seek legal advice.

Ruling

[119] The Petitioner is concerned about the Respondent using expensive legal resources in order to get T.O. elected to Council. I find this is an inaccurate characterization of what occurred. The Petitioner complained about the proxy form and the proof of corporate representation. The Respondent took these complaints seriously and, in an effort to avoid further litigation, the Respondent consulted with a lawyer to create the proxy form and a corporate representation form.

[120] Creating these forms did not get T.O. elected to Council. He still had to be nominated and elected. There is no wrongdoing in seeking legal advice when the Respondent's practice has been challenged.

[121] The fact that the Respondent sought legal advice to correct documentation that had been challenged by an owner does not suggest a lack of neutrality. The members of the Strata Council are not legally trained. In an effort to ensure that they were following the law, they were entitled to seek legal advice.

[122] There are limitations on what a Tribunal Member can decide. It was reasonable for the Tribunal Member to dismiss this claim because it was not founded on any section of the *SPA*.

[123] The Tribunal Member can make decisions based on significant unfairness under s. 123(2) of the *CRTA*, but not on moral blameworthiness.

[124] I see no reason to interfere with the Tribunal Member's decision in dismissing this claim. I see no moral blameworthiness in the Respondent seeking legal advice to address the challenges raised by the Petitioner.

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Claim #4 [C-076534] — Was Mr. Macdonald's Nomination for the Strata Council Improperly Denied?

The Petitioner's submissions

[125] The Petitioner submits that during the Strata Council's election process at the April 12, 2019 AGM, an owner, Ms. W., nominated Mr. Macdonald for Council and he accepted.

[126] The election was managed by the property manager. The Petitioner submits that his name was placed on the blackboard by the property manager. An objection was raised by multiple Strata Council members that the Petitioner was a party to ongoing litigation and would therefore be in conflict of interest. The property manager ruled at that time that the Petitioner could not be on the Strata Council, pending the outcome of the Supreme Court judgment in *Macdonald*. The Petitioner challenged this ruling during the meeting. After he did so, an unknown Council member stated, "but then we have no one else in the building that would go on [C]ouncil. So how does that work?", and the Council President agreed with that. The Petitioner submits that his name was then removed from the blackboard.

[127] The Petitioner submits that, in the dispute response, the Respondent validated that the Petitioner had been nominated and that his name had been subsequently removed. The Rogers Affidavit, Tab B, page 33 (epage 13/22) , reads:

> At the 2019 AGM, the [Petitioner] made a number of points and comments from the floor throughout the meeting. At one point, another owner suggested that if the [Petitioner] "has so much to say, why doesn't he run for council". At this point someone on the council advised that there may be a conflict of interest because the [Petitioner] was involved in ongoing litigation. There followed some discussion.
>
> After the discussion, the [Petitioner] did not indicate that he actually wanted to sit on council and so his nomination was removed. The [Petitioner] has not brought this particular issue up again and did not pursue a nomination to sit on the council at the 2020 AGM and has not expressed any interest in sitting on council since 2019.
>
> The Respondent does not agree that it ever blocked the [Petitioner] from being on council.

[128] At para. 39 of the Decision, the Tribunal Member found that the Petitioner had not been nominated and that he had been free to be nominated or to self-nominate.

[129] The Petitioner submits this is an absurd finding. Both the Petitioner and the Respondent acknowledged that the Petitioner had been nominated and that his name had been later removed.

[130] The Petitioner says the Tribunal Member does not address the position taken by the Respondent in the dispute response and its subsequent reversal of that position in the Respondent's argument. The Petitioner submits that such a reversal in position is possibly akin to inconsistent pleadings in a court proceeding. The Petitioner submits that it is procedurally unfair for the Tribunal Member to have ignored the serious contradiction between the dispute response and the Respondent's arguments.

[131] The Tribunal Member found that neither the *SPA* nor the bylaws prevent Mr. Macdonald from being on the Strata Council. The Petitioner submits that although that is true, the handling of his nomination was significantly unfair. The property manager ruled that the Petitioner could not be on the Strata Council at that time. Consistent with democratic norms, both the owner Ms. W. and the Petitioner acceded to that decision, although the Petitioner did not agree with it. The Petitioner argues that the Tribunal Member is suggesting that, in defiance of the ruling, the Petitioner or Ms. W. could have reasserted the nomination just removed. This puts the onus on the Petitioner to defy the power and authority in the room.

