



# Civil Resolution Tribunal

Date Issued: October 21, 2022

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Type: Strata

Civil Resolution Tribunal

Indexed as: *Keating v. The Owners, Strata Plan BCS 435*, 2022 BCCRT 1153

BETWEEN:

MARY KATHLEEN KEATING, JON MCGRATH  
and JAMES HARRISON

**APPLICANTS**

AND:

The Owners, Strata Plan BCS 435

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Nav Shukla

## INTRODUCTION

1. The applicants, Mary Kathleen Keating, Jon McGrath, and James Harrison (together, the owners), each own or co-own a strata lot in the respondent strata corporation, The Owners, Strata Plan BCS 435 (strata).

2. The owners say the strata has failed to provide requested records as required under section 36 of the *Strata Property Act* (SPA). They seek an order that the strata produce the documents requested in their September 21, 2021 letter.
3. It is undisputed that the strata did not provide the owners with the requested records within 2 weeks of the owners' request as required under SPA section 36(3). In its Dispute Response, the strata addresses only the legal documents requested by the owners and says these documents are protected by solicitor-client privilege. Since filing its Dispute Response, the strata has produced various documents to the owners, but the owners say some of their requests are still outstanding.
4. The owners are represented by the applicant Mary Kathleen Keating, a non-practicing lawyer. The strata is represented by its lawyer, Dan Richardson.

## **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.

## ***Preliminary Issues***

### **Jurisdiction**

9. One category of documents the owners seek are legal opinions relating to 2 previous legal proceedings the strata was involved in. The parties refer to these as the Sharp matter (see *Sharp v. The Owners, Strata Plan BCS 435*, 2020 BCCRT 1142) and the Wong matter (see *Wong v. The Owners, Strata Plan BCS 435*, 2020 BCCRT 53 and *The Owners, Strata Plan BCS 435 v. Wong*, 2020 BCSC 1972). The Sharp matter was a CRT dispute where the strata was a party. The Wong matter involved a CRT dispute and judicial review of the CRT's decision. The strata was a party to the Wong CRT dispute and initiated the judicial review.
10. In their Dispute Notice, the owners say that they had always considered these disputes "unnecessary and ill-advised". In its Dispute Response, the strata says that to the extent the owners make claims against the strata's legal counsel, those matters are outside of the CRT's jurisdiction. Neither party addressed the strata's allegations about the CRT's jurisdiction in their submissions.
11. The only order the owners seek in the Dispute Notice is for the strata to produce the records they requested in their September 21, 2021 letter under SPA section 36. CRTA section 121(1)(a) gives the CRT jurisdiction over claims about the SPA's interpretation or application. I find the owners' claims involve the interpretation and application of SPA sections 35 and 36 and so are within the CRT's jurisdiction. Since the owners seek no orders about the adequacy of the legal advice received by the strata, I make no findings about it.

SPA Section 189.1(2)

12. SPA section 189.1(2) says an owner must first request a strata council hearing before commencing a CRT strata property dispute unless the CRT waives the request requirement. In their Dispute Notice, the owners request that the CRT waive this requirement. Neither party addressed the hearing requirement and the owners' request to waive it in their submissions.
13. The evidence shows that the strata received the owners' September 21, 2021 letter setting out their records' requests and had its lawyer respond to it. Since the strata was aware of the owners' claims and had sufficient opportunity to respond to them before this dispute was filed, I see no utility in refusing to resolve this dispute due to the owners' failure to request a hearing. I find that waiving the hearing requirement is consistent with the CRT's mandate to provide dispute resolution services in an accessible, speedy, economical, informal, and flexible manner. So, I direct that the hearing requirement set out in SPA section 189.1(2) is waived.

Additional Documents Sought

14. In their submissions, the owners seek additional documents not requested in their September 21, 2021 letter. For example, the owners seek all correspondence to or from the strata or the strata council about the Wong matter, including anything about insurance coverage, legal fees, and any claim to privilege. It is undisputed that the owners previously made this request to the strata in a December 17, 2021 email that is in evidence.
15. The strata says that this request does not form a part of this CRT dispute. I agree. The Dispute Notice only refers to the owners' requests set out in their September 21, 2021 letter. Though the CRTA and CRT rules permit applicants to request to amend the Dispute Notice to add new claims or remedies, the owners did not do so. I find the purpose of the Dispute Notice is to define the issues and provide notice to the respondent of the claims against it. CRT rule 1.19(3) says that the Dispute Notice will only be amended after the dispute has entered the CRT decision process where exceptional circumstances apply. I find no exceptional circumstances here that would

justify adding new claims or remedies at this late stage in the CRT process. So, I decline to address any requests for documents other than those listed in the owners' September 21, 2021 letter.

