



# Civil Resolution Tribunal

Date Issued: September 11, 2018

File: #ST-2018-001865

Type: Strata

Civil Resolution Tribunal

Indexed as: *Generalov v. The Owners, Strata Plan BCS 2498*, 2018 BCCRT 516

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

Yury Generalov

**APPLICANT**

**A N D :**

The Owners, Strata Plan BCS 2498

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

Vivienne Stewart

## **INTRODUCTION**

1. The applicant, Yury Generalov (owner), owns strata lot 4, which is a townhouse in the respondent strata corporation, known as The Owners, Strata Plan BCS 2498 (strata), in Burnaby. The strata was created in August 2007. It is made up of three clusters of townhouse type strata lots and one 29 storey tower of apartment type strata lots. There are 12 townhouses and 202 apartments.

2. The main dispute is about the strata's allocation of operating expenses and revenues in its budget between the townhouse and apartment types. The owner says that the strata council, which is made up entirely of apartment owners, treats the townhouse owners unfairly in the way it allocates these expenses and revenues.
3. The applicant is self-represented. The respondent is represented by a member of strata council.

## **JURISDICTION AND PROCEDURE**

4. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims brought under section 3.6 of the *Civil Resolution Tribunal Act (Act)*. The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
5. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
6. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
7. Under section 48.1 of the Act and the tribunal rules, in resolving this dispute the tribunal may make order a party to do or stop doing something, order a party to pay money, order any other terms or conditions the tribunal considers appropriate.

## ISSUES

8. I summarize the issues in this dispute as follows:
  - a. Did the strata treat the townhouse owners unfairly in the strata budget by:
    - i. Improperly allocating a portion of landscaping expenses to the townhouse owners? If so, what is the appropriate remedy?; and
    - ii. Improperly allocating move-in/move-out revenue to the apartment owners rather than to strata revenue in the budget? If so, what is the appropriate remedy?
  - b. Did the strata treat the surplus improperly and was the strata acting unfairly when it refunded a portion of the apartment owners' strata fees in 2017? If so, what is the appropriate remedy?
  - c. Does the strata act significantly unfairly toward the townhouse owners when it makes decisions? If so, what is the appropriate remedy?
  - d. Are townhouse garage doors and townhouse fencing common property and/or common assets which the strata must pay to maintain and replace as common expenses?

## BACKGROUND AND EVIDENCE

9. I have only commented upon the evidence and arguments as necessary to give context to my reasons.
10. The strata was created with 2 types of strata lots. The strata's bylaws refer to apartment strata lots and townhouse strata lots. The strata does not have separate sections within the meaning of the *Strata Property Act* (SPA).
11. The creation of different types of strata lots permits operating expenses to be allocated to the designated strata lot type. Unlike separate sections (which have their own councils and budgets), a strata with different types has only one

operating fund, one contingency reserve fund (CRF), one budget, and one strata council.

12. There is nothing in the SPA or the *Strata Property Regulation* (regulation) that permits a strata with different types of strata lots to create different budgets for them. The strata has created what it calls a “joint use” budget as well as separate budgets for the apartment and townhouse strata lots. Having types of strata lots only permits the strata to allocate certain operating expenses to one type or the other. I find that the strata’s current budget-creation process is flawed and does not comply with the SPA.
13. The relevant parts of the strata’s current bylaws, which were approved and filed in 2017, are:
  - a. **Bylaw 3(1)**: An owner must repair and maintain the owner’s strata lot, except where the strata has the responsibility to do so under the bylaws.
  - b. **Bylaw 3(2)**: An owner who has use of limited common property (LCP) must repair and maintain it except where the strata has the responsibility to do so under the bylaws.
  - c. **Bylaw 3(3)**: An owner who has the use of a yard designated as LCP for the exclusive use of their strata lot is responsible for all regular maintenance of the yard.
  - d. **Bylaw 8**: the strata must repair and maintain common property not designated as LCP, and LCP, but only to the extent the repair and maintenance ordinarily occurs less often than once per year, except fences and railings that enclose patios, balconies, terraces and yards. The strata must also repair and maintain that part of a strata lot that includes doors that front on the common property.
  - e. **Bylaw 30**: the owners in the two separate types of strata lots contribute as separate types to the operating fund when expenses relate to and benefit only their type of strata lot. Their contribution is calculated in accordance with

the formula in regulation 6.4(2). This formula is based on their unit entitlement in relation to the total unit entitlement of the strata lot type.