[132] The Petitioner submits that the decision reached by the Tribunal Member is patently unreasonable because the findings by which the decision was reached themselves are patently unreasonable, leaving no rational or tenable line of analysis supporting the decision. The Petitioner argues that the Tribunal Member had ignored highly relevant contrary evidence that validated the Petitioner's assertion that he had been nominated for the Strata Council and that his nomination was later removed. The Petitioner says that this decision ignores the fact that the property manager had

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ruled that the Petitioner was not eligible for nomination, and assumed that the Petitioner was free to defy the ruling.

[133] The Petitioner submits that the Tribunal Member acted in a procedurally unfair manner by negatively assessing the Petitioner's credibility, and without providing credible reasons for doing so by failing to assess the serious lack of credibility of the respondent.

[134] The Petitioner has provided an audio recording of this portion of the AGM.

[135] The Petitioner also objects to the Tribunal Member copying and pasting from his previous decisions. He suggests that doing so prevents the decision-maker from approaching the matter with an open mind or fresh eyes. The Petitioner suggests that the Tribunal Member failed to apply the test for significant unfairness, which he references at para. 33 of the Decision, found in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, leave to appeal to SCC ref'd, 34739 (19 July 2012).

The Respondent's submissions

[136] The Petitioner provided a recording of the relevant AGM in evidence, and a copy of the recording is included as a USB on page 477 of Exhibit E of the Rogers Affidavit. The Petitioner also uploaded a transcript of the relevant portion, presumably prepared by himself, which is at page 397 of Exhibit E (epage 198/280) of the Rogers Affidavit. The Respondent agrees that the transcript is fairly accurate.

[137] The relevant portion of the meeting commences at 1 hour, 25 minutes, and 23 seconds of the recording, and goes until the recording ends. The recording ends just after the property manager states "any opposed". It is not clear if any objections were raised after that.

[138] At the time of filing its dispute response, the Respondent did not have a copy of the recording and its response was filed based on memory of how the 2019 AGM unfolded. The written submissions were made based on the best available evidence, which was the recording and transcript. The Respondent says the Petitioner's

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insistence that the Respondent must be tied to an alleged admission that he was nominated, made in the dispute response, is unreasonable. The purpose of the CRT is for an independent decision-maker to make findings of fact and legal conclusions based on evidence. The best evidence to make that conclusion was clearly the recording of the meeting, and not the subsequent statements written to the CRT. The decision-maker made his decision based on the recording.

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[139] The Respondent submits the Petitioner's argument that it was up to him to defy the property manager is not congruent with the evidence and is not persuasive in proving that the Decision was patently unreasonable. It says the recording clearly states that the Petitioner did not agree with the finding of the property manager. The discussion about eligibility to sit on Council while litigation was pending occurred before opening nominations. The Respondent submits this is a reasonable interpretation of the recording and transcript. Following the statement on eligibility, the property manager then said, "so let's start with the nominations". This clearly indicates that no nominations had yet been made.

[140] The Respondent submits the legal test for significant unfairness is the same across all claims. The application of distinct facts to that test is different for each case. The summary of the legal test for significant unfairness allegedly copied and pasted did not demonstrate that the CRT did not review the facts in detail and consider the application of the test. The Respondent argues the analysis of the evidence and application to the legal test for significant unfairness was reasonable and should not be disturbed.

Ruling

[141] The Tribunal Member found that the Petitioner's allegation that the Respondent prevented his nomination to run for the Strata Council was a strata corporation action against an owner within the scope of the *CRTA*, s. 121(1)(e). The Tribunal Member considered the test for significant unfairness, as set out in *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, leave to appeal to SCC ref'd, 30057 (22

April 2004); *Dollan*; and *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851*, 2020 BCCA 342 at para. 89.

[142] The Tribunal Member noted that the *SPA* and bylaws do not provide for specific nomination rules.

[143] The Tribunal Member relied solely on the audio recording, and found it supported the Respondent’s submission that the Petitioner was never nominated for the Strata Council and did not establish that the Respondent prevented Mr. Macdonald’s nomination, as he claims. The Tribunal Member ignored the Petitioner’s evidence of his name being written on a blackboard. He concluded that the Petitioner failed to prove the Respondent’s conduct was oppressive, and dismissed the claim.

