



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Musial v. The Owners, Strata Plan BCS 3017*, 2019 BCCRT 1431

B E T W E E N :

ANITA MUSIAL, GEORGE MAGILL, PAUL BUTTLE, AGNES MCKAIN,
SHARON CONKLIN and JANET GOETZ

APPLICANTS

A N D :

The Owners, Strata Plan BCS 3017

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Kate Campbell, Vice Chair

INTRODUCTION

1. This dispute is about an access gate in a strata corporation.

2. The applicants, Anita Musial, George Magill, Paul Buttle, Agnes Mckain, Sharon Conklin and Janet Goetz (owners) each own strata lots in the respondent strata corporation, The Owners, Strata Plan BCS 3017 (strata).
3. The strata is a bare land strata complex, made up of 17 strata lots and a common property driveway. The strata plan shows the driveway connects to the public roadway in 2 places. The first is on the north end of the strata property, and the second is on the south end of the strata property. The parties agree that each of these access points has a gate.
4. The owners say the south gate is kept locked, which impedes their access. They request an order that the strata install power to the gate at the south entrance, so it opens by remote control. They also request an order that the strata rescind the rule that the south gate remain closed. The owners also seek an order that the council comply with section 31 of the *Strata Property Act* (SPA).
5. The strata denies the owners' claims. It says the ownership has voted on various resolutions to change the south gate, and to change the rule about the gate, and each resolution has failed.
6. The owners are represented by Ms. Musial in this dispute. The strata is represented by a strata council member.

JURISDICTION AND PROCEDURE

7. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims 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. The tribunal must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the tribunal's process has ended.

8. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.
9. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The tribunal may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.
10. 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, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

Limitation Period

11. In its Dispute Response Form, the strata argued that the owners' claim about powering the south gate was barred under the *Limitation Act* (LA). In an unpublished preliminary decision dated July 8, 2019, a tribunal vice chair concluded that the claim was not out of time under the LA, for the following reasons:

Under section 6 of the LA, a party has 2 years to commence a tribunal proceeding in respect of a claim. However, under section 1 of the LA, a claim is defined as a claim to remedy an *injury, loss or damage* that occurred as a result of an act or omission. Despite the fact the matter of adding electrical power to the south gate has been raised and discussed several times by the strata corporation in the past, there is no evidence before me that suggests there has been an injury, loss or damage sustained as a result of the gate not having electrical power. For this reason, I find the LA does not apply to the applicants' claim to add electrical power to the gate.

12. I agree with this reasoning, and confirm that the owners' claim about powering the gate is not barred under the LA.

Previous CRT Dispute

13. The tribunal decided a previous dispute about a gate in this strata in December 2018. In *Conklin v. The Owners, Strata Plan BCS 3017*, 2018 BCCRT 872 one owner, John Conklin, who is also an applicant in this dispute, argued that the strata must remove a pedestrian gate located at the north entrance to the strata because it encroached on his strata lot. The tribunal member found there was no consent and no easement allowing for the gate, so she ordered the strata to remove it.
14. The pedestrian gate is not at issue in this dispute.

ISSUES

15. The issues in this dispute are:
 - a. Should the tribunal order that the strata council comply with SPA section 31?
 - b. Must the strata make the south gate power-operated?
 - c. Must the strata rescind the rule that the south gate remain closed?

BACKGROUND AND EVIDENCE

16. I have read all of the evidence provided but refer only to evidence I find relevant to provide context for my decision. In a civil proceeding like this one, the applicant must prove their claims on a balance of probabilities.
17. The strata was created in 2008, and consists of 17 residential strata lots.
18. The following facts are relevant to the parties' dispute about the south gate:
 - a. Minutes from the October 2011 annual general meeting (AGM) indicate that some owners questioned what type of gate the owner developer (OD) intended to install, and wanted input on the matter.
 - b. March 27, 2012 council meeting minutes state the council met with the OD to discuss the style and number of gates to be installed, since the development

was almost complete. The minutes state, "The gates will be operated by the Owner's garage door opener." The minutes also state that the council would consult with the 2 owners with strata lots closest to the gates.