- f. **Bylaw 40:** a resident moving into an apartment strata lot must pay a non-refundable move-in fee of \$150 to the strata. Although the bylaw sets out other requirements and restrictions on moves in and out of both types of strata lots, only the apartment owners have to use the elevator and pay the fee. The townhouse lots do not have to pay the fee.
14. Although the strata was created in August 2007, the parties provided certain budgets and financial statements from December 1, 2012 to November 30, 2018 only. That is therefore the time period within which I have considered and decided the issues. Where I have ordered corrections, I include only the budgets that were in effect during the two years preceding March 13, 2018 (the relevant limitation period) when the owner submitted his application to the tribunal. These budgets are for the years 2015/2016, 2016/2017 and 2017/2018.
15. From 2012 to 2018, the strata prepared a “joint use” budget. Common expenses paid by the strata have routinely been recorded on the joint use budget. The strata prepared either statements of income and expenses, or budgets, or both, for the apartments for the same period. From the evidence it appears that, in this 7 year period (2012-2018), the townhouse owners only had separate budgets or statements for 2014/2015 and 2015/2016 and then 2017/2018.
16. As noted above, with separate budgets, the strata is not in compliance with the SPA. The strata should retain professional advice on the proper form of a strata budget that includes different types of strata lots.
17. Section 1 of the SPA defines common expenses as those related to the strata’s common property and common assets or that are required to meet any other purpose or obligation of the strata.

18. Section 91 of the SPA states the strata is responsible for the strata's common expenses. Section 92 defines "operating fund" and the contingency reserve fund (CRF) as follows:
  - a. Operating fund: common expenses that usually occur either once a year or more often, or are necessary to obtain a section 94 depreciation report;
  - b. CRF: common expenses that usually occur less often than once a year or that do not usually occur.
19. The owner says that the main dispute is about the way operating expenses are allocated by strata lot type. Section 99(2) of the SPA requires all owners to contribute to operating fund expenses on the basis of unit entitlement. Under regulation 6.4, a strata cannot use a different formula unless the expense related to and benefited only LCP or only one type of strata lot.
20. Annual landscaping expenses have been relatively consistent over the years at about \$40,000. Moving fee revenue has varied considerably from year to year but the strata budgets show that a total of \$21,550 has been collected. The elevator maintenance expenses generally fall within the range of \$20,000 to \$25,000 per year.

### ***Landscaping expenses***

21. In October 2017, the strata notified the townhouse owners that a portion of the landscaping expenses would be moved from common expenses to townhouse only expenses in the 2017/2018 budget. The strata said that the townhouse yards are LCP for the exclusive use of the townhouse owners. Therefore the townhouse owners are responsible for the regular maintenance of these yards.
22. The strata plan shows that both the front and back yards next to each strata lot are LCP for that particular strata lot. These designations mean that these yards are for the exclusive use of the particular townhouse owner.