[144] I have reviewed the audio recording and transcript. I cannot ascertain from the audio recording whether names were written on the blackboard when the discussion about nominations was initiated by Ms. W. The Petitioner says that they were, and his name was subsequently erased.

[145] The owner Ms. W. asked the Petitioner why he did not run for Council because he was so passionate about it, and she indicated that she would vote for him.

[146] This show of support for a nomination of the Petitioner was immediately interrupted by the property manager, who ruled that Mr. Macdonald was not eligible for nomination because of a conflict of interest, in that he was the Petitioner in *Macdonald*. After some discussion, the property manager called for nominations. Ms. W. did not advance her intended nomination for the Petitioner, and the Petitioner did not self-nominate. Of significance is while the property manager was directly approaching specific owners in order to elicit sufficient nominations, he never once invited Ms. W. to restate her nomination. It is clear that he was relying on his ruling that the Petitioner was not eligible.

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[147] I accept the Petitioner’s explanation. Once ruled by the property manager that he was not eligible for nomination, regardless of whether the Petitioner agreed with the ruling, I find that neither Ms. W. nor the Petitioner felt they could advance a nomination. As it turns out, the ruling was incorrect.

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[148] There are credibility issues to be considered here. The Respondent initially agreed that the Petitioner had been nominated and his nomination had been withdrawn. After hearing the audiotape, they asserted a contrary position. This is an area where cross-examination of the parties may have assisted.

[149] The Tribunal Member does not consider the inconsistent positions taken by the Respondent, nor the missing visual evidence of the blackboard.

[150] I conclude that Mr. Macdonald was treated significantly unfairly. When Ms. W. indicated support for his nomination, he had a reasonable expectation that he would be permitted to stand for election. There was clearly opposition to having him sit on the Strata Council, but this could have been dealt with in an election and not at the nomination stage.

[151] I consider the test for significant unfairness as set out in the following authorities.

[152] Courts should not interfere with the actions of strata councils, unless the actions result in something more than mere prejudice or trifling unfairness: *Reid* at para. 27.

[153] Moreover, some concepts and principles drawn from the law of corporations are relevant in the context of strata property law: see *King Day Holdings Ltd.* at para. 88.

[154] In determining whether the impugned conduct is oppressive or unfairly prejudicial to a shareholder's respective interests, as opposed to the interests of other shareholders, the Court should look to the principles underlying the oppression remedy, and the concept of reasonable expectations in particular: see *Dollan* at

para. 29. If a breach of a reasonable expectation is established, the Court then considers whether the conduct complained of amounts to “oppression”, “unfair prejudice” or “unfair disregard”: see *Dollan* at para. 29.

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[155] In the context of shareholders, their reasonable expectations is a question of fact. The nature of the business relationship between the parties will determine their reasonable expectations as to what is just and equitable: see *Dollan* at para. 29.

[156] Regarding claims for oppression, oppression is fact-specific, and courts should look at business realities, not just narrow legalities: see *Dollan* at para. 29. The questions for the Court are whether the evidence: 1) supports the reasonable expectation asserted by the claimant, and 2) establishes that the reasonable expectation was violated by conduct falling within the terms “oppression”, “unfair prejudice” or “unfair disregard” of a relevant interest: see *Dollan* at para. 29.

[157] In *Dollan*, Justice Garson held that, in the context of a strata unit owner seeking redress under s. 164 of the *SPA*, the test for significantly unfair conduct is: 1) examined objectively, does the evidence support the asserted reasonable expectations of the Petitioner, and 2) does the evidence establish that the reasonable expectation of the Petitioner was violated by action that was significantly unfair?: para. 30. Significantly unfair conduct is conduct that is oppressive in that it is burdensome, harsh, wrongful, lacking in probity or fair dealing, or done in bad faith, or conduct that is unfairly prejudicial in that it is unjust or inequitable: *King Day Holdings Ltd.* at para. 88.

[158] In *King Day Holdings Ltd.*, Justice Dickson, writing for the Court, specified that the consideration of the reasonable expectations of a Petitioner, assessed in the manner described by Justice Garson in *Dollan*, is one relevant factor to be taken into account in the conduct of an inquiry under s. 164: para. 89.

