



# Civil Resolution Tribunal

Date Issued: August 28, 2019

Date Amended: November 28, 2019<sup>1</sup>

File: ST-2019-002752

Type: Strata

Civil Resolution Tribunal

Indexed as: *McKenna et al v. The Owners, Strata Plan KAS 495*, 2019 BCCRT 1024

B E T W E E N :

GERARD MCKENNA and DOLORES MCKENNA

**APPLICANT**

A N D :

The Owners, Strata Plan K 495

**RESPONDENT**

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**AMENDED<sup>1</sup> REASONS FOR DECISION**

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Tribunal Member:

J. Garth Cambrey, Vice Chair

## INTRODUCTION

1. The applicants, GERARD MCKENNA and DOLORES MCKENNA, jointly own a strata lot in the respondent bare land strata corporation, The Owners, Strata Plan K 495 (strata).
2. The applicants claim the strata has permitted the owner of strata lot 19 (SL19) to alter common property (CP) by installing shrubs and “rock borders” on CP, and also that the strata has failed to properly repair and maintain the CP. They also say the alleged alterations have created unsafe conditions because they impede the vision of a pedestrian or vehicle driver when negotiating the corner of the road at SL19. The applicants say the strata’s actions are contrary the *Strata Property Act* (SPA), its bylaws and municipal bylaws.
3. The applicants ask for an order that the strata remove the vegetation and landscaping from the CP next to SL19.
4. The strata denies the applicants’ claims and requests that I dismiss them.
5. The applicants are represented by Gerard McKenna. The strata is represented by a strata council member.
6. For the reasons that follow, I dismiss the applicants’ claims and order the applicants to pay the strata \$782.25 for dispute-related expenses<sup>1</sup>.

## JURISDICTION AND PROCEDURE

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

8. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email or other electronic means, 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.
9. 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.
10. Under section 61 of the CRTA, the tribunal may make any order or give any direction in relation to a tribunal proceeding it thinks necessary to achieve the objects of the tribunal in accordance with its mandate. In particular, the tribunal may make such an order on its own initiative, on request by a party, or on recommendation by a case manager.
11. Tribunal documents incorrectly show the name of the respondent as The Owners, Strata Plan, KAS495, whereas, based on section 2 of the SPA, the correct legal name of the strata is The Owners, Strata Plan K 495. Given the parties operated on the basis that the correct name of the strata was used in their documents and submissions, I have exercised my discretion under section 61 to direct the use of the strata's correct legal name in these proceedings. Accordingly, I have amended the style of cause above.
12. Under section 123 of the CRTA and the tribunal rules, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.
13. As described in below, it came to my attention after I made my original decision, that the respondent's claim for dispute related-expenses was not addressed.
14. By way of background and explanation, the parties to a tribunal dispute provide their evidence and submissions by uploading them directly to an online portal during the

facilitation stage of the proceeding. Once the dispute has been assigned to a tribunal member, the online portal is closed, and the parties are unable to directly upload further evidence or submissions.

15. When this dispute was originally assigned to me, it did not include a claim for dispute-related expenses about an expert report as tribunal staff incorrectly advised the strata that it must make a counterclaim in order to recover dispute-related expenses. The strata's claim relates to fees it paid to obtain the CTQ report discussed below. At the time I was assigned this dispute, 1 of 2 invoices paid by the strata to CTQ were provided as evidence. The strata says, and I accept, that it did not provide the second invoice because it had already been advised it could not claim the expense of the first invoice. There was no corresponding claim identified in the tribunal decision plan, but I am advised by tribunal staff that the strata expressly asked to recover its expenses and staff overlooked adding the claim.
16. I made my decision on August 28, 2019, without knowing the strata's claim existed. After tribunal staff provided my decision to the parties, the strata contacted staff who immediately advised me of their oversight.
17. At common law, an administrative tribunal may reopen a proceeding to cure a jurisdictional defect. This tribunal authority is also reflected in section 51(3) of the CRTA.
18. The British Columbia Court of Appeal discussed the scope of the power to reopen a hearing to cure a jurisdictional defect in *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499. Among other things, the court found it is a jurisdictional defect for an administrative tribunal to fail to provide the parties with procedural fairness.
19. I find in the circumstances here it would be a breach of procedural fairness for me to make a decision on only some of the issues raised by the parties. While I had seen 1 of the invoices the strata paid to CTQ in evidence, I was not aware of the strata's claim for dispute-related expenses and did not decide that issue, which I find was a breach of procedural fairness.