23. The owner argues that the only operating expense that relates to and benefits only one type of strata lot is elevator maintenance. This expense benefits only the apartment owners. The evidence shows that only the apartment owners now pay for this expense. The owner says that all other expenses benefit all of the strata lots and cannot be allocated by type.
24. The owner disagrees that the landscaper's estimate can be used to create separate expenses out of what he says is still a common expense. He refers to other regular occurring expenses that benefit only the apartment owners but he does not ask for a different allocation of these expenses. The owner wants the apartments and townhouses to be treated equally in the allocation of expenses.
25. All landscaping expenses were on the "joint use" budgets from 2012 to 2016. They were therefore treated as common expenses. The first separate charge for landscaping to the townhouse owners appeared in the 2017/2018 budget.
26. At the strata's request, the landscaper gave the strata a breakdown of the time spent on townhouse yards in relation to other areas. The strata then allocated portions of the expenses to reflect landscaper's estimate. Based on my review of the 2017/2018 budget approved at the 2017 AGM, the strata is responsible for \$35,000 and townhouse owners for \$4,500 of the budgeted landscaping costs. There is no separate allocation to the apartment owners.
27. The owner says that the result of the strata's allocation is to dramatically increase townhouse monthly fees while reducing the apartment fees. I find that, at \$4,500 shared amongst the 12 townhouse owners, the average increase to each townhouse owner is \$375 per year. The total budget for landscaping charges amounts to \$39,500. At 10.3% (the townhouse owners' unit entitlement share), the townhouse owners would contribute to \$4,068.50 of the landscaping charges if the total landscaping charges were allocated to all strata lots.
28. The strata relies on strata bylaw 3(3) to make the townhouse owners responsible for regular maintenance of their LCP yards. The strata says that it has its

landscaper maintain the townhouse yards to have a consistent and uniform appearance throughout the complex.

### ***Move-in move-out revenue***

29. The move-in move-out revenue is paid by a resident moving into an apartment strata lot. No move-in move-out fee is charged to townhouse strata lots. The strata says it allocates this revenue to the apartment owners in the budget because they alone pay for the elevator expenses.
30. Moving fee revenue appeared in the 'joint use' budget at least as of 2012. This revenue was moved to the separate apartment budgets as of 2013. The elevator expense was allocated to the apartment owners in all budgets.
31. The strata says the move-in move-out fee is charged to cover the inconvenience and possible damage to the elevators during a move. The strata says that since the elevator expenses are allocated solely to the apartment owners, it is only fair that the apartment owners receive the revenue. It says that since the townhouse owners contribute nothing to the elevator expenses, they should not share in the revenue as part of joint revenue.
32. The owner says this is common revenue for the benefit of all owners.

### ***Treatment of surplus***

33. The 2017-2018 budget shows that the strata carried forward an operating surplus of \$53,444. There was a refund of \$28,443 to the apartment owners from the prior year's operating surplus. Their separate strata fees for 2017-2018 were budgeted at \$19,632. The overall operating fund budget was \$590,374. The budget shows no surplus or deficit for the townhouse owners for this period.
34. The owner says that the strata improperly created an artificial surplus for the apartments and used that surplus to refund a portion of their strata fees to the apartment owners. It appears that the surplus was created by crediting the move-in move-out revenue separately to the apartment owners instead of to the strata



budget over several years. The owner says that, when the townhouses had a surplus in previous years, that surplus was transferred to the CRF, not refunded to the townhouse owners.

35. The strata says that section 105(1)(c) SPA allows it to use a surplus to reduce the total contribution to the next year's operating fund. It says that the surplus was created because actual expenses were less than the budgeted amount.
36. The strata says that the only reason for the townhouse budget surplus was that a townhouse budget was created but no costs were applied to it.

### ***Decision-making by the strata***

37. There are 202 apartment owners and 12 townhouse owners. There is no strata bylaw requiring representation on strata council by both types. Council members currently are only from the apartment side.
38. The strata gives examples showing decisions made by council that benefited the townhouse owners including charging all elevator costs to the apartment owners, agreeing to replace the townhouse fence using the surplus in the strata (joint use) account, and changing the rules to allow townhouse owners to store bicycles in their garages.
39. The strata says it is required by the SPA to allocate expenses and calculate strata fees on the basis of unit entitlement. It says it cannot change the unit entitlement basis of allocating expenses or calculating strata fees. It says this is not inequitable or unfair.
40. The owner says the strata is abusing its power and refers to the strata's statement that "some owners continue to abuse the privilege strata has given to the owners." I have no evidence to put this statement into context but it does suggest that the strata, as represented by strata council, may misunderstand its role in administering and managing the strata as a whole. The strata council members should remember that they have a duty to act in the interests of all owners, not just some of them. I recognize that members of strata council are volunteers and may

not be lawyers but strata corporations and councils do have access to legal advice and this strata has a property management company to assist.

