



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Rogers v. The Owners, Strata Plan NW 2900*, 2022 BCCRT 593

B E T W E E N :

ROBERT ROGERS and JANET ROGERS

APPLICANTS

A N D :

The Owners, Strata Plan NW 2900

RESPONDENT

A N D :

ROBERT ROGERS and JANET ROGERS

RESPONDENTS BY COUNTERCLAIM

REASONS FOR DECISION

Tribunal Member:

Chad McCarthy

INTRODUCTION

1. This dispute is about patio and fence alterations. The applicants and respondents by counterclaim, Robert Rogers and Janet Rogers, own strata lot 30 in the respondent strata corporation, The Owners, Strata Plan NW 2900 (strata). The Rogers expanded one of the patios adjacent to their strata lot and built a bordering fence. The Rogers say the strata unfairly withdrew or withheld its approval of the alterations and demanded that the changes be reversed. The Rogers request an order directing the strata to provide final approval of the changes, which they have not removed.
2. The strata says it approved a new patio fence in the same location as the patio's original fence line, but it never approved the Rogers' patio and fence expansion. The strata says the expansion is an unauthorized alteration to common property (CP) under the strata's bylaws, and the Rogers are not permitted to incorporate that CP into their private patio area. In its counterclaim, the strata requests orders that the Rogers remove the unauthorized alterations and rehabilitate the area. It also counterclaims for strata bylaw fines of \$50 per week from October 12, 2021 "until the matter is resolved". The Rogers deny being responsible for fines.
3. Mr. Rogers represents the applicants in this dispute. The strata council president represents the strata.
4. For the reasons set out below, I deny the Rogers' claim, I allow strata's counterclaims for certain bylaw fines and the removal of unauthorized alterations, and I deny the strata's counterclaim for rehabilitating the altered area.

JURISDICTION AND PROCEDURE

5. 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). CRTA section 2 says the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize

any relationships between the dispute's parties that will likely continue after the CRT process has ended.

6. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice and fairness.
7. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary, and appropriate, even where the information would not be admissible in court. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
8. Under CRTA section 123, 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.
9. The Rogers submitted late evidence, including annotated drawings of strata property, photos, strata lot account statements, and a list of material purchases and labour. The strata objected to the late evidence, saying the Rogers could have provided it earlier and they did not identify which of their submissions the evidence supported. The strata says some of the late evidence was unreadable, but did not comment on the clearer, readable versions of some documents the Rogers submitted later. I find the only documents that remained difficult to read were the strata lot account statements, but those were dated March 7, 2022 and given my decision below, I find nothing turns on them. The strata also says it was unable to open one document. I also could not open it, and the Rogers did not provide a working version, so I did not rely on it. Notably, the strata did not say that it would be prejudiced if the late evidence was allowed, or that it did not have an adequate opportunity to formulate a response to the evidence. I find the late evidence is relevant, and that it would not be unfair to the strata to consider it, so I allow all of it except the unopenable document.

ISSUES

10. The issues in this dispute are:

- a. Must the strata approve the Rogers' patio and fence alterations, or must the Rogers remove the alterations and rehabilitate the area?
- b. Did the Rogers contravene a strata bylaw, and if so, must they pay bylaw fines of \$50 per week from October 12, 2021 until "the matter is resolved"?

EVIDENCE AND ANALYSIS

11. In a civil proceeding like this one, the Rogers must prove their claims on a balance of probabilities (meaning more likely than not). The strata must prove its counterclaims to the same standard. I have read all the parties' submissions and evidence but refer only to the evidence and argument that I find relevant to provide context for my decision.

Applicable Strata Bylaws

12. The strata repealed and replaced its bylaws by filing an amendment with the Land Title Office (LTO) on May 1, 2002. The strata later filed various other bylaw amendments before the disputed events occurred. I discuss the applicable and relevant bylaws below.

13. Strata bylaw 6(1) says that an owner must obtain the strata's written approval before making an alteration to CP or common assets, including limited common property (LCP). Bylaw 6(2) says the strata may make its approval conditional on the owner agreeing in writing to take responsibility for any expenses relating to the alteration, and providing evidence of appropriate insurance coverage.

14. I find that under SPA section 72 and bylaw 8(b), the strata must repair and maintain CP that has not been designated as LCP. Further, under strata bylaw 43(1), an owner must indemnify and save harmless the strata from the expense of any CP maintenance, repairs, or replacement rendered necessary by the owner's act,

neglect, or carelessness, to the extent that it is not met by the proceeds of the strata's insurance. I find the combined effect of bylaws 6 and 43 is that an owner is responsible for the expense of the strata maintaining, repairing, or replacing non-LCP CP that is intentionally altered by the owner without the strata's written approval. I find this can include the strata's expense of removing unapproved alterations.

