



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan KAS 1201 v. Neilson*, 2021 BCCRT 667

B E T W E E N :

The Owners, Strata Plan KAS 1201

APPLICANT

A N D :

CARL NEILSON

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Micah Carmody

INTRODUCTION

1. The applicant strata corporation, The Owners, Strata Plan KAS 1201 (strata), says the respondent, Carl Neilson, built a fence on his strata lot without the strata council's permission in contravention of the strata's bylaws.

2. The strata seeks over \$1,300 for “ongoing” bylaw contravention fines to date, \$2,695.50 for legal fees related to bylaw enforcement, and an order “to remove” the fence. The strata is represented by a strata council member.
3. Mr. Neilson disputes the strata’s claims. He says the strata unfairly withheld approval of the fence. He also says he does not recognize the strata council as the governing authority because there was no recent annual general meeting to elect council. Mr. Neilson represents himself.

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The CRT’s mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT’s process has ended.
5. The CRT 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.
6. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The CRT may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.
7. Under section 123 of the CRTA and the CRT rules, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.

Mr. Neilson's status as a former owner

8. After submissions closed, Mr. Neilson advised the CRT that as of May 5, 2021, he no longer owned a strata lot in the strata. Although Mr. Neilson provided no documentation to confirm the transfer of title, the strata was given the opportunity to respond and did not dispute the change in ownership, so I accept that as of May 5, 2021, Mr. Neilson ceased being a strata lot owner.
9. Section 1 of the *Strata Property Act* (SPA) defines “owner” as including a person shown in the register of a land title office as the owner of a freehold estate in a strata lot.
10. In *Downing v. Strata Plan VR2356*, 2019 BCSC 1745, the British Columbia Supreme Court stated that the fact that a current owner becomes a former owner would not, by itself, result in her no longer being an “owner” under the SPA or oust the CRT’s jurisdiction to decide a dispute. The Court also noted the finding in *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32, that the SPA definition of “owner” includes former owners.
11. As well, although section 189 of the SPA restricts who can make a request for resolution of strata property disputes with the CRT, it does not restrict who may be named as a respondent. For these reasons, I find that I have jurisdiction to consider the strata’s claims against Mr. Neilson as a former owner.

Previous agreement

12. In submissions, both parties refer to an agreement reached in CRT facilitation in a previous dispute between the parties about the same fence. There is no copy of any written agreement in evidence. Both parties accuse the other of breaching that agreement. However, neither party seeks enforcement of the agreement or any remedy arising from the alleged breaches. So, I find nothing turns on who breached the agreement.

ISSUES

13. The issues in this dispute are:
- a. Did Mr. Neilson's fence contravene the strata's bylaws?
 - b. Is the strata entitled to payment for bylaw contravention fines?
 - c. Should I make any orders about fence removal?
 - d. Must Mr. Neilson reimburse the strata for legal fees it incurred to enforce its bylaws?

EVIDENCE AND ANALYSIS

14. As the applicant in this civil dispute, the strata must prove its claims on a balance of probabilities. I have considered all the parties' evidence and submissions, but only refer to what is necessary to explain and give context to my decision.
15. The strata is a bare land strata made up of 66 strata lots. During the relevant times, Mr. Neilson owned strata lot 10 (SL10). SL10 shares a border with strata lot 9 and strata lot 11.
16. The strata's bylaws include the SPA's Standard Bylaws and amended bylaws filed with the Land Title Office on June 22, 2017. The amended bylaws are not numbered continuously. There are 3 bylaws potentially relevant to the fence. I refer to these bylaws as alteration bylaw 1, 2, and 3, or together, the alteration bylaws.
17. I reproduce in whole the first sentence of alteration bylaw 1 because it is confusingly worded:

A lot owner must obtain the written approval of the strata council before making or causing to be made any major exterior structural alterations or major additions to the strata lot or the improvements constructed thereon, without first having the design and specification of any such alteration or addition approved in writing by the Strata Council.