[159] Applying the *Dollan* test, I have inquired into whether the evidence establishes that the reasonable expectation of the Petitioner was violated by an action that was significantly unfair? I find that his reasonable expectation was

violated when the suggestion that he be nominated was shot down by the property manager, with his incorrect ruling on conflict of interest.

[160] This is an area where there is clearly conflicting evidence. I find it patently unreasonable for the Tribunal Member to have relied solely on the audiotape and not to have considered the prior inconsistent statements of the Respondent, and the explanation of the Petitioner that his name was placed on a blackboard and then removed, indicating that he was being considered for nomination. His explanation is consistent with the original position of the Respondent.

[161] I also find it absurd to suggest that Mr. Macdonald could defy the ruling of the Chair and present himself for nomination after the Chair ruled that he was not eligible. I note that there was no invitation to Ms. W. to advance her nomination after this ruling, and it seems to be reasonable to assume that she was under the same impression as Mr. Macdonald that he was not eligible for nomination.

[162] There is no remedy other than acknowledgement for this significantly unfair act, given that the event took place at the 2019 AGM. There have been several subsequent elections. As far as I know, the Petitioner was not nominated again. These reasons serve to educate the Strata Council to be careful not to unfairly block nominations in the future.

[163] The claim that the Tribunal Member did not approach this claim with fresh eyes because he cut and pasted a passage from a previous ruling into the Decision is without merit. The copied portion of the Decision related to a discussion of the law and not a finding of fact in this case. There is no unfairness in repeating a summary of the law from a previous decision.

Claim #5 [C-076535] — Should the Respondent be Required to Provide Reasons for its Strata Council Meeting Decisions?

The Petitioner's submissions

[164] The Petitioner submits that this claim was made with respect to hearing written decisions, and it was not intended to apply to all Strata Council decisions.

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Both the Respondent and the Petitioner understood the claim had a more restricted scope.

[165] In response to a November 3, 2020 written hearing decision, the Petitioner requested to know the Strata Council's reasons for reaching its decision. The Respondent indicated that Council had no obligation to provide him with their written explanation of their thinking. Having said that, however, the Respondent falsely stated its position in its dispute response. In the dispute response, it said Council held a hearing with the Petitioner on November 3, 2020, and provided the Petitioner with a written explanation of its reasons following that hearing: Rogers Affidavit, Tab B, page 34.

[166] In its written argument, the Respondent reversed that position without amending its prior position, and argued in support of not having to provide reasons.

[167] The Petitioner submits that in paras. 41 and 42 of the Decision, the Tribunal Member grossly condenses the relevant facts of the claim and makes a number of errors of fact. The Petitioner submits this is relevant to procedural fairness, as it is a further indication that the Petitioner was not heard.

[168] The Petitioner relied on *Doig v. The Owners, Strata Plan VR 1712*, 2017 BCCRT 36 at para. 64, which reads:

> Under the principles of procedural fairness established by the Supreme Court of Canada in *Hill v. Hamilton*, [2007] 3 SCR 129, a written decision must allow a party (in this case, the owners) or a reviewing tribunal or court to understand the meeting's outcome, and why the outcome was reached. The form and detail of adequate reasons can be different in different situations. Applied to this case, *Hill* says that reasons must meet the parties' functional "need to know" council's reasoning in reaching its decision about their hot tub.

[169] The Tribunal Member declined to agree with *Doig*, choosing to rely on s. 34.1(3) of the *SPA*, which only requires councils to provide a written decision and not written reasons.

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[170] The Petitioner submits that the Respondent should have to comply with the principles of procedural fairness, citing *Tretick v. The Owners, Strata Plan 2548*, 2020 BCCRT 39 at para. 32.

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[171] The Tribunal Member found that the Petitioner failed to prove that the Respondent had “acted unreasonably by not providing reasons”. The Petitioner relies on *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, which reads:

> ... A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes.

[172] The Petitioner submits that withholding reasons is inconsistent with the overall decision-making chain. He says the Tribunal Member would have strata councils operating opaquely, and without justification. The Petitioner submits it invites arbitrary or ill-considered or unconsidered decision-making, and fails to inform the owners.