### ***Townhouse garage doors and fencing***

41. In August 2017, the owner's garage door malfunctioned. He asked the strata to repair it but the strata refused. The owner had to repair it himself. The townhouse garage doors front on the common property.
42. The owner says that the garage doors are part of the common property. He says that strata bylaw 8 supports his position since the garage door fronts on the common property. He also says that the duty to repair and maintain includes the whole door including the attached mechanism that opens and closes it.
43. The strata argues that the townhouse garage doors are LCP and since the townhouse owners have exclusive use of these garage doors, they are responsible for the repair and maintenance under regulation 6.4. The strata adds that it is not the actual door that is the issue but the attached mechanism.
44. The strata plan does not indicate the location of the garages but I infer they are part of the individual townhouse type strata lots. It appears that the townhouse garages are accessed via the common property located between the apartment tower and the townhouse clusters.
45. The parties do not dispute that the fencing at the townhouses needs to be replaced. The strata did not get the  $\frac{3}{4}$  vote it needed to pay for this cost from the CRF. However, the strata has now agreed to replace the fences using surplus funds in the 'joint use' operating account. There is an estimate from a contractor of \$47,829 plus GST to do this work. I find that there is nothing in the 2017/2018 budget to allow for this expense. Strata bylaw 21(2) contains spending restrictions. Unless an expense is included in the budget, the strata may only replace common property, without a  $\frac{3}{4}$  vote, if that replacement is required immediately to ensure safety or to prevent significant loss or damage. I have no evidence that would support a finding of "immediate need".

46. The owner says this cost must come from the CRF and not the operating fund.
47. The owner requests that I order the strata:
- a. To allocate all landscaping expenses and moving fee revenue to the joint use budget in the strata's next budget;
  - b. To maintain and repair the entire townhouse garage door assemblies and allocate these expenses to the joint use budget;
  - c. To replace townhouse fences using funds from the CRF;
  - d. To treat the apartment and townhouse owners equally and fairly in the strata's decision-making process given the majority voting position of the apartment owners;
  - e. To reverse the 2017 refund of apartment strata fees in the amount of \$28,443, include that amount as owing by the apartment owners in the 2018/2019 budget and, once collected, to transfer that amount to the CRF;
  - f. To treat surpluses of the apartment and townhouse owners in the same way and to transfer both to the CRF when they occur; and
  - g. To reimburse the owner his tribunal fees of \$225.00.
48. The strata responds to each of the owner's arguments but, other than disagreeing with the owner's position, the strata makes no specific request of the tribunal. However, I find that the strata's response amounts to a request that I dismiss the owner's claims.
49. In a civil claim such as this, the applicant bears the burden of proof.

## ANALYSIS

### ***Does the strata treat the townhouse owners unfairly in the strata budget by:***

- a. Improperly allocating landscaping expenses to the townhouse owners? If so, what is the appropriate remedy?; and
  - b. Improperly allocating move-in move-out revenue to the apartment owners? If so, what is the appropriate remedy?
50. The strata bylaws identify the two types of strata lots in the complex. Bylaw 30 states that a contribution to the operating fund that *relates to and benefits only one type of strata lot* will be shared only by the owners of that type of strata lot. It specifically refers to regulation 6.4(2).
51. Regulation 6.4(2) sets out the formula for the cost sharing amongst the owners of a type of strata lot. It is based on unit entitlement. In this case, the apartment owners share the elevator maintenance expenses on the basis of unit entitlement within the total apartment unit entitlement. With the 2017/2018 budget, the townhouse owners share a portion of the landscaping expenses allocated to them by the strata on the basis of a time breakdown provided by the landscaper.
52. Section 99 SPA creates a general rule that owners must contribute their share of fees to the operating expenses in proportion to their strata lot's unit entitlement. This formula can be changed by a unanimous vote of the owners under section 100 SPA. There is no evidence in this case that the strata changed the usual unit entitlement formula so section 100 does not apply here.
53. It is not uncommon that there are disagreements about the meaning of "relates to and benefits only one type of strata lot". In *Ernst & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259*, 2004 BCCA 597, at paragraph 18, the court said this means an item of operating expense that relates to or benefits one type of strata lot "exclusively."