- c. On July 3, 2012, Gates Your Way provided a written quote of \$33,564.40 for 2 gates. The quote indicates that the north gate would be powered and automatic, but the south gate would not. The quote was addressed to the strata council president.
- d. The August 2012 AGM minutes note a discussion about the gates, including why the south gate would not be powered. The minutes stated that the OD's budget for the gates was \$22,000 including tax, so council would speak to the gate supplier to learn what could be purchased for that amount, and also get at least 2 more quotes.
- e. Both the north and south gates were installed by the OD in February 2013. The gates and the installation work were paid for by the OD.
- f. When the gates were first installed, some homes in the strata were still under construction, and both gates were left open during the day for worker access.
- g. Since it was installed in February 2013, the north gate has been powered. It opens and closes by remote control. The south gate has never been powered. It must be opened and closed manually.
- h. Council meeting minutes from May 1, 2013 say an owner requested that the south gate be powered, so the council would get a quote for this work. The minutes also say the council agreed that the south gate would be closed now that the main construction was finished, and owners would be informed by email.
- i. At the September 2013 AGM, owners voted in favour of a majority vote resolution that until a decision was made about powering the south gate, it would remain open in the daytime. The resolution also said that before a vote at a special general meeting (SGM) about powering the gate, all owners

would be provided with detailed quotes. There was also discussion at the AGM about how to pay for powering the gate.

- j. At a February 2014 SGM, the strata ownership voted on a $\frac{3}{4}$ vote resolution to spend up to \$10,000 plus tax from the contingency reserve fund (CRF) to power the south gate. There were 9 votes in favour and 8 opposed, so the resolution did not pass.
 - k. At an AGM in October 2014, the ownership voted on another $\frac{3}{4}$ vote resolution to power the south gate. This resolution was also defeated.
 - l. In July 2016, 6 owners petitioned the strata to hold another vote on powering the south gate. At the October 2016 AGM the strata ownership voted on a third $\frac{3}{4}$ vote resolution on powering the south gate. The resolution again did not pass.
 - m. Currently, the south gate has a padlock and chain, which is kept locked except on Fridays to allow garbage trucks entry, on move-in and move-out days, and when large recreational vehicles need access. Each strata lot owner has a key.
19. The owners submit that having the south gate locked and not powered creates numerous safety and traffic hazards, is inconvenient, and increases traffic noise and poor traffic flow in the strata. The strata says there are numerous reasons why it cannot power the south gate, including that the gate would partially block access to one strata lot (in front of a driveway/parking pad). The strata also says that leaving the south gate open would create a safety and security hazard.

REASONS AND ANALYSIS

SPA Section 31

20. The owners say that past and current strata council members have not met the required standard of care in dealing with the south gate, and have acted in conflict

of interest. They request an order that the strata council must comply with SPA section 31.

21. The remedies for conflict of interest by strata council members are set out in SPA section 33. (See *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183.) CRTA section 122(1)(a) says the tribunal has no jurisdiction over a claim under SPA section 33. I therefore make no findings or orders about conflict of interest in this decision.
22. SPA Section 31 sets out the standard of care for strata council members. It says that in exercising the powers and performing the duties of the strata corporation, each council member must act honestly and in good faith with a view to the best interests of the strata corporation, and must exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.
23. I decline to order that the strata council comply with section 31. Based on the BC Supreme Court's decision in *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32, I find the owners have no standing to make a claim under SPA section 31. In *Sze Hang*, the court said the duties of strata council members under SPA section 31 are owed to the strata corporation, and not to individual strata lot owners (see paragraph 267). This means that a strata lot owner, or group of owners cannot succeed in a claim against the strata, the strata council, or individual strata council members for a breach of section 31.
24. 23. *Sze Hang* is a binding precedent and the tribunal must apply it. Following *Sze Hang*, I therefore dismiss the owners' claim for a remedy under SPA section 31.

Power to South Gate

25. The owners request an order that the strata modify the south gate so it is power-operated.
26. The gates are not shown on the strata plan. Based on the definitions set out in SPA section 1(1), I find that both the north and south gates are common assets of the

strata corporation. The roadway through the strata is common property, as shown on the strata plan.

27. The applicants have provided statements indicating that the OD told them at the time they purchased their strata lots that both the north and south gates would be powered. While I accept that evidence, I find it is not determinative of this claim. The OD is not a party to this dispute, and the strata is not responsible for any promises made by the OD.
28. The parties agree that the OD installed and paid for the gates. The parties disagree about who selected the gates, and who decided that the south gate would not be powered.
29. The evidence shows that the strata council was involved in obtaining quotes for the gates, and made requests about the style and materials for the gates.
30. RP, owner of Gates Your Way, provided and installed the gates. RP's August 13, 2019 affidavit states as follows:
 - a. In 2008, at the request of the OD, RP provided verbal quotes for both automated and non-automated gates.
 - b. The City of Chilliwack (City) demanded room for future community mailboxes near the south entrance, which meant only the north gate could be automated.
 - c. RP and the OD agreed that both gate areas should be prepared for the necessary wiring to power both gates, in case the City changed its mind. Conduit was installed.
 - d. In late 2011, the OD asked RP to visit the site and provide written quotes for 2 gates, 1 automated and 1 manual.
 - e. In early 2012, the new strata council wanted to change the style of gates chosen by the OD. The south gate, which was manual, was changed to 2 10 foot leaves with a separate pedestrian gate.