The Respondent’s submissions

[173] The Respondent submits that the decision by the Tribunal Member found at paras. 41–46 of the Decision was reasonable based on the evidence and submissions before him, and the Petitioner has not shown a reviewable error.

[174] The Respondent submits the Tribunal Member correctly interpreted s. 34.1 of the *SPA*.

[175] The cases of *Chorney v. The Owners, Strata Plan VIS770*, 2016 BCSC 148 and *Tretick* relate to bylaw complaints under s. 135, which may, but not necessarily, include s. 34.1 hearings. The Respondent submits that it was reasonable for the Tribunal Member to conclude that the procedural fairness requirements of the bylaw investigation are not the same as when an owner requests a hearing about other issues. It says it was reasonable for the Tribunal Member to interpret s. 34.1 as requiring only a written decision, and not the reasons for the decision.

[176] The Respondent submits that *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 does not apply to the Strata Council, which is not sitting as a court providing sufficient reasons for appellate review. The Respondent submits that *Dunsmuir* does not apply to impose a standard of reasonableness on a strata council. The standard of care of a strata council member is found in s. 31 of the *SPA*, which is to exercise powers acting honestly and in good faith with a view to the best interests of the strata corporation. The Strata Council is not an administrative decision-maker, and there is no basis for the Court to require the Strata Council to provide reasons. The Respondent says the fact that reasons were requested does not change their duty.

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[177] The Respondent submits that *Chorney* is distinguishable because it deals with the procedure to investigate a complaint and provide procedural protection to a person accused of a breach. It says the complainant is not provided with the protection that the accused is, there is no right of investigation, and there is no right to a written decision. The Respondent submits that *Dunsmuir* does not apply.

Ruling

[178] The decision of the Tribunal Member is not patently unreasonable. Section 34.1 requires that a written decision be issued within one week after the hearing, but does not stipulate that reasons are required.

Claim #6 [C-076555] — Was Mr. Macdonald's Request to Amend General Meeting Minutes Improperly Handled?

The Petitioner's submissions

[179] The Petitioner submits that the Strata Council treated him significantly unfairly. On three occasions, following three general meetings, the Petitioner proposed changes to the minutes of those meetings. The Petitioner says the bylaws have always required that general meeting minutes be approved at the following general meeting. The Strata Council left off the approval of previous meeting minutes from the agenda for two consecutive general meetings. Therefore, at the

third subsequent general meeting, the minutes of all three general meetings needed to be presented for approval.

[180] The Petitioner submits that the day before the general meeting, Council emailed a ten-page package to owners, which contained the Petitioner's original three amendment requests interspersed with notes from the property manager; a legal opinion on the proposed amendments that had been written without the lawyer having been provided any of the evidence needed to support the opinion; and the Petitioner's full name and email address.

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[181] At the meeting, Council attempted to gain approval for the minutes of the previous general meeting without any reference to the amendment package or to the minutes of the other two general meetings.

[182] The Petitioner objected. The property manager advised that the Petitioner would have to defend each and every amendment and the Petitioner would need a seconder. If he had a seconder, a vote would be held as to whether the minutes were to be amended.

[183] The Petitioner says he had expected that the Strata Council would have considered the amendments and would have presented to the owners the minutes with any amendments they considered warranted.

[184] The amendments failed because no one would second the motion to amend the minutes.

[185] In his submissions to the CRT, the Petitioner clarified that he is not asking the Tribunal Member to rule on the requested amendments. His purpose is to show the overall handling of the amendments by Council was biased and significantly unfair pursuant to the *SPA*, s.164 standards.

[186] The Petitioner submits that when the Strata Council sought a legal opinion, it did not provide the lawyer with the evidence that was readily available, leaving her in a position of having to make hypothetical determinations.

[187] The Petitioner seeks a finding that the actions of the Strata Council were oppressive, but insists that this is not declaratory relief. He says there is no remedy other than the finding of wrongdoing. In the dispute notice, the Petitioner claims that the Strata Council misled owners on requested amendments to the minutes of a previous general meeting.

