



# Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Muscardin v. The Owners, Strata Plan LMS3758*, 2022 BCCRT 912

B E T W E E N :

PAULA MUSCARDIN

**APPLICANT**

A N D :

The Owners, Strata Plan LMS3758

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Richard McAndrew

## INTRODUCTION

1. This dispute is about strata corporation landscaping. The applicant, Paula Muscardin, leases a strata lot (SL30) at the respondent strata corporation, The Owners, Strata Plan LMS3758 (strata). The owner of SL30 is not a party in this dispute. The strata's landscapers trimmed 3 common property hedges near Ms. Muscardin's strata lot's patio. Ms. Muscardin claims that these hedges were improperly trimmed without

consulting her in advance. Ms. Muscardin claims damages of \$1,000 for the hedge trimming and she requests an order prohibiting the strata from trimming further hedges without good reason, and without consulting affected residents in advance.

2. The strata denies Ms. Muscardin's claims. The strata says that it does not make decisions relating to plant maintenance. Rather, the strata says the landscaper independently trims the hedges as part of its maintenance services, based on its own judgment and residents' requests.
3. Ms. Muscardin is self-represented. The strata is represented by a strata council member.

## **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). 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.
5. 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.
6. 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.

7. 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.

### ***Late Evidence***

8. Ms. Muscardin provided late evidence consisting of 3 photographs that she had previously provided. I do not allow these duplicate copies of the photographs since they had already been provided. Ms. Muscardin also provided an additional submission which the strata had the opportunity to respond to. The strata provided a responsive submission, which I have reviewed and considered. Consistent with the CRT's mandate that includes flexibility, I find that Ms. Muscardin's late submission does not prejudice the strata since it had an opportunity to respond. So, I allow both late submissions.

### **ISSUES**

9. The issues in this dispute are:
  - a. Did the strata violate *Strata Property Act* (SPA) section 71 by trimming the common property hedges? If so, what is the remedy?
  - b. Did the strata treat Ms. Muscardin significantly unfairly by trimming the hedges? If so, what is the remedy?

### **BACKGROUND AND EVIDENCE**

10. In a civil proceeding like this one, the applicants must prove their claims on a balance of probabilities (meaning more likely than not). 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.
11. The strata consists of 78 strata lots in multiple buildings.

12. The strata filed a complete set of bylaws with the Land Title Office (LTO) in January 2002 which repealed and replaced all previous bylaws. The strata has filed further bylaw amendments at the LTO which are not relevant to this dispute. I discuss the specific bylaws relevant to this dispute in my reasons below.
13. Ms. Muscardin is the leaseholder of SL30, located on the first floor of a residential apartment-style building. SL30 has a limited common property patio which overlooks an adjacent courtyard. This courtyard includes multiple hedges and a vehicle entrance to an underground parking structure.

## **REASONS AND ANALYSIS**

### ***Did the strata violate SPA section 71 by trimming the hedges?***

14. The strata plan does not designate the landscaping areas containing the hedges as part of a strata lot or as limited common property. Further, there is no evidence before me showing that the strata has passed resolutions designating the landscaping areas as limited common property. So, I find that the landscaping areas next to SL30, including the hedges planted there, are common property of the strata.
15. It is undisputed that the strata's landscapers trimmed 3 hedges near Ms. Muscardin's patio. Based on the parties' submissions and photographs provided, I find that one of the hedges is located directly in front of Ms. Muscardin's patio. Another hedge is located in a space in front of and between both Ms. Muscardin's patio and an adjacent strata lot's patio. I find that the third hedge is located in front of the neighbouring strata lot's patio. As discussed above, I find that all 3 of the hedges are located on common property.
16. Section 72 of the SPA and bylaw 3(1) requires the strata to maintain common property, which I find includes landscaping maintenance. However, SPA section 71 says that a strata corporation must not make a significant change in the use or appearance of common property unless the change is approved by a resolution passed by a 3/4 owners' vote at an annual or special general meeting, or there are reasonable grounds to believe that immediate change is necessary to ensure safety

or prevent significant loss or damage. See *Foley v. The Owners, Strata Plan VR 387*, 2014 BCSC 1333.