- f. The strata later inquired about powering the south gate, and “was informed” that the pedestrian gate would be in the swing path, without the necessary 24 inch clearance. RP wrote:

If the gate were to be powered as it was and is now configured, the risk is way too high to install a lock out switch. It would not comply with...insurance and my professional code of practice. In addition, there is no room to install a motor on the south leaf of the south gate.

31. I place significant weight on RP’s evidence. He is knowledgeable about gate installation, and was involved in the strata’s gate selection from 2011 onwards. I find his statement clear and persuasive. RP’s statement is also consistent with an April 2, 2012 email from MG, the strata council president at that time.
32. In the email, MG wrote that the OD came to the site to discuss the council’s proposal for the gates, and “agreed with our plan”. The attached plan, which was hand-drawn, specifically indicated that the south gate was “manual”.
33. I find that all of this evidence shows that the council provided input about gate styles, but did not ultimately make the decision that the south gate would be manual. While RP says the gate selected by the strata did not allow for automation, he also says the OD had already decided at that point to install a manual gate.
34. I therefore conclude that the strata is not responsible for the decision to install a manual south gate. Although the strata had input about gate styles, the final decisions about style and power were made by the OD.
35. The owners argue that the strata council should not have agreed to the manual south gate. They argue that the council should have pushed harder for the OD to power the south gate at the time it was installed, possibly by offering to contribute strata funds. They argue that the strata’s failure to do this was significantly unfair, especially given that the 2011 AGM minutes and correspondence in evidence confirm that the strata council knew some owners wanted an automatic south gate.

The owners also submit the strata council's actions during this period were significantly unfair because they did not advise the ownership about their decisions.

36. Under CRTA section 123(2), the tribunal may make an order directed at the strata corporation, the council or a person who holds 50% or more of the votes, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights. This is similar to the Supreme Court's power under SPA section 164.
37. The BC Court of Appeal considered the language of section 164 of the SPA in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in *Dollan* was restated by the BC Supreme Court in *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164 at paragraph 28:
 - a. What is or was the expectation of the affected owner or tenant?
 - b. Was that expectation on the part of the owner or tenant objectively reasonable?
 - c. If so, was that expectation violated by an action that was significantly unfair?
38. I find it is not necessary in this case to determine whether the owner's expectations of the strata were reasonable, and whether the strata violated those expectations. That is because even accepting there was significant unfairness, I find the appropriate remedy would be to order a vote of the ownership about what to do about the gate. Since there have already been 3 such votes, I find that any significant unfairness about the south gate installation decisions has been effectively remedied.
39. In *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333, the BC Supreme Court considered a case about disputed common property changes that a strata had allowed to continue. Even though the court agreed that the changes had not been properly authorized by the owners, as required under the SPA, the court did not order the contested alterations removed. Rather, the court said it was important that strata lot owners attempt to resolve their differences by following the

procedures set out in their bylaws and the SPA. Therefore, instead of ordering the disputed deck and railings to be removed, the court ordered the strata to call an SGM and have owners vote on a $\frac{3}{4}$ vote resolution on whether the change was acceptable.

40. I find that this reasoning in *Foley*, which dealt with changes to common property under SPA section 71, applies equally to the significant unfairness in decision-making alleged by the owners in this dispute. The proper remedy for a dispute about improper decision-making by a strata is generally not to impose a different decision. Rather, the proper remedy is to refer the matters to the strata ownership for a vote.
41. The BC Supreme Court has held that the fact that a minority of owners may be outvoted does not justify court intervention in democratic strata governance. In *Oldaker v. The Owners, Strata Plan VR 1008*, 2010 BCSC 776, the court reviewed a number of cases and found at paragraphs 39 and 40:

These cases establish that for better or worse the majority of owners make the rules. For better or worse the minority of owners are to abide by those rules. ...

Not remarkably the views of disparate groups within a strata corporation are often strongly held. The force of these convictions can lead to internal friction, to competing camps within the strata corporation and to paralysis of the corporation. The ongoing efficacy of the strata corporation requires that the views of the majority be respected.

42. Following the reasoning in these cases, which are binding precedents, even if I found the strata's actions about the south gate were significantly unfair, I would not order the strata to power the gate. Rather, I would order the strata to hold a vote of the ownership about whether to power the south gate. Since powering the gate would require either a special levy or a non-emergency expenditure from the CRF (or a combination of the two), a $\frac{3}{4}$ vote resolution would be necessary at an AGM or SGM.