16. For the same reason, I decline to address the owners' request in their reply submissions for the strata to produce "a copy of the ledgers associated with legal fees, specifically line code 7830" since it was not in the owners' September 21, 2021 letter.

## **ISSUE**

17. The issue in this dispute is whether the CRT should order the strata to produce the documents requested by the owners in their September 21, 2021 letter that the strata has not already produced.

## **EVIDENCE AND ANALYSIS**

18. In a civil proceeding like this one, as the applicants, the owners 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.
19. SPA section 35(2) requires the strata to retain records. SPA section 36 says the strata must make requested section 35 records available to an owner on request. An owner may inspect the documents or receive copies.
20. In their September 21, 2021 letter, the owners requested the following documents from the strata:
  - a. All retainer agreements between the strata and its lawyers including any that had been terminated in the past 6 years.
  - b. The strata's insurance policies' declaration pages from the past 6 years.

- c. The insurance policies' wording relating to coverage for directors' and officers' (D&O) liability and legal expenses for 2020 to 2021 and 2021 to 2022.
  - d. Correspondence between the strata council, the strata management company, and BFL Canada (the strata's insurance broker), about replacement insurance coverage for 2021 to 2022 with a different insurer outside of the BFL strata protect package.
  - e. All claims submitted for legal fees and the resolution of those claims, whether under legal expenses or D&O liability.
  - f. All legal opinions obtained by the strata council or the strata about the Sharp or Wong legal matters, including opinions about the bylaw at issue in the Wong matter.
  - g. Bank statements showing any amounts paid on account of legal fees in 2019, 2020, and 2021 and statements showing the amounts the strata was required to pay by way of court-ordered costs in the Wong matter.
21. During the course of this CRT dispute, the strata has provided some of the requested documents to the owners. In their submissions, the owners say the following requests remain outstanding:
- a. Legal retainer agreements other than the May 2020 Citadel Law Corporation agreement already provided by the strata.
  - b. Further correspondence about the strata's replacement insurance coverage for 2021 to 2022 other than the June 11, 2021 email provided by the strata, or a declaration that there is nothing further.
  - c. A copy of all claims submitted for legal fees and the resolution of those claims, whether under legal expenses or D&O liability.
  - d. All legal opinions as mentioned above.
  - e. Indication of amounts paid for legal fees and court-ordered costs.

22. I address each of the owners' remaining requests in turn below.

### ***Legal retainer agreements***

23. Legal retainer agreements are written contracts. So, I find the owners are entitled to a copy of the strata's legal retainer agreements under SPA sections 35(2)(g) and 36. As noted, the strata provided the owners with a copy of its May 11, 2020 retainer agreement with Citadel Law Corporation. In their submissions, the owners ask for any other retainer agreements not provide by the strata. The strata says that the May 11, 2020 retainer agreement is the only retainer agreement its strata manager has been able to locate.

24. Though the strata does not say that no additional retainer agreements exist, the burden is on the owners to show that the documents they are requesting do exist. I find the evidence before me does not establish that there are any further retainer agreements from the last 6 years that the strata was party to. So, I decline to order the strata to produce any other retainer agreements.

### ***Correspondence about replacement coverage***

25. SPA section 35(2)(k) says the strata must retain copies of all correspondence sent or received by the strata and strata council. The strata does not deny that the owners are entitled to copies of its correspondence about replacement insurance coverage for 2021 to 2022. As noted, the strata has provided a June 11, 2021 email under this request. In its submissions, the strata says its strata manager located a July 14, 2021 to August 19, 2021 email chain which it has also produced to the owners. The strata says that its strata manager has advised that this is the only additional correspondence the strata manager has been able to find relating to this request.

26. The owners say that in the June 11, 2021 email that has been provided, BFL Canada sent a D&O insurance renewal application to the strata manager that needed to be completed and signed by a strata council member. The owners say that the completed application has not been produced but is part of the requested correspondence. The parties' submissions and evidence do not confirm whether this

completed application exists. However, it is undisputed that the strata did obtain D&O insurance for 2021 to 2022, so I find it more likely than not that the strata did complete this application.