54. There may be exceptions to the unit entitlement formula for allocating operational expenses but this is not common. These exceptions may depend on the history of cost allocations in a particular strata. (See *The Owners Strata Plan VR2654 v. Mason*, 2004 BCSC 685)
55. I find that this strata's history does not support an exception being made to the unit entitlement formula for allocating operational expenses. Therefore, if the landscaping expenses are common expenses, they must be shared by all owners on a unit entitlement basis.
56. Under section 164 of the SPA, an owner can dispute a decision by the strata on grounds that the decision is "significantly unfair" to the owner. Section 48.1 of the Act mirrors the language in sections 164 and 165 of the SPA, giving the tribunal the authority to consider significant unfairness claims and make a range of orders. (See also *The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 164, at paragraph 119 where the court confirms this authority).
57. "Significant unfairness" is "unjust and inequitable conduct" and conduct that is "oppressive, unfairly prejudicial, wrongful, burdensome, harsh or done in bad faith." (*Reid v. The Owners, Strata Plan LMS 2503*, 2003 BCCA 126 at paras. 27-29)
58. Strata bylaw 3(3) makes an owner, who has exclusive use of a yard designated as LCP, responsible for all regular maintenance of the yard. I find that 'regular maintenance' is repair and maintenance ordinarily required more often than once per year. This includes lawn care, gardening and pruning and care of shrubs and trees. Although neither party provided evidence about what work the landscaper actually does, these are the kind of services normally included in a landscaping or gardening contract.
59. The strata says that having one landscaper allows it to maintain a consistent and uniform appearance of the grounds throughout the complex. There is logic to the strata's argument. If one or more townhouse owners were to maintain their yards at a lesser level than the others, it could certainly affect the overall appearance of

the strata complex and, possibly, property values. Further, this is how the strata has historically, up until this year, arranged for the landscaping work.

60. However, is it significantly unfair to the owner to allocate the townhouse share of yard maintenance to the townhouse owners when no allocation was made in the previous 6 years and when the strata controls the overall landscaping process?
61. The test used to answer this question has two parts: 1. does the evidence objectively support the owner's reasonable expectation that the landscaping expenses would always be common expenses, and 2. if so, was the owner's reasonable expectation violated by an action that was significantly unfair? (See *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44 at paragraph 30)
62. I find that the strata charged landscaping expenses as common expenses for at least 6 years before deciding to charge a portion of them separately to the townhouse owners. Bylaw 3(3), which specifically makes owners with use of yards designated as LCP responsible for regular maintenance, did not come into effect until March 7, 2017. The original bylaws, filed in August 2007, adopted the SPA Standard Bylaws and a new bylaw creating the separate types. Standard Bylaw 2(2) says that an owner who has the use of LCP must repair and maintain it except for repair and maintenance that is the responsibility of the strata. Standard Bylaw 8 refers to repair and maintenance by the strata that occurs less often than once a year. This is similar to strata bylaw 8. Therefore, no bylaw has changed the townhouse owners' responsibility for their LCP yards over the years. I find however that the strata's actions in hiring a landscaper to do all of the maintenance on the strata grounds and charging the cost as a common expenses has changed the townhouse owners' responsibility for their LCP. The evidence supports my finding on the first point that the owner had a reasonable expectation that landscaping expenses were and would remain common expenses rather than his individual responsibility.
63. On the second point, is it significantly unfair for the strata to change the traditional approach by charging townhouse owners for their separate landscaping costs