The Respondent's submissions

[188] The Respondent submits that the Tribunal Member's conclusion that the Petitioner was not requesting a remedy is a reasonable interpretation of the Petitioner's own submissions. The Petitioner did not seek a remedy from the CRT that the minutes must be amended or that the Respondent should compensate him for significantly unfair conduct. They submit that s. 164 of the *SPA* cannot be used, but the CRT could use s. 123(2) of the *CRTA*. According to the Respondent, that section, however, does not provide for declaratory relief, and therefore the declaration that the Petitioner sought was not within the CRT's jurisdiction.

[189] The Respondent submits that s. 123(2) of the *CRTA* allows the CRT to make an order directing a strata corporation or strata council to do something to remedy or prevent unfairness, but it does not provide declaratory relief. Had the Petitioner sought an order that the minutes be amended because the process for proposing amendments was significantly unfair, the CRT would have been able to consider the issue and make a ruling. Without seeking an order that the Respondent does something to remedy the unfairness, the CRT had no jurisdiction. Accordingly, the Respondent submits that the decision of the Tribunal Member was reasonable based on the evidence and submissions before him, and shows no reviewable error.

[190] The Respondent submits the CRT only has jurisdiction to remedy significantly unfair actions that are within the scope of the *CRTA*, ss. 121(1)(e) to (g). It says the Petitioner's allegation that the Respondent did not properly amend the minutes is not a strata's action against an owner or a decision related to an owner or an exercise of voting rights.

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Ruling

[191] I find that the Petitioner is seeking a declaration that the procedure followed by the Strata Council was biased and significantly unfair. He seeks no other remedy other than this declaration. The Tribunal Member was correct in dismissing the claim on the basis that he had no jurisdiction to grant declaratory relief. I see no reason to interfere with this decision.

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Claim #7 [C-076602] — Did the Respondent Fail to Properly Consider Mr. Macdonald's Complaints About Barbecue Smoke?

The Petitioner's submissions

[192] The Petitioner objects to the Respondent's intent to ban all smoking within the building, while simultaneously expanding by an order of magnitude the number of Strata units permitted to use barbecues on their balconies. In advance of the special general meeting, the Petitioner sent three letters of objection dated September 24, October 1 and October 13, 2020. He pointed out that it was logical to ban barbecues if smoking was to be banned, and he provided links to articles on barbecue smoke hazards. He asked Council to amend the proposed bylaw to include a barbecue ban. The Strata Council responded that they had no time to amend the bylaw with the Special General Meeting being two weeks away, but they remained very open to continuing this discussion.

[193] On October 1, 2020, the Petitioner reported that he had an allergic reaction to barbecue smoke at 10 PM, but was unable to locate the source of the smoke. He suggested that the Strata Council could create a rule banning barbecue use, and he provided links to blog discussions and to recent Supreme Court cases.

[194] On October 13, 2020, he provided additional information on barbecue use risks and requirements from BC Housing, Fortis BC, Technical Safety BC and the BC Electrical Code.

[195] The Stata Council did hold a meeting on November 3, 2020, during which they considered the Petitioner's arguments. The Strata Council decided against a

ban on barbecues. This decision was reported in writing to the Petitioner without reasons, as was discussed under Claim #5.

[196] In his argument to the CRT, the Petitioner reiterated his health and safety concerns regarding barbecue use in a condominium. Four months later, the Strata Council responded, focusing on the one incident where he smelled barbecue smoke at 10 PM, and advising him that he should have contacted either the strata manager or a member of the Strata Council.

[197] The Petitioner objects to the Tribunal Member inferring that the entire issue was about the October 1, 2020 incident, when the Petitioner reported an allergic reaction to barbecue smoke. The Petitioner says the Tribunal Member misinterpreted the issue, which was the Petitioner's efforts to convince the Strata Council to add barbecue smoke to the smoking ban that the Strata Council was considering. He was not attempting to enforce a nuisance bylaw over the one incident where he could not identify the location of the barbecue smoke.

[198] The Petitioner was seeking a resolution to ban barbecue smoke in general for its toxicity, and fire and explosion risks associated with propane-fueled barbecues used on small condominium balconies. He was advocating for a ban on barbecue use.

[199] The Petitioner says he was not seeking accommodation for a disability, and therefore it was unnecessary for him to provide any medical evidence to support a claim for a need for accommodation. Since he is not advancing a nuisance claim, it was also not necessary for him to provide evidence of the origin of barbecue smoke.