20. Therefore, I decided under section 51(3) of the CRTA to reopen this dispute to address the parties' further submissions on the strata's dispute-related evidence.
21. At my request, the parties were given an opportunity to provide supplementary submissions on both invoices the strata paid to CTQ for a report. The submissions were fully received by the tribunal on November 22, 2019.
22. I have reviewed those submissions and have amended my decision and order to allow the strata's claim for dispute related expenses totaling \$782.25 for CTQ invoice 19062-002 and invoice 19062-003 as set out below<sup>1</sup>.

## **ISSUE**

23. The sole issue in this dispute is whether the strata has contravened the SPA or its bylaws with respect to the tree, plant material, and rock borders located on CP next to SL19.

## **BACKGROUND, EVIDENCE AND ANALYSIS**

24. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.
25. In a civil proceeding such as this, the applicants must prove each of their claims on a balance of probabilities.
26. The strata is a bare land strata corporation located in Summerland, B.C. It was created in 1982 and consists of 35 residential strata lots.
27. The strata filed a complete new set of bylaws at the Land Title Office on January 15, 2019 which apply to this dispute. The Schedule of Standard Bylaws under the SPA does not apply. I address the bylaws relevant to this dispute in my analysis below.
28. An interior CP road of the strata contains a corner at the top of a small hill at SL19. The parties refer to the corner as the "blind corner" and I will use the same reference in this decision. From the evidence, the existence of a pine tree and installation of

the plant material and rock borders on the blind corner has been the topic of discussion with the strata at its general and council meetings for several years.

29. Such discussion has resulted in the strata installing a speed bump and painting a centre line on the road at the blind corner. Two signs have also been installed to identify the subject area for approaching vehicle drivers as a blind corner with a speed limit of 10 KPH. The strata considered installing a mirror but decided against it.
30. It is undisputed that no accident has occurred at the blind corner since the strata was formed. The applicants argue that there were “numerous occasions when vehicles and trailers have been forced to hug the corner and driven over the rock borders” and “countless near misses and sudden stops to avoid accidents”. However, the applicants did not provide evidence to support their assertions.
31. At a July 2018 strata council meeting, the applicant Gerard McKenna, then a council member, raised a motion to have the pine tree and landscaping removed. The council meeting minutes show the motion was discussed in detail and defeated by a vote of 1 in favour and 5 opposed. At the same meeting, the strata council passed a motion to work with the SL19 owner to “trim or remove shrubbery to improve sightlines and safety”.
32. At the annual general meeting (AGM) held in December 2018, Gerard McKenna again raised the issue of the blind corner. The December 2018 AGM minutes show the matter was discussed and resulted in the owners passing a motion for the strata to “continue to do due diligence to maintain the safety at the blind corner without removing any major infrastructure.” I find the reference to “infrastructure” to mean the landscaping, rock borders and pine tree. The motion passed with 27 of the 34 owners present in favour.
33. In June 2019, the strata requested an opinion from CTQ Consultants Ltd. (CTQ) on the relative safety of the road at the blind corner, whether the road conforms with municipal and other regulations, and whether the road meets the standard road design and maintenance for a rural hillside setting.

34. On July 24, 2019, the strata received a report from CTQ on the road safety at the blind corner (CTQ report). The author of the CTQ report is David Cullen, a Professional Engineer and transportation engineer with over 25 years of experience in traffic planning and engineering, The CTQ report found, among other things, that the blind corner:
- a. Complies with current standards of road safety and pertinent regulation,
  - b. Roadway width is within the District of Summerland regulations,
  - c. Is adequately controlled by signage,
  - d. Does not pose an unreasonable level of safety, and
  - e. Shrubbery on the inside of the curve should be trimmed regularly to aide with sightlines around the curve, but the removal of the [pine] tree is not necessary.