27. In order for the CRT to order the strata to produce a record, the owners must first show that they are entitled to that record under the SPA. In *Kayne v. The Owners, Strata Plan LMS 2374*, 2007 BCSC 1610 and *The Owners, Strata Plan NWS 1018 v. Hamilton*, 2019 BCSC 863, the BC Supreme Court said that owners are not entitled to documents beyond those listed in SPA section 35. Section 35 does not include insurance applications.
28. However, in *Ottens et al v. The Owners, Strata Plan LMS 2785 et al*, 2019 BCCRT 730, the tribunal member considered a request by 2 owners for correspondence. The tribunal member found at paragraph 29 that a plain and ordinary reading of the word “correspondence” in SPA section 35 includes any attachments to that correspondence. Although it is not binding on me, I agree with the tribunal member’s finding in *Ottens*. So, to the extent the owners seek correspondence sent by the strata to BFL Canada attaching the completed insurance application, I find the strata must produce that correspondence and its attachments under SPA section 35(2)(k) if it exists.

### ***Legal fee claims***

29. As mentioned above, in their September 21, 2021 letter, the owners requested the strata provide a copy of all claims submitted for legal fees and the resolution of those claims, whether under legal expenses or D&O liability coverage.
30. The strata says it is unclear what documents the owners are referring to in this request. It further says that it has already advised the owners that its insurer responded to the Wong matter under the strata’s D&O coverage, not legal expenses coverage.



31. In their reply submissions, the owners say that since sending their September 21, 2021 letter, they have “refined” their request. They say what they seek now is all correspondence to or from the strata about the Wong CRT claim and judicial review, including anything about insurance coverage, legal fees, and any claim to privilege. I have already found above that this request is not a part of this dispute as it was not included in the September 21, 2021 letter.
32. In the owners’ December 17, 2021 letter where they set out this later request, they noted that their document requests from September 21, 2021 remained and that they were adding this request, among another, to the previously requested list of documents. Based on this letter, I find this later request was not a “refined” request but a new request altogether. I find the subject matter of the later request, though restricted to the Wong matter, is actually broader than the original request as the owners ask for all correspondence relating to the Wong matter, not just legal fees. For those reasons, I decline to order the strata to produce the documents the owners’ request in this later request.
33. I find the owners’ original request as set out in their September 21, 2021 is vague and does not appear to fall within the list of records set out in SPA section 35. So, based on the *Kayne* and *Hamilton* decisions mentioned above, I decline to order the strata to produce any of these documents.

### ***Legal opinions***

34. In its submissions, the strata asks the CRT to wait to decide whether to order the strata to produce the legal opinions sought by the owners. The strata says that there is an unrelated CRT decision, *Mitchinson v. The Owners, Strata Plan VR 1120*, 2020 BCCRT 1420, that considered the issue of solicitor-client privilege over legal opinions received by a strata corporation and is being judicially reviewed by the BC Supreme Court. The strata says that the Mitchinson judicial review decision will clarify the law about disclosure of legal opinions by a strata which will be helpful in this dispute. It says that the Mitchinson judicial review was set for hearing in late July. It is unclear from the strata’s submissions whether the hearing proceeded as scheduled and when the court will issue its decision.

35. The owners' submissions do not address the strata's request for the CRT to hold off on deciding whether to order the strata to produce the requested legal opinions pending the Mitchinson judicial review.
36. The CRT's mandate includes providing dispute resolution services in a speedy and economical manner. I find granting the strata's request would lead not only to delay but also would not be economical as it would require a separate decision on the legal opinion issue at a later date. For those reasons, I do not find it would be in the interests of justice to split this dispute and wait to decide whether to order the strata to produce the legal opinions. So, I decline the strata's request.
37. As mentioned above, in their September 21, 2021 letter, the owners requested that the strata produce a copy of all legal opinions obtained by the strata about the Sharp and Wong matters, including opinions about the bylaw that gave rise to the Wong matters. The strata does not deny that it received legal advice relating to the Sharp and Wong matters, some of which may be legal opinions. However, it says that it is not prepared to produce the legal opinions on the grounds of solicitor-client privilege.
38. Other than saying in its Dispute Response that the co-client with privilege over the documents includes the strata's insurer who has denied disclosure to any party, the strata has not explained its claim of solicitor client privilege any further.
39. Solicitor-client privilege covers communications between a lawyer and a client that are made in confidence, for the purpose of obtaining legal advice (see *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC)). Under SPA sections 35(2)(h) and 36 the strata must retain copies of any legal opinions it obtains and produce them if requested by an owner. SPA section 169(1)(b) says that an owner suing the strata does not have a right to information or documents relating to the suit, including legal opinions kept under section 35(2)(h). It is undisputed that the owners in this dispute were not parties in the Sharp or Wong matters.