[200] The Petitioner submits that the Tribunal Member considered irrelevant considerations, while ignoring all the relevant considerations outlined in the three letters.

[201] The Petitioner submits he was attempting to engage the Strata Council with realistic concerns about its radically inconsistent policies on two equally harmful

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sources of smoking emissions, and the health and safety concerns raised by the insurance industry.

The Respondent's submissions

[202] The Respondent submits that paras. 52–58 of the Decision are reasonable based on the evidence and submissions before the Tribunal Member. It says the Petitioner has not shown a reviewable error. It is not clear from the dispute notice, written argument, tribunal decision plan or written submissions of the Petitioner exactly what remedy was sought in this claim. It appeared the Petitioner was seeking an order that the CRT order that the Strata Council either ban barbecues completely, or implement his proposed system for investigating smoke complaints. Interspersed through his lengthy submissions were references to specific smoke complaints and allergies.

[203] The Respondent submits that the process for amending bylaws under the democratic system created by the *SPA* is that owners decide on the bylaws pursuant to Part 7, and the council enforces the bylaws. The Petitioner's arguments appear to be based on amending bylaws, which the Strata Council cannot do on its own. The other arguments relate to treating complaints fairly, which the Tribunal Member correctly identifies relate to s. 135 bylaw contravention.

Ruling

[204] The Tribunal Member mischaracterized the claim by focusing on the one incident of barbecue smoke entering the Petitioner's strata lot, affecting his health. He infers that the Petitioner is arguing that barbecue smoke emissions violate an existing bylaw.

[205] I agree with the submissions of the Petitioner that the complaint is that the Strata Council did not consider the Petitioner's request that they add a barbecue ban to the smoking ban they were already in the process of presenting to the owners.

[206] The evidence of smoke entering the Petitioner's suite at 10 PM on October 1, 2020, was an example to support the rationale for a barbecue ban. This was not

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intended to be a nuisance claim. The Petitioner did not have a reasonable expectation that the Strata Council could enforce a nuisance claim. What he was asking for is that the Strata Council consider adding a barbecue ban to their smoking ban.

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[207] I find that the Strata Council did consider the Petitioner's request and they rejected it at this time. There is nothing that prevents the Petitioner from raising this request in the future, but he will have to accept the results. The Petitioner realizes that he does not have the ability to force a barbecue ban on the Strata Council or the owners. He provided a list of articles in support of banning barbecues and asked that they be taken into consideration. I conclude that they were, and through the democratic process, the Strata Council rejected the suggestion that the barbecue ban be included.

[208] Although I agree that the Tribunal Member mischaracterized the issue, the results are the same. There is no remedy. The Strata Council considered the Petitioner's submissions and did not accept them. I will not interfere with the result. This claim was properly dismissed.

Costs

[209] The Respondent seeks special costs against the Petitioner, alleging that his conduct has been reprehensible in advancing frivolous claims, which should be sanctioned. It criticizes the Petitioner for not reassessing the strength of this case once the standard of review was altered from correctness to patent unreasonableness. It submits that special costs may be ordered against a party who fails to narrow the issues by abandoning claims that are not supported by the evidence. It submits that not only is there an absence of merit, but that the Petitioner brings these claims with an improper motive. It says the Petitioner makes general allegations of misconduct and bad behaviour; wishes to establish wrongdoing on behalf of the Strata Council; and seeks validation that the Council is morally wrong.

[210] The Respondent submits that the Strata Council members are volunteers who make their best efforts to run the Strata Council business properly.

[211] The Petitioner submits that he is constantly being bullied by counsel for the Respondent; they are always threatening costs against him. He is advancing claims that he thinks should be upheld, even with the change in the standard of review.

[212] I do not find the Petitioner's conduct to be reprehensible, although I do find his insistence that the Strata Council is dishonest or morally wrong to be without merit. These are serious allegations that he has made against volunteer Strata Council members. I have found in his favour with respect to Claim #4, where I thought the Strata Council's conduct was oppressive. I agreed with the submissions with respect to Claim #7 although this does not change the result.

[213] I conclude that success has been divided. The Respondent has been substantially successful and is entitled to its party and party costs at Scale B.

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"B. M. Young, J."

The Honourable Madam Justice Young