without giving them the opportunity to do their own maintenance or hire someone to do it at less cost? This action has removed the townhouse owners' responsibility for maintaining their own yards (without an amendment being made to the bylaws) but has, at the same time, imposed a choice and a cost on them that is not within their control. No bylaw permits the strata to take over this responsibility from the townhouse owners. For these reasons, I find that the strata's action is wrongful, unjust and inequitable and meets the definition of significant unfairness. What, then, should the appropriate remedy be?

64. The owner asks to have these landscaping expenses included as common expenses in next year's 'joint use' budget as in the pre-2017/2018 budgets. To be in compliance with the bylaws, however, I find that, for maintenance occurring more than once a year, the townhouse owners are to maintain their own yards. This is at their own cost. Arranging and paying for their own yard maintenance, should result in a reduction in the overall strata landscaping costs. The townhouse owners may decide to use the services of the strata's landscaper and pay for those services directly to the landscaper. They will still continue to contribute to the remaining reduced strata landscaping costs as part of the common expenses.
65. I order the strata to stop allocating the portion of the landscaping expenses relating to the LCP yards separately to the townhouse owners in compliance with the bylaws and to ensure that the 2018/2019 budget and corresponding strata fees reflect this change.
66. The move-in move-out revenue presents a different problem. The provisions of the SPA, regulations and strata bylaws deal specifically with allocation of certain common expenses. There is nothing in the legislation that deals with allocating revenue earned. The elevator maintenance costs have been paid only by the apartment owners since at least 2013. There is law to support for this. However, without support in the law for the strata to attribute revenue by type, all revenue must be recorded as strata (common) revenue. I return to this point below on the issue of allocation of the surplus.

67. I order the strata to calculate the move-in move-out revenue as income to the strata and to revise the 2017/2018 budget, as well as the previous two years' budgets, and to reflect this change in the associated financial statements for the past 3 years. The strata must comply with the SPA in future, particularly when it comes to handling operating fund and CRF expenditures and, as described below, surpluses.

***Did the strata treat the surplus improperly and was it acting unfairly when it refunded a portion of the apartment owners' strata fees in 2017?***

68. The amount of \$28,443 was refunded to the apartment owners as part of the current budget.

69. Should the strata collect this amount from the apartment owners and transfer it to the CRF? The owner says it should because when there was a surplus in the townhouse budget in prior years, the strata transferred those funds into the CRF.

70. Section 105(1) of the SPA deals with surpluses. It states that surpluses can occur when contributions to the operating fund are not needed to meet operating expenses accrued during the fiscal year to which the budget relates. The strata must transfer surplus funds to the CRF (105(1)(a)), or carry them forward as part of the operating fund as a surplus (105(1)(b)), or use them to reduce strata fees (105(1)(c)). The strata can also obtain a  $\frac{3}{4}$  vote of the owners to approve some other use of a surplus (105(1)).

71. Regulation 6.4 allows for allocation of certain common expenses by strata lot type. However, it does not deal with allocation of an operating fund surplus. The strata bylaws do not speak to this issue either.

72. The SPA does not give the strata the discretion to allocate surplus funds under section 105 by type. It is not a question of unfairness. I find that allocation of surplus funds by types is an additional allocation that the SPA would expressly mention if it were permitted, as it does for separate sections. Without the power to allocate surpluses by type, the strata was required, when it chose to use the



surplus to reduce strata fees, to reduce the strata fees of all owners, not just those of the apartment owners. Although not binding on me, I adopt the comments in *Paterson v. The Owners, Strata Plan VIS 6371*, 2018 BCCRT 94 at paras. 31-33 relating to the allocation of prior years' operating surplus.