40. In *Azura Management (Kelowna) Corp. v. Owners of the Strata Plan KAS2428*, 2009 BCSC 506, the court considered whether a strata lot owner was entitled to legal opinions about proceedings where the owner was not named as a party. The court did not permit the strata to maintain solicitor-client privilege over the dispute between the strata corporation and another owner. However, the court found that providing unrestricted access to privileged legal opinions was not appropriate because they might be provided to owners involved in the proceedings. The court determined that the proper approach was to share the opinions with the owner but restrict the owner from sharing them with others. I am bound by the court's decision in *Azura*, which I find applies to the withheld legal opinions in this dispute.
41. I find that the owners are entitled to a copy of all legal opinions the strata obtained about the Sharp and Wong matters under SPA sections 35(2)(h) and 36. So, I order the strata to provide these legal opinions to the owners. In keeping with *Azura*, I order the owners not to share or discuss with any other person or organization, any part of those legal opinions.

***Amounts paid for legal fees and court-ordered costs***

42. As mentioned above, in their September 21, 2021 letter, the owners requested copies of bank statements showing any amounts paid on account of legal fees in 2019, 2020, and 2021 and statements showing the amounts the strata was required to pay by way of court-ordered costs in the Wong matter.
43. It is undisputed that the strata has provided the owners with copies of its bank statements from 2019, 2020 and 2021. The owners say these bank statements do not identify amounts paid by the strata for legal fees. So, in their reply submissions, the owners make a further request for "a copy of the ledgers associated with legal fees, specifically line code 7830". I have already found above that this request for the ledger does not form a part of this dispute since it was not in the owners' September 21, 2021 letter.
44. The strata says that it has already told the owners that it negotiated a settlement about the court-ordered costs in the Wong matter and confirmed that its insurer paid

the costs. The strata says there is no statement showing the amount the strata was required to pay and the strata cannot be ordered to produce a document that does not exist. As noted, the onus is on the owners to prove that the records they seek exist. Here, I find the owners have failed to prove that any “statements” exist showing the amounts the strata was required to pay for court-ordered costs in the Wong matter. So, I decline this request.

## **CRT FEES AND EXPENSES**

45. 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. Since the owners were partially successful, I order the strata to reimburse them \$112.50 for half of their paid CRT fees. The owners did not claim any dispute-related expenses, so I order no reimbursement.
46. The strata claims \$750 in dispute-related expenses for a fee it says its strata manager intends to charge it for dealing with the owners’ requests. Under *Strata Property Regulation* (SPR) 4.2(1), the strata may charge a fee for copies of requested records that it provides under section 36, up to a maximum of 25 cents per page. However, prior non-binding CRT decisions, which I agree with, have found that owners are not obligated to pay any additional fees for copies, which I find would include charges for a strata manager’s time to compile requested documents (see *Deng v. The Owners, Strata Plan LMS 3904*, 2018 BCCRT 495 and *Drance v. The Owners, Strata Plan KAS 3625*, 2021 BCCRT 725). So, I find the strata is not entitled to reimbursement from the owners of any fee its strata manager may charge it for dealing with the owners’ requests.
47. The strata also asks for an order that each of the owners pay the strata 25 cents a page for the documents it has already produced. The owners do not object to paying for the copies but say that since the 297 pages of documents were sent electronically in a single email to all 3 owners, the total cost payable should be \$74.25, and not \$76.25 payable by each owner as the strata claims. Based on the wording of SPR

section 4.2(1) and since the documents were undisputedly provided in one email to all 3 owners, I agree with the owners. So, I find the owners must pay the strata \$74.25 in total for the 297 pages of documents it has already provided. I find it appropriate in the circumstances to deduct this amount from the \$112.50 I have ordered the strata to pay the owners for CRT fees. The net result is that the strata owes the owners \$38.25.

48. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against the owners.

## **ORDERS**

49. I order that within 21 days of this decision, the strata must:

- a. provide the owners with a copy of any correspondence sent by the strata attaching the completed D&O liability insurance renewal application for 2021 to 2022, including the attachments, if such correspondence exists,
- b. provide the owners with a copy of all legal opinions the strata or strata council obtained about the Sharp and Wong matters, including opinions about the bylaw at issue in the Wong matter, and
- c. pay the owners \$38.25 for CRT fees.

50. The owners must not share or discuss with any other person or organization, any part of those legal opinions I have ordered the strata to produce.

51. The owners are entitled to post-judgment interest under the *Court Order Interest Act*, as applicable.

52. The strata remains entitled to charge the owners 25 cents per page in accordance with SPR section 4.2(1) for the documents I have ordered it to produce in this decision.

53. 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.

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Nav Shukla, Tribunal Member