15. Further, I note that under SPA section 133, the strata may reasonably remedy a bylaw contravention by doing work on CP or removing objects from CP. The strata may require that the reasonable costs of remedying the contravention be paid by the person who may be fined for the contravention under SPA section 130.
16. Finally, bylaw 23(1) says the maximum fine for a bylaw contravention is \$50. Bylaws 23(2) and 24 say that a fine may be imposed every 7 days for a continuing bylaw contravention.

Patio Alterations

17. The Rogers' strata lot is on one end of a row of 3 townhouses. The strata plan shows there are 2 patios adjacent to strata lot 30, which are designated as LCP for the strata lot 30 owners' exclusive use. This dispute is about changes to the southern patio, which I will refer to as "the patio". According to the strata plan, the patio's north side is adjacent to the strata lot and its other sides are adjacent to CP that is not LCP.
18. The strata plan shows that other strata lots have similar configurations, including similar-sized LCP patios, although there are some size differences. However, it is undisputed that some strata lot patios extend beyond the dimensions shown on the strata plan, and encroach onto CP that is not LCP. The strata says, and the Rogers do not directly deny, that these patio encroachments were present at the time the owner developer built the strata. I find the evidence does not show that the strata explicitly approved the original expanded patios.
19. According to the strata, and the Rogers' annotated drawings and photos, the Rogers' original concrete patio encroached onto CP beyond the designated LCP area by approximately 16 inches on 2 sides. So, I find the Rogers' patio was one of the

originally-encroaching patios, which I refer to as the “original patio”. Photos show the original patio was partially surrounded by a large hedge. The Rogers’ own drawings show that there were original wooden fence posts located at the interface between the original concrete patio and the hedge. I find the undisputed location of those fence posts was along the patio’s original fence line. Although photos show the original fence near the hedge no longer existed, I find the original fence line and fence post locations were at the edge of the original concrete patio, along the inside edge of the hedge. Referring to submitted photos, drawings, and the strata plan, I find that the hedge, large parts of the original fence line, and parts of the original concrete patio, were on non-LCP CP.

20. The Rogers say at least 4 other strata patios were larger than their original patio, that 75% of other patios were larger than theirs, and that they measured 50% of the patios at the strata to compare them with their own. Although the Rogers provided some patio hand drawings with dimensions, they do not say how they made the measurements and I find there is no evidence proving their accuracy. I place limited weight on the Rogers’ patio area measurements and calculations, but I note that those calculations show that the Rogers’ existing patio was larger than several other patios. Those calculations also show that the Rogers’ first requested patio expansion to approximately 170 square feet, discussed below, would have made it the largest patio in the strata by a significant margin. Further, the Rogers do not dispute that they purchased their strata lot knowing the size of the original patio. Finally, I find nothing in the strata’s bylaws or the SPA requires all patios to be the same size.
21. On June 24, 2021, the Rogers requested permission from the strata council to remove the hedge and “replace it” with a new patio fence of a type that matched similar fences at the strata. The Rogers did not mention the original fence line, ask to expand the patio area into the hedge area, or ask to install the fence in a specific new location beyond the original fence line and further inside the hedge area. July 20, 2021 council meeting minutes show the strata council approved the request to remove the hedge adjoining the patio and “replace it” with a new fence, although they did not specifically mention expanding the patio or placing the new fence beyond the original fence line.

22. The strata says this permission was to install a fence at the same location as the original fence line like those on other strata lot patios, because the Rogers requested permission for a fence that would “match” the fences on other strata lot patios. The Rogers suggest this was permission to place the fence some distance inside the CP area where the hedge was. Having weighed the evidence, I find that on July 20, 2021 the strata gave the Rogers written permission to remove the hedge and install a new fence, but not to expand the patio or place the fence somewhere further inside the area where the hedge used to be.
23. On August 3, 2021, the Rogers emailed the strata for permission to fill in the former hedge area with cement, which they said would increase the size of the 120 square foot patio by an additional 50 square feet. There Rogers do not deny that their intent was to place the new patio fence at the edge of this proposed, expanded patio area. The strata says this was the first indication they had that the Rogers intended to expand the patio area and place the fence beyond the original fence line. I find the Rogers do not adequately explain why their original June 24, 2021 written alteration request did not also include the patio expansion and concreting request.
24. The Rogers refer to the former hedge area as being part of the “existing” perimeter of the patio, but I find that is not accurate. Based on submitted photos and drawings, I find that the original patio area ended at the original fence line between the original concrete patio and the hedge, but did not extend further into the hedged area. So, I find the Rogers’ request was not simply to fill an existing patio area with concrete. I find the Rogers’ August 3, 2021 request was for a patio expansion. I find that the requested expansion implied a request to install the fence at the edge of the proposed, expanded patio area, which as noted was some distance into the formerly hedged area and beyond the original fence line. I also find this request is evidence that the Rogers knew, or should have known, that the previous July 20, 2021 strata approval was only to remove the hedge and build the patio fence on the original fence line, and not to expand the patio and move the fence line out.
25. The Rogers admit they began installing the fence in the proposed location outside of the original fence line in August 2021, without first receiving the strata’s written

