

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Macdonald v. The Owners, EPS 522*,
2024 BCCA 52

Date: 20240205
Docket: CA49283

Between:

David Macdonald

Appellant
(Petitioner)

And

The Owners, EPS 522 and Civil Resolution Tribunal

Respondents
(Respondents)

Before: The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Grauer
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated
July 17, 2023 (*Macdonald v. The Owners, EPS 522*, 2023 BCSC 1215,
Victoria Docket S213271).

Oral Reasons for Judgment

The Appellant, appearing in person:

D. Macdonald

Counsel for the Respondent,
The Owners, EPS 522:

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Counsel for the Respondent,
Civil Resolution Tribunal:

Z.N. Rahman
E. McCullum, Articled Student

Place and Date of Hearing:

Victoria, British Columbia
February 5, 2024

Place and Date of Judgment:

Victoria, British Columbia
February