***Significant changes to CP***

35. The applicants' arguments imply the strata did not obtain a  $\frac{3}{4}$  vote before permitting the SL19 owners to alter the CP which they imply is contrary to section 71 of the SPA. I disagree.
36. I accept the owners of SL19 at the time the Dispute Notice was issued had planted items on the CP at the blind corner. I find the submissions of the strata support this conclusion given the strata agreed to "work with" the SL19 owners to trim the subject landscaping.
37. I also note that section 71 of the SPA applies only to ***significant*** changes in use or appearance of CP, for which the strata must first obtain a  $\frac{3}{4}$  vote of the strata owners at a general meeting. Although section 71 refers to a strata corporation making significant changes to CP, I have also found the strata may not permit owners to make significant alterations to CP without first passing a  $\frac{3}{4}$  vote. See for example my reasons in *Deane v. Cusick et al*, 2019 BCCRT 539 and *Farrell et al v. The Owners, Strata Plan K 414 et al*, 2018 BCCRT 369. There is an exception permitted under

section 71(b) about preventing significant loss or damage that I find does not apply here.

38. The BC Supreme Court set out several criteria in *Foley v. The Owners, Strata Plan VR 837*, 2014 BCSC 1333 to establish if a change in use or appearance is significant. The applicants did not address any of the criteria mentioned in *Foley* and I find there is no evidence that the changes were significant within the meaning of section 71 of the SPA.
39. Given the applicants must prove the alterations were significant and did not do so, I dismiss the applicants' claim that the strata acted contrary to Section 71 of the SPA.

### ***Repair and maintenance of CP***

40. The applicants claim the strata has failed to repair and maintain CP. Again, I disagree.
41. Under section 72 of the SPA, the strata is responsible for repair and maintenance of CP. Although the SL19 boundary with CP around the blind corner has not been established in evidence, it is undisputed, and I accept, that the subject tree, shrubs and rock borders are likely located on CP.
42. I find the applicants' argument that the strata has failed to repair and maintain the CP between the blind corner and SL19 is really an argument that the strata has not removed the subject landscaping and pine tree. The photographs provided in evidence do not show the CP is in a state of disrepair, nor do the landscaping items appear out of place. On the contrary, the area appears to be maintained to same standard as other areas of CP visible in the photographs provided.
43. I agree with the strata that landscaping and rock borders are not "overhanging" the road, also based on the photographs provided. While limbs from the pine tree clearly overhang the road, the limbs have been removed on the roadside to allow vehicles to pass freely under the existing higher limbs.



44. In reaching my conclusion, I put significant weight on the motion passed at the December 2018 AGM passed by nearly 80% of the owners present at the meeting, to continue the strata's due diligence at the corner without removing landscaping. I find the resolution passed means a super majority of the owners are content with the appearance of the landscaping as it was in December 2018 after it had been trimmed. Had there been issues with lack of maintenance, the strata owners would likely not have passed such a motion.
45. I also find the strata must accept the direction given to it by the owners as a direction under section 27 of the SPA not to remove the subject landscaping. I see no reason to interfere with the directions provided.
46. For these reasons, I find the applicants have not established that the strata has failed to repair and maintain CP. I dismiss the applicants claim that the strata has failed to do so.
47. From the parties' submissions, it is unclear if exclusive use of the subject CP has been given to the SL19 owners. Exclusive use of CP was not argued, and I raise it here only to bring to the strata's attention that exclusive use of, or special privilege in relation to, common property can only be given under section 76 of the SPA. I make no finding about the strata's compliance with section 76 of the SPA as I find that issue is not before me.

### ***Unsafe conditions and nuisance***

48. The applicants argue that the existing landscaping and pine tree at the blind corner create unsafe conditions. They rely on bylaw 7.3.1 that states an owner must not permit or engage in any activity on their strata lot or common property that creates a hazard or nuisance, is illegal, or contravenes a strata bylaw or rule. They also rely on Standard Bylaw 3.1(a), which is similar to bylaw 7.3.1, but I have found the Standard Bylaws do not apply. I do not agree with the applicants that the landscaping and tree create unsafe conditions.