73. I find that the strata was wrong to allocate the surplus funds to the apartment owners. I order the strata to include this revision in the budget and financial statement revisions already ordered. If the owners want to vote for a different SPA-compliant method of allocating the surpluses, the strata can pursue the required resolution at a general meeting. Without a  $\frac{3}{4}$  vote, the strata has only the 3 options set out in paragraph 71 above. No matter what the decision, the strata must correct the error made.
74. The owner asked only that the 2017/2018 budget refund be reversed. More is required however to correct this error and return the refunded amount to the strata operating fund. I order the strata to:
  - a. Recalculate strata fees by adding the refunded amount to the operating fund strata fees of the apartment type strata lots for budget year 2018/2019,
  - b. Reconcile the amount due from the apartment strata lots to replenish the surplus in the operating fund, and
  - c. Correspond with all apartment strata lot owners advising them of the individual amount of strata fees that are outstanding after the reconciliation and demanding payment of that amount.
75. The strata may retain a professional accountant familiar with the SPA requirements to assist it in preparing the revised budgets and reconciling the financial statements as ordered.
76. I recognize that there may be cases where an apartment is sold, creating the possibility of significant unfairness against the new owner, since it was the previous owner who received the benefit of the refund. Individual owners in this situation are free to bring an application for relief against any alleged significant

unfair action of this kind, if the previous owner will not or cannot adjust for this adjustment.

***Does the strata act significantly unfairly toward the townhouse owners when it makes decisions? If so, what is the appropriate remedy?***

77. This issue highlights the fact that the apartment owners control 202 votes and the townhouse owners only 12. The owner argues that council, consisting solely of apartment owners, consistently abuse their majority position in making financial decisions. The other issues in this dispute involve specific examples of this argument.
78. The owner asks the tribunal to order the strata to treat the apartment and townhouse owners equally in their budgeting decisions.
79. Based on the evidence before me, I find that the strata is conscious of its obligations under the SPA, regulation and bylaws. It may not have sought the appropriate advice on the issues where I have found the strata to have acted improperly or may have received poor advice. I do not have enough evidence to make a finding of significantly unfair treatment in the strata's decision-making.
80. I am satisfied however that in carrying out the orders in this decision, the strata will become even more aware of its obligations and duties particularly with regard to allocations and budgeting as well as its legal obligations under the SPA and strata bylaws. I make no order to require the strata to treat both types 'equally' in their decision-making. However, if the strata fails to comply with the SPA, regulation or bylaws, or fails to act fairly, the strata can expect to respond to more complaints to this tribunal. A strata concerned about proper management and use of the owners' money will no doubt keep this in mind.

***Are townhouse garage doors and townhouse fencing common property and/or common assets which the strata must pay to maintain and replace as common expenses?***

81. The strata no longer disputes that townhouse fencing is common property for which it is responsible. The strata has agreed to replace the fencing but plans to use surplus funds from the 'joint use' budget to pay for this work. This is an expense that should be paid from the CRF since it occurs less often than once a year. I accept that the apartment owners at the AGM voted against drawing funds from the CRF to replace the townhouse fences. However, even if the vote failed to pass, the strata must still comply with the SPA in dealing with a less-than-yearly expenditure. I find that it is not appropriate for the strata to charge this as an operating expense without following the required procedure. The provisions of the SPA defining the CRF and the operating fund and how expenditures are to be made are clear.
82. I also find, however, that the strata is unlikely to get the necessary vote to pay for the fence replacement from the CRF. These fences are common property and the strata is obliged to replace them when necessary. I accept the owner's evidence that they are rotting and have been neglected. I find that it is significantly unfair for the apartment owners to use their significant majority to prevent the strata from doing what it is required by law to do. I therefore order that the strata may use funds from the CRF to replace the townhouses fences without passing a  $\frac{3}{4}$  vote.
83. I find that the townhouse garages front onto the common property. The strata argues that the townhouse garage doors are LCP and used exclusively by the townhouse owners so they must pay. I do not agree. The garage doors form part of the townhouse building envelope along with the cladding and windows.
84. In fact, the strata plan shows what parts of the townhouse buildings are LCP. The LCP does not include garage doors. There is no evidence that the strata has created additional LCP areas as permitted under section 74 of the SPA. LCP for townhouse type strata lots includes yards, patios and terraces. Townhouse garages are not shown separately from the strata lots. I find that they are therefore part of the strata lot and share the same exterior. Strata bylaw 8 makes the strata responsible for the repair and maintenance of common property that is not designated as LCP, which I find the townhouse garage doors and related operating