approval of their August 3, 2021 request. The Rogers say the strata council president provided verbal permission, which the president denies. I find the evidence does not show that the president provided verbal approval. Further, as noted, under bylaw 6 CP alterations require written strata approval.

26. August 17, 2021 strata council meeting minutes show that the council issued a stop work order on the Rogers' patio changes until it could consider them further, noting that an alteration agreement was also required. August 19, 2021 minutes show that the strata council denied the Rogers' requested patio expansion and fence line relocation, although it confirmed that the fence could be built on the original fence line. The Rogers confirm that a council member verbally instructed them to stop work on August 19, 2021. The August 17 and 19, 2021 meeting minutes were undisputedly distributed to the owners on August 20, 2021.
27. The strata sent the Rogers a September 9, 2021 letter alleging that they had contravened bylaw 6(1) by making CP alterations without strata approval. The letter said enforcement of the bylaw could include fines, and invited the Rogers to request a strata council hearing on the matter if they wished. The Rogers undisputedly requested and attended a September 21, 2021 hearing, where they requested a 1 foot patio expansion and to position the fence beyond the original fence line.
28. On Friday, September 24, 2021, the strata sent the Rogers a letter confirming that the strata council had decided the Rogers' unauthorized alterations must be removed by October 5, 2021 and the CP rehabilitated. Also on September 24, 2021, the strata sent the Rogers an alteration agreement letter, responding to their request for permission "for alterations to install a fence along the perimeter of the existing patio." The letter said permission was granted for the alteration "as submitted." The Rogers say this granted permission for the 1 foot patio and fence line expansion they "submitted" at the hearing, which the strata denies. The Rogers completed most of that expansion work over the following days, which fell on a weekend.
29. I find that although the September 24, 2021 alteration agreement refers to a "submitted" alteration proposal, the letter clearly identifies the proposal as a request

for installing a fence “along the perimeter of the existing patio.” I find this is consistent with the other September 24, 2021 letter confirming that the strata council required the unauthorized patio and fence alterations to be removed. So, I find the strata only granted permission to install a fence on the original fence line, and not to expand the patio or position the new fence further outward. I find that the Rogers expanded the patio and placed the fence further onto CP without strata permission, and have not removed those alterations. I find this is an ongoing violation of bylaw 6(1).

30. The Rogers argue that the strata has a practice of allowing encroachments onto CP, so their patio expansion should be allowed because it is similar to other previous encroachments. As noted, the Rogers’ original patio area and other patios encroached onto non-LCP CP, and I infer the strata has not ordered any original patios to be reduced in size to fit within their LCP boundaries. The Rogers say their expansion means the patio is now of a comparable size and relative position as other patios in the strata. However, as noted, the evidence does not show that the Rogers’ original patio was smaller than all other similar patios. The Rogers also say another strata lot owner previously removed a hedge and installed a new fence. I find the evidence before me does not show that any other patio was enlarged by an owner, or that the strata allowed any patios to expand beyond the original areas fenced by the owner developer. Further, even if the strata had a practice of authorizing new patio expansions that further encroached onto non-LCP CP, and I find it did not, as explained below that does not mean the Rogers’ expansion is allowed under the SPA.
31. I find the Rogers’ patio area expansion and fence placement are a new, permanent conversion of non-LCP CP into property reserved for the Rogers’ exclusive use. The expansion is essentially an extension of their LCP patio area. I find that such a patio expansion would require the newly-incorporated non-LCP CP area to be designated as LCP for the strata lot 30 owners’ exclusive use. Under SPA section 73, such an LCP designation requires either a strata plan amendment by unanimous ownership vote, or an LCP designation resolution passed by $\frac{3}{4}$ majority ownership vote. Further, under SPA section 71, the strata must not make a non-emergency significant change in the use or appearance of CP unless it is approved by a $\frac{3}{4}$ majority ownership vote.

However, the evidence does not show that any SPA section 71 or 73 votes have been held about the Rogers' patio.

32. In the absence of ownership votes approving an LCP designation and approving a significant change in use of CP, I find that strata approval of the Rogers' patio expansion would essentially approve a contravention of SPA section 73 and potentially section 71. So, I find it would not be appropriate to interfere with strata's decision to withhold approval of the patio expansion in this case. I deny the Rogers' request for an order that strata council provide "final approval" of the patio expansion, including the fence location.
33. I find that the Rogers continue to violate bylaw 6 because they made unapproved patio expansion and fence alterations and did not remove them. So, I find it is appropriate that the Rogers remove their unapproved alterations. I allow the strata's request for an order that the Rogers remove the unauthorized alterations, including the portions of the patio surface and fence installed beyond the original fence line.
34. Given that the strata permitted the Rogers to remove the hedges and did not subsequently landscape that CP area, I find that area was essentially unimproved ground before the Rogers expanded their patio and fence into it. I find it is unproven that the patio and fence expansion caused, or their removal will cause, damage to the area where the hedges used to be, beyond its relatively unimproved state before the expansion. So, I find the strata has not shown that the Rogers' unapproved patio and fence alterations created, or will create, a need for rehabilitation. I deny the strata's request for an order that the Rogers rehabilitate that CP area.

Bylaw Fines

35. The strata undisputedly issued bylaw violation fines against the Rogers for their continuing contravention of bylaw 6(1). I find that by the strata's letters dated September 9, 2021, September 24, 2021, and October 12, 2021, and by holding the September 21, 2021 hearing with the Rogers, the strata met the notice and hearing requirements under SPA section 135. I find that the strata levied an initial \$50 fine in its October 12, 2021 letter, and warned that further \$50 fines would be issued every

7 days for a continued contravention of bylaw 6(1) as long as the unauthorized alterations remained in place. Under section 135(3), I find the strata was entitled to impose \$50 fines every 7 days for a continuing contravention without further notice to the Rogers.

36. As noted, the strata requests an order that the Rogers pay fines of \$50 per week from October 12, 2021 until “the matter is resolved.” The strata does not claim a total fine amount, or say when the matter would be resolved. However, the Rogers do not deny that \$50 fines were charged to their strata lot account every 7 days beginning on October 12, 2021, and that they did not pay those fines. I note that the initial Dispute Notice for this dispute was issued on October 29, 2021.
37. I decline to order payment of any bylaw fines issued on or after October 29, 2021, the date this CRT dispute was initiated, for the following reasons. Although not binding on me, I find persuasive and rely on the reasoning in *The Owners, Strata Plan VR 484 v. Lawetz*, 2017 BCCRT 59 at paragraph 60, which was also adopted in *The Owners, Strata Plan VR 939 v. Longine Properties Ltd.*, 2019 BCCRT 740 at paragraphs 35 and 36. In *Lawetz*, the vice chair found that once the CRT proceeding commenced, the issue of whether there had been a bylaw violation was a matter for the CRT to decide. So, the vice chair declined to order fines beyond the Dispute Notice date.
38. Consistent with the reasoning in *Lawetz* and *Longine*, I find that the strata’s claim for outstanding bylaw fines is limited to fines issued before the October 29, 2021 Dispute Notice date. I find that 3 fines of \$50 were issued before October 29, 2021, so I order the Rogers to pay the strata \$150 for bylaw fines. I order the strata to remove from the Rogers’ strata lot account the remaining fines issued on or after October 29, 2021.

CRT Fees, Expenses, and Interest

39. The *Court Order Interest Act* applies to the CRT. I find the strata is entitled to pre-judgment interest on the \$150 owing, from the dates the fines were imposed by the strata (October 12, 19, and 26, 2021) until the date of this decision. This equals \$0.40.

40. 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. I see no reason in this case not to follow that general rule. Neither party claimed CRT dispute-related expenses. The Rogers were unsuccessful in their claim, but the strata paid no CRT fees for that claim. The strata was partly successful in its counterclaims, so I find it is entitled to reimbursement of half the CRT fees it paid for those counterclaims, which equals \$62.50. The Rogers paid no fees for the counterclaims.
41. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the Rogers.

ORDERS

42. I order that, within 45 days of the date of this decision:
- a. The Rogers remove their unauthorized CP alterations surrounding the strata lot 30 patio, including the portions of the patio surface and fence they installed or changed outside of the original fence line at the edge of the original concrete patio, and
 - b. The strata cancel from the Rogers' strata lot account any bylaw 6(1) contravention fines imposed on or after October 29, 2021.
43. I order that, within 30 days of the date of this decision, the Rogers pay the strata a total of \$212.90, broken down as follows:
- a. \$150 in debt for unpaid bylaw contravention fines,
 - b. \$0.40 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$62.50 in CRT fees.
44. The strata is also entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.

45. I dismiss the Rogers' claim, and the remaining aspects of the strata's counterclaims.
46. 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.

Chad McCarthy, Tribunal Member