49. I find the CTQ report to be an expert report within the meaning of tribunal rule 8.3. While the applicants disagreed with the conclusion in the CTQ report, they did not challenge the strata's expert, nor the expert's evidence as they were permitted to do under the tribunal rules. Further, the applicants did not provide their own expert report to contradict the findings in the CTQ report.
50. I find the conclusions reached in the CTQ report to be persuasive, given Mr. Cullen's stated expertise in traffic planning and design, and roadway safety assessments and his physical attendance to view the blind corner. I accept the conclusions establish the landscaping existing at the time of the report (July 2019) pose no hazard to sight lines primarily because the sightlines are affected by the topography of the blind corner. The report also concludes the existing road conditions are not illegal as they meet the District regulations.
51. I turn now to the strata's bylaws. As noted, the strata has removed the standard bylaw about nuisance and replaced it with a similar bylaw.
52. Nuisance in a strata setting has been found to be an unreasonable continuing or repeated interference with a person's enjoyment and use of their strata lot. (See *The Owners, Strata Plan LMS 3539 v. Ng*, 2016 BCSC 2462).
53. While the applicants find the tree and landscaping at the blind corner to be annoying, I simply cannot agree that a nuisance has been established on the evidence before me. Although the applicants find the landscaping an interference with their use and enjoyment of their strata lot or the road access to it, since no safety hazard has been established and the majority of owners want to keep the landscaping and pine tree, I find that any interference caused by the landscaping is reasonable in the circumstances.
54. As a result, I dismiss the applicants' claim that the blind corner creates a hazard or nuisance, contrary to the strata's bylaws.

## TRIBUNAL FEES AND EXPENSES<sup>1</sup>

55. Under section 49 of the CRTA, 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. Here, the strata was the successful but did not pay tribunal fees, so I make no order in that regard.
56. As described above, the strata did claim dispute-related expenses for 2 invoices it paid CTQ. Invoice 19062-002 dated June 30, 2019 totals \$441.00. The description on the invoice states "letter in support of current roadway configuration". Invoice 19062-003 dated July 26, 2019 totals \$341.25. The description on the invoice states "address comments on letter in support of current roadway configuration". The total of the 2 invoices is \$782.25 and this is the amount claimed by the strata in its supplemental submissions.
57. The applicants provided very lengthy supplementary submissions that mostly address their displeasure with the findings and outcome of my original decision. I will not comment further on the applicants' supplementary submissions as the proper way for the applicants to challenge a tribunal decision is to apply for judicial review. I infer from their supplementary submissions that the applicants ask me not to award dispute-related expenses to the strata.
58. Tribunal rule 9.4(2)(c) states that the tribunal may order one party to pay another party's reasonable expenses and charges that it considers directly relates to the conduct of the tribunal process. Given I relied on the content of the CTQ report in reaching my decision, I find the expenses claimed by the strata for the 2 invoices to be consistent with the tribunal rules. Accordingly, I and order the applicants to reimburse the strata \$782.25. I do not accept the applicants' submission that CTQ produced 2 reports given the descriptions on the 2 invoices imply only 1 report and the fact the CTQ report was issued on July 24, 2019, 2 days before the date of the final July 26, 2019 invoice.<sup>1</sup>
59. The strata must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the applicant owners.

## DECISION AND ORDER

60. I dismiss the applicants' claims.
61. I order the applicants, within 30 days of the date of this decision, to pay the strata \$782.25 for dispute related expenses.
62. The strata is entitled to post-judgement interest under the *Court Order Interest Act*, as applicable.
63. Under section 57 of the CRTA, a party can enforce this final tribunal decision by filing a validated copy of the attached order in the Supreme Court of British Columbia (BCSC). Once filed, a tribunal order has the same force and effect as a BCSC order.
64. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia (BCPC). However, the principal amount or the value of the personal property must be within the BCPC's monetary limit for claims under the *Small Claims Act* (currently \$35,000). Under section 58 of the CRTA, a party can enforce this final decision by filing a validated copy of the attached order in the BCPC. Once filed, a tribunal order has the same force and effect as a BCPC order.<sup>1</sup>

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J. Garth Cambrey, Vice Chair

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1. <sup>1</sup> Some headings and several paragraphs have been amended to cure a jurisdiction defect relating to a missed claim for dispute-related expenses. The specific paragraphs that were amended are 6, 13 through 22, 55 through 58, and 61 through 64.