43. As summarized above, the strata has already held 3 such votes about powering the south gate, in February 2014, October 2014, and October 2016. Each of these votes was defeated. In these circumstances, I find it would be unreasonable to order a fourth vote. Rather, I find that any flaw in the strata's decision-making about powering the south gate were remedied by the subsequent votes by the ownership. Again, following *Oldaker*, the fact that a minority of owners are unhappy with the outcome of those votes is not determinative.
44. I also note that it is open to the owners to propose new resolutions about the south gate in the future.

Significant Change in Use

45. The owners also argue that installing the manual south gate and locking it was a significant change in the use of the common property roadway, and therefore required a $\frac{3}{4}$ vote. Under section 71 of the SPA, a strata corporation must not make a significant change in the use or appearance of common property unless the change is approved by a $\frac{3}{4}$ vote resolution at an AGM or special general meeting (SGM), or there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage.
46. Again, I find it is not necessary to make a finding about whether the south gate constituted a significant change in use, because under *Foley* the proper remedy would be to order a vote, and in this case 3 such votes have occurred.
47. For all of these reasons, I dismiss the owner's claim about powering the south gate.

Rescind South Gate Closure Rule

48. The owners seek an order that the strata rescind the rule that the south gate remain closed. The owners did not argue that the strata did not follow the required process in imposing the rule. Rather, they argue that the rule is unreasonable, unsafe, and causes traffic problems.
49. The history of the south gate closure rule is as follows:

- a. At the September 2013 AGM, owners voted in favour of a majority vote resolution that the south gate would remain open for the same times as the north gate (6:30 am to 8:00 pm).
 - b. November 25, 2013 council meeting minutes state that the council voted to keep the south gate closed at all times, except for garbage collection. The minutes do not indicate the reasons for this decision. The strata now says it was due to nuisance at strata lot 13, as the gate partially blocks that strata lot's driveway or parking pad when open.
 - c. The minutes of the February 2014 AGM state that the ownership voted on whether to ratify new rules established by the council since the previous AGM. It is unclear from the evidence what those rules are, or whether they include a rule about south gate closure. In any event, the minutes show that the ownership voted against ratifying the rules.
 - d. At the October 2016 AGM, the ownership voted in favour of a majority vote resolution on a rule that the south gate remain closed at all times except on garbage pickup days.
 - e. At the October 2017 AGM, the ownership voted to ratify a rule that the south gate remain locked except in emergencies, extended power failures, and for garbage pickup.
50. Under SPA section 125, the strata may make rules governing the use, safety and condition of common property and common assets. Since the gate is a common asset, and the roadway is common property, I find the strata is entitled under section 125 to make rules about closing the gate.
51. There are arguably some problems with the strata council's decision to keep the south gate closed after the February 2014 AGM, since no rule was ratified to support that, and at the September 2013 AGM the owners had voted in favour of keeping the gate open. SPA section 125(6) says a rule ceases to have effect at the next AGM after it is made, unless ratified by a majority vote resolution. However, I

find that these problems are now moot, since the ownership ratified rules at the 2016 and 2017 AGMs to keep the gate closed.

52. Following the reasoning above from *Foley* and *Oldaker*, I find there is no reason to set aside the rule to keep the south gate closed. The ownership has voted to do so at 2 successive AGMs. SPA section 125(7) says once ratified, a rule is effective until it is repealed, replaced, or altered.
53. SPA section 121(1) and 125(2) set out the circumstances where a rule is not enforceable, including if it contravenes the SPA or other legislation. I find none of these circumstances are applicable in this case.
54. For these reasons, I dismiss the owners' claim to rescind the gate closure rule.

TRIBUNAL FEES AND EXPENSES

55. As the owners were not successful in this dispute, in accordance with the CRTA and the tribunal's rules I find they are not entitled to reimbursement of tribunal fees or dispute-related expenses.
56. The strata did not specifically claim dispute-related expenses in its submissions, but it provided copies of 2 receipts from a notary for notarizing witness statements from RP and MG. It also provided an invoice for \$307.13 for the cost of RP's time to look up and send paperwork for his affidavit.
57. I find the strata is not entitled to reimbursement for the notary fees. The tribunal's rules provide for reimbursement for reasonable dispute-related expense. I find the notary fees are not reasonable, because the tribunal does not require witness statements to be notarized, and notarization does not change the weight placed on such statements.
58. I find RP's invoice was a reasonable dispute-related expense. It was reasonable for the strata to obtain RP's evidence, and I relied on it in making my decision.
59. I therefore order the owners to reimburse the strata \$307.13 for RP's invoice.

60. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses to the owner.

ORDERS

61. I order that within 30 days of this decision, the owners reimburse the strata \$307.13 for RP's invoice.

62. I dismiss the owners' claims.

63. I dismiss the strata's claim for reimbursement of notary costs.

64. 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.

65. 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, the strata 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.

Kate Campbell, Vice Chair