18. Alteration bylaw 1 also says that if an owner makes an alteration or addition without strata council approval, the strata council may require the owner to restore “it” to the original condition.
19. Alteration bylaw 2 is about alterations to buildings and structures on the strata lot. Although in early correspondence with Mr. Neilson the strata referred to alteration bylaw 2, its later correspondence focused on alteration bylaws 1 and 3, and its submissions address only alteration bylaw 3. I find alteration bylaw 2 does not apply to Mr. Neilson’s fence because the fence did not involve an alteration to a building or structure.
20. Alteration bylaw 3 says a strata lot owner may construct a fence on their strata lot with written approval of the strata council. In applying for approval, the owner must provide the proposed fence’s specifications and written consent from the owners of adjoining lots. Fences may not exceed 6 feet in height and must be constructed of black chain link or any other material approved in writing by the strata council at its discretion.
21. In addition, Standard Bylaw 5(1) says an owner must obtain the strata’s written approval before making an alteration to a strata lot that involves fences, railings or similar structures that enclose a patio, balcony or yard. Bylaw 5(2) says the strata must not unreasonably withhold its approval.
22. In April 2020, Mr. Neilson applied in writing to the strata council to build a 6-foot cedar fence around the perimeter of his strata lot.
23. On April 20, 2020, the strata council met to discuss Mr. Neilson’s fence application. As recorded in the minutes, the strata council observed that Mr. Neilson’s application did not include the required documentation. The strata council denied the application and suggested that Mr. Neilson could instead install a chain link fence once the strata received an application with all necessary documentation. This decision is restated in the May 7, 2020 council meeting minutes.

24. The evidence is unclear about exactly when Mr. Neilson started and finished building his fence. The strata received 3 written complaints from other owners. An April 19, 2020 complaint mentions Mr. Neilson's plans to build a fence. Two complaints dated May 8, 2020 refer to a partially constructed fence. So, I find Mr. Neilson began building his fence no later than May 8, 2020.
25. On May 11, 2020, the strata held a hearing with Mr. Neilson to discuss its reasons for denying the fence application. The minutes say that the strata explained that the original developer did not allow fences, in order to maintain the natural beauty of the area. To accommodate pets, chain link fences were eventually allowed as a compromise. It is undisputed that at this meeting, the strata gave Mr. Neilson a May 8, 2020 letter outlining the reasons his cedar fence application was denied. The letter said he could only build a chain link fence. The letter also warned of \$50 weekly fines for contravening alteration bylaw 2, which I noted above does not apply to the fence.
26. On May 21, 2020, the strata's lawyer wrote to Mr. Neilson, attaching 3 complaint letters redacted for privacy. The strata's lawyer stated that by building a fence without strata council's permission, Mr. Neilson was contravening alteration bylaws 1 and 3, which the letter reproduced. The letter said the strata was considering a) imposing a fine, b) imposing a fine every 7 days, c) requiring Mr. Neilson to remove the fence, or d) removing the fence itself. The letter invited Mr. Neilson to provide a written response or request another hearing.
27. Mr. Neilson requested another hearing, which was held on July 1, 2020. The minutes said that strata council told Mr. Neilson he would be advised of its decision after its July 7, 2020 meeting.
28. The July 7, 2020 council meeting minutes said that the strata council was "proceeding and filing legal action" about the "unauthorized fence" on SL10. There is no record of further communication with Mr. Neilson.

Validity of strata council decisions

29. As a general defence to the strata's claims, Mr. Neilson says the strata council members have exceeded their time on council and used the COVID-19 pandemic to extend their terms by not holding an annual general meeting (AGM). I infer that he argues that the strata council's decisions about the fence and any related bylaw contraventions are therefore invalid.
30. The strata says strata council was elected on May 29, 2019, with its term to end under normal circumstances at the next AGM. SPA section 40(2) says an AGM must be held no more than 2 months after the strata's fiscal year end, which is undisputedly May 31. Section 17.23 of the *Strata Property Regulation* extends meeting deadlines by 2 months during a state of emergency. On March 18, 2020 the BC government declared a state of emergency in response to the COVID-19 pandemic. The state of emergency remains in effect. Thus, the strata had until September 31, 2020 to hold its 2020 AGM. All of the strata council's decisions and actions at issue in this dispute took place before that date, and I find nothing contrary to the SPA in how the strata exercised its powers and performed its duties.

Bylaw contravention

31. Although alteration bylaw 1's wording is confusing, I find the intent is clear that an owner must obtain the strata council's written approval for major additions or alterations to the strata lot. I find a 6-foot cedar fence is a major addition to the strata lot. As well, bylaw 3 makes it clear that fences in particular require the strata council's written approval and must be constructed of a material approved in writing by the strata council.
32. It is undisputed that Mr. Neilson erected a 6-foot cedar fence on the perimeter of his strata lot without the strata council's written approval. I find that by doing so, Mr. Neilson contravened alteration bylaw 1.
33. Mr. Neilson says the strata unfairly withheld its approval of his fence application. He argues that by obtaining consent of the 2 adjoining lots he complied with the

requirements for approval. The strata concedes that the 2 adjoining strata lot owners consented to the fence. It says that is only 1 requirement of alteration bylaw 3, and satisfaction of that requirement did not guarantee strata council's approval. I agree. Bylaw 3 also gives council explicit discretion to consider the materials and height of the fence, which I find the strata council did appropriately.