mechanism to be. Even if this were LCP, the bylaw makes it clear that doors on the exterior of the building or that front on the common property are the responsibility of the strata, not the strata lot owner. I order the strata to maintain and repair the townhouse garage doors, including their operating mechanisms, as necessary, on an ongoing basis.

85. For additional clarity, I exclude from this order any garage door fobs or transmitters since they are not part of the door or its attached mechanism. The fobs and transmitters will remain the responsibility of the individual townhouse strata lot owners.
86. Under section 49 of the Act, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. The owner has been substantially successful in his claims. I therefore order the strata to reimburse him for tribunal fees of \$225. He has not claimed dispute-related expenses.

## **DECISION AND ORDERS**

87. I order that:
  - a. The strata must stop creating separate budgets for the apartment and townhouse strata lot owners,
  - b. With the next strata budget for 2018/2019, the strata must not allocate any portion of the landscaping expenses for the townhouse strata lot LCP yard areas separately to the townhouse strata lot owners and must comply with the strata bylaws,
  - c. The strata must stop allocating the move-in move-out revenue separately to the apartment strata lot owners and must record this revenue as income to the strata,
  - d. Within 30 days of the date of this decision, the strata must recalculate strata fees for 2017/2018 by adding back the refunded amount to the operating fund strata fees of the apartment type strata lots. It must reconcile the

amounts due from the apartment strata lot owners to replenish the surplus, and add those amounts to the strata fees of the apartment strata lot owners for 2018/2019,

- e. Within 15 days of completion of the reconciliation and recalculation of the apartment strata lot owners' strata fees, the strata must send a written notice to each apartment strata lot owner demanding payment of the outstanding amount of their strata fees,
  - f. Within 30 days of the date of this decision, the strata must revise the 2017/2018 budget, as well as the previous two years' budgets, and reconcile the strata's financial statements for the past 3 years to reflect the corrections relating to the move-in move-out revenue and treatment of the surplus,
  - g. The strata must comply with section 105 of the SPA,
  - h. The strata must maintain and repair the townhouse garage doors, including the attached mechanism which opens and closes the doors, excluding the garage door fobs and transmitters, which will remain the responsibility of the townhouse owners,
  - i. The strata may replace the townhouse fencing as common property using funds from the CRF without passing a  $\frac{3}{4}$  vote and may not use operating funds, and
  - j. Within 30 days of the date of this decision, the strata must reimburse the owner \$225.00 for tribunal fees.
88. The owner's remaining claim is dismissed.
89. Under section 189.4 of the SPA, an owner who brings a tribunal claim against a strata corporation is not required to contribute to any monetary order issued against the strata corporation or to any expenses the strata corporation incurs in defending the claim. I order the respondent to ensure that no part of the strata's expenses with respect to defending this dispute is allocated to the owner.

90. Under section 57 of the Act, a party can enforce this final tribunal decision by filing, in the Supreme Court of British Columbia, a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 56.5(3) of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the Supreme Court of British Columbia.
91. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia. However, the principal amount or the value of the personal property must be within the Provincial Court of British Columbia's monetary limit for claims under the *Small Claims Act* (currently \$35,000). Under section 58 of the Act, the Applicant can enforce this final decision by filing in the Provincial Court of British Columbia a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 56.5(3) of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

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Vivienne Stewart, Tribunal Member