17. There is no evidence before me showing that the landscaping alterations were approved by a 3/4 owners' vote or that the trimming was urgently needed. So, were the landscaping changes a significant change in the use or appearance of the common property?
18. In *Foley*, the court summarized the criteria for a significant change at paragraph 19 as follows:
  - a. A change would be more significant based on its visibility to residents and towards the general public.
  - b. Whether the change to common property affects the use or enjoyment of a unit or a number of units or an existing benefit of a unit or units.
  - c. Is there a direct interference or disruption as a result of the changed use?
  - d. Does the change impact on the marketability or value of the unit?
  - e. The number of units in the building may be significant along with the general use, such as whether it is commercial, residential, or mixed.
  - f. Consideration should be given as to how the strata corporation has governed itself in the past and what it has allowed. For example, has it permitted similar changes in the past? Has it operated on a consensus basis, or has it followed the rules regarding meetings, minutes and notices as provided in the SPA?
19. Court decisions suggest that the more permanent the change, the more significant it is. See for example, *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126 and *Sidhu v. The Owners, Strata Plan VR1886*, 2008 BCSC 92.
20. I have also considered several non-binding CRT decisions. In *Bourque v. The Owners, Strata Plan VIS 6730*, 2020 BCCRT 701, the CRT held that the strata's decision to replace small ornamental plants with cedar trees was a significant change.

The CRT placed weight on its finding that the change negatively affected the owner's enjoyment of his strata lot. In *Richardson v. Simmons*, 2020 BCCRT 241, the CRT held that in considering whether the removal of trees from common property is a significant change, relevant factors include whether the removal impacts residents' privacy or views. In *Kent v. The Owners, Strata Plan LMS4555*, 2022 BCCRT 470, the CRT held that the removal of trees and bushes was a significant change because it reduced many strata lot owners' privacy. I agree with the reasoning in these decisions and find that privacy and an owner's or tenant's enjoyment are relevant considerations.

21. I will first consider how the *Foley* factors apply to this dispute. I find that the hedge trimming would be very visible from Ms. Muscardin's strata lot and the neighbouring strata lot since the hedges at issue are located directly in front of these strata lots. Based on the courtyard photographs, I find that these hedges would also be visible to residents and visitors walking or driving in the courtyard. However, without evidence showing how much height was trimmed from the hedge, I am unable to determine whether the hedges' appearance changed substantially.
22. I accept Ms. Muscardin's submission that the hedge trimming negatively affected her enjoyment of SL30. Ms. Muscardin says that the hedges looked beautiful, provided privacy and blocked vehicle pollution from the parking structure entry before they were trimmed. After being trimmed, the photographs show that these hedges were reduced to a height just below the patio railing. Based on the proximity to her patio, I find the hedges likely provided some privacy from the neighbouring courtyard. However, without providing evidence showing the amount that the hedges were trimmed, I find that Ms. Muscardin has not established that this privacy loss was substantial.
23. Based on the photographs, I find that the hedge trimming likely also reduced the neighbouring strata lot owner's privacy. However, the hedge trimming also likely increased the scope of the neighbouring strata lot owner's view and possibly increased their sunlight access. Without a statement from the neighbouring owners, I am unable to determine whether the hedge trimming had a positive or negative effect

on their enjoyment of their strata lot. I find that Ms. Muscardin has not established that any other owners' enjoyment of their strata lots were significantly affected by the hedge trimming.

24. In the absence of evidence showing a loss in value, I find that Ms. Muscardin has not established that the hedge trimming reduced SL30's value or marketability.
25. I find the number of affected strata lots is not significant. As stated above, the hedges that were trimmed are located directly in front of Ms. Muscardin's strata lot and the neighbouring strata lot. I find that the evidence does not show that the hedge trimming significantly affected any strata lots, other than SL30 and the neighbouring strata lot.
26. I have also considered how the strata has managed the landscaping in the past. Ms. Muscardin says that she was told that the strata would consult with the residents most affected by landscaping changes in advance.
27. The strata disagrees and says that its landscaper uses their judgement to trim plants on their own without strata direction. The strata also says that residents can provide landscaping requests which the landscaper can consider. The strata provided the January 18, 2022 strata council minutes which also stated the same procedure.
28. Further, TA, an employee or principal of the landscaping service, sent the strata a December 3, 2021 email. In this email, TA wrote that they never intended to let the hedges grow past the railings' height. Further, TA wrote that they trimmed the hedges to match the height of other strata hedges.
29. Based on TA's December 3, 2021 email and the January 18, 2022 strata council minutes, I find that the strata's submissions about its landscaping procedures are more likely to be accurate than Ms. Muscardin's. So, I find that the strata's past practice consisted of letting the landscapers trim plants independently, based on their own discretion. Further, I find that though the strata's landscapers considered residents' suggestions, they did not consult residents about landscaping maintenance in advance. It is undisputed that Ms. Muscardin did not make any advance landscaping requests relating to the hedge trimming.

30. In considering the above *Foley* factors, I find that on balance Ms. Muscardin has not established that the hedge trimming was a significant change to the common property. As discussed above, I find that the hedge trimming reduced Ms. Muscardin's privacy somewhat. However, without providing evidence showing the amount that was trimmed, I find that Ms. Muscardin has not established that her loss of privacy was substantial. Further, the evidence does not establish that the trimming reduced any other residents' enjoyment of their strata lots. In consideration of all of the *Foley* factors, I find that the strata did not significantly change the common property by letting the landscaper trim the hedges. So the strata did not need 3/4 owner approval to trim the hedges.
31. Based on the above, I find that the strata did not violate SPA section 71 and I dismiss Ms. Muscardin's claim for damages based on this SPA section. Further, since I find that the landscaper's hedge trimming was not a significant change in the use or appearance of common property, I find that the strata was not required to consult residents before trimming the hedges. So, I deny Ms. Muscardin's request for an order prohibiting the strata from trimming further hedges without good reason, and without consulting affected residents in advance.

***Did the strata treat Ms. Muscardin significantly unfairly?***

32. I find that Ms. Muscardin's allegations also raise the issue of whether the strata treated her significantly unfairly by trimming the hedges without consulting her.
33. Under section 123(2) of the CRTA, the CRT has jurisdiction to consider whether an action listed under s. 121(1) (e) to (g) of the CRTA is significantly unfair (see *Time Share Section of The Owners, Strata Plan N 50 v. Residential Section of The Owners, Strata Plan N 50*, 2021 BCSC 486). I find that the hedge trimming was a strata action within the scope of CRTA section 121(1)(e).
34. Under CRTA section 123(2), the CRT can make orders to remedy a strata's significantly unfair actions or decisions. In *Reid v. Strata Plan LMS 2503*, 2003 BCSC 126, the BC Court of Appeal interpreted a significantly unfair action as one that is



burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith, unjust or inequitable.

35. In *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851*, 2020 BCCA 342, the BC Court of Appeal confirmed that the reasonable expectations of an owner may also be relevant to determining whether the strata's actions were significantly unfair. The test for assessing an owner's reasonable expectations is from *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44:

- a. What was the owners' or tenant's expectation?
- b. Was that expectation reasonable?
- c. Did the strata violate that expectation with a significantly unfair action or decision?

36. Based on the facts and evidence before me in this dispute, I find the strata's actions were not significantly unfair. Though Ms. Muscardin expected the strata to consult her before trimming hedges near her strata lot, I do not find this expectation to be reasonable. I reach this conclusion because such an expectation is inconsistent with the strata's landscaping practice. As discussed above, I find that the strata did not consult residents before trimming plants. Rather, the strata let the landscapers trim plants independently, using their own discretion and in consideration of residents' suggestions. Further, I find that neither the SPA nor the strata's bylaws required the strata to discuss such hedge trimming with Ms. Muscardin in advance. So, I find that Ms. Muscardin's expectation that the strata would consult her before trimming the hedges near here strata lot was not reasonable.

37. For the above reasons, I find that the strata did not treat Ms. Muscardin significantly unfairly and I dismiss this claim.

## **CRT FEES AND EXPENSES**

38. Neither party paid any CRT fees nor claimed any dispute-related expenses. So, I do not make any orders for reimbursement of CRT fees or expenses.

## **ORDER**

39. I dismiss Ms. Muscardin's claims and this dispute.

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Richard McAndrew, Tribunal Member