34. Mr. Neilson says the tall fence was required to protect his family. He says he reported a cougar attack next to his property. He did not provide any independent evidence that he reported a cougar attack, or any evidence of cougar sightings at all. There is also no evidence he raised a concern about cougar attacks when applying for approval of the fence. Finally, there is no evidence before me about differences in degree of cougar protection provided by chain-link and cedar fences.
35. Mr. Neilson says there are other wood fences in the strata, and he does not believe they had approval. He does not mention the height of those fences. The strata acknowledges strata council has approved 4 wood fences in the strata but says council has not received a single complaint from any owners about those fences. In contrast, there were 3 written complaints about Mr. Neilson's fence before it was approved or finished.
36. The burden of proving unfair treatment rests with Mr. Neilson. I find there was nothing unfair about the strata's decision to withhold approval of the fence given the discretion alteration bylaw 3 gives the strata council, and the 3 complaints received. I find it significant that the strata was willing to accommodate Mr. Neilson if he would build a chain-link fence. For clarity, I find the strata's conduct was neither oppressive nor unfairly prejudicial as the test for significant unfairness was articulated in *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, and endorsed in *Kunzler v. The Owners, Strata Plan EPS 1433*, 2021 BCCA 173.
37. The parties do not make submissions about standard bylaw 5, which says the strata corporation must not unreasonably withhold its approval of a fence. I decided it was not necessary to seek submissions about the application of standard bylaw 5 because

I would find the strata's decision to withhold approval of the fence was reasonable for the same reasons I found it was not unfair.

38. In submissions, the strata asks for an order that Mr. Neilson allow strata council members to enter SL10 to measure the fence height, presumably to see if it exceeds the 6-foot limit in alteration bylaw 3. I decline to make this order because it was not a requested remedy in the Dispute Notice, because Mr. Neilson no longer owns SL10, and because determining the height of the fence is not necessary as I have already determined that Mr. Neilson built the fence in contravention of alteration bylaw 1.

Bylaw contravention fines

39. The strata seeks an order that Mr. Neilson pay more than \$1,300 for weekly bylaw contravention fines of \$50 from May 21, 2020, with the final amount determined by the CRT based on the date of this decision.
40. Mr. Neilson says he has never been given notice of a fine being imposed. Rather, he says he has only been advised that fines might be imposed. The strata says its interpretation of the SPA is that fines can only be imposed for proven contraventions, and because the strata and respondent disagree about whether or not there has been a contravention, the strata has not imposed fines to date. Thus, the strata asks the CRT to "award" or impose fines of \$50 weekly for continuous contravention.
41. The SPA empowers strata corporations to make decisions about bylaw contraventions and impose fines without the need for court or CRT intervention. SPA section 135(1) sets out the procedures a strata must follow before imposing a fine or requiring a person to pay the costs of remedying a contravention. I find the strata met those requirements by writing to Mr. Neilson on May 21, 2020 and then holding a hearing on July 1, 2020. After that date, the strata was able to impose a fine against Mr. Neilson for contravening alteration bylaw 1. However, it did not.
42. I find the strata did not comply with section 135(2), which says the strata must, as soon as feasible, give written notice of its decision to impose a fine or to require a person to pay the costs of remedying a contravention. I find the statement in the July

7, 2020 council meeting minutes that strata council is “proceeding and filing legal action” does not meet the requirement of written notice of a decision to impose a fine. I find the strata did not give Mr. Neilson notice of its decision to impose a fine.

43. SPA section 135(3) says that only once the strata has complied with the rest of section 135 can the strata impose a fine for a continuing contravention without further compliance with section 135. The strata therefore cannot impose continuing weekly fines, because it never gave notice of its decision to impose an initial fine under section 135(2).
44. Under section 121(1)(d) of the CRTA, the CRT has jurisdiction over a claim in respect of the SPA concerning money owing, including money owing as a fine under a bylaw. However, the CRT cannot order a party to pay money for fines that have not been imposed and where the SPA’s procedural requirements have not been followed. I decline to grant the strata’s requested remedy related to bylaw contravention fines.

Fence removal

45. The strata seeks “an order to remove unauthorized constructed fence.” It is not clear if the strata wants Mr. Neilson to remove the fence, or if it is asking if it may remove the fence itself and, presumably, charge the costs to Mr. Neilson.
46. Mr. Neilson is no longer an owner. I find it would be impractical to order him to do what the SPA permits the strata to do and remove the fence.
47. SPA section 129 says that to enforce a bylaw, a strata corporation may remedy a contravention under section 133. SPA section 133(1) says that a strata corporation may do what is reasonably necessary to remedy a contravention of its bylaws or rules, including:
 - a. doing work on or to a strata lot, the common property or common assets, and
 - b. removing objects from the CP or common assets.

48. SPA section 133(2) says the strata corporation may require the person who may be fined for the contravention to pay the reasonable costs of remedying the contravention.
49. I understand that the strata has not yet removed the fence and there is no evidence of the cost, so there is no money owing for which I can make an order under CRTA s. 123(1)(c). As well, the strata has not followed the section 135(2) requirement to give Mr. Neilson notice that it has decided to require him to pay the costs of removing the fence. Accordingly, I decline to order Mr. Neilson to pay the costs of fence removal.

Legal fees

50. The strata says it required legal guidance in attempting to remedy the bylaw contravention. It says the strata's bylaws allow the strata to recover these costs.
51. The strata provided a statement of account from its lawyer, for services rendered between April 28 and July 2, 2020, about Mr. Neilson and his fence.
52. Bylaw 6 of the "Powers and Duties of Strata Corporation" says any expenses, including legal expenses, that the strata incurs to enforce its bylaws will become part of the "assessment" of the responsible strata lot owner and will become due and payable on the first day of the following month. It also says the strata may commence a court action against the responsible owner.
53. I find that this bylaw establishes that owners who cause the strata to incur legal expenses to enforce its bylaws will be required to reimburse the strata for those expenses. The bylaw creates a debt owed by the responsible owner to the strata. I find it is not necessary for the strata to add the expenses to the responsible owner's "assessment" or strata lot account, or to commence a court action, although it may do those things. Although Mr. Neilson is no longer an owner, the strata made this claim for legal fees before he sold his strata lot.
54. The CRT has ordered an owner to reimburse a strata corporation for legal expenses in other cases where the strata corporation had bylaws making an owner responsible

for those expenses. In *The Owners, Strata Plan VR 293 v. Bains*, 2019 BCCRT 504, the CRT member reasoned that the CRT had authority under sections 123(1)(c) and 121(1)(d) of the CRTA to order payment of money owed under a strata bylaw. Although CRT decisions are not binding on me, I agree with and adopt the reasoning in *Bains*.

55. Mr. Neilson says there was no need for legal advice as he has been amicable in discussions. I find Mr. Neilson disregarded alteration bylaws 1 and 3 by building his fence knowing the strata had denied his application. The legal expenses were a direct result of his decision to proceed in clear contravention of the strata's alteration bylaws. In the circumstances, I find it would not be fair to burden the other owners in the strata with the cost of the bylaw enforcement expenses. I order Mr. Neilson to pay the strata the \$2,695.50 claimed for legal expenses, which is supported by a detailed invoice that I find shows the expenses were reasonable.

CRT FEES, EXPENSES AND INTEREST

56. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. The strata was partially successful, so I order Mr. Neilson to reimburse the strata \$112.50, representing half its CRT fees of \$225. It did not claim dispute-related expenses.

57. The *Court Order Interest Act* (COIA) applies to the CRT. The strata is entitled to pre-judgment interest on the legal fees from July 8, 2020, the date of the invoice, to the date of this decision. This equals \$11.46.

ORDERS

58. I order that, within 14 days of the date of this decision, Mr. Neilson must pay the strata a total of \$2,819.46, broken down as follows:

- a. \$2,695.50 in bylaw enforcement expenses,

b. \$112.50 in CRT fees, and

c. \$11.46 in interest under the *Court Order Interest Act* (COIA).

59. The strata is also entitled to post-judgement interest on the \$2,695.50 debt under the COIA, as applicable.

60. I dismiss the strata's remaining claims.

61. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court if it is an order for financial compensation or return of personal property under \$35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

Micah Carmody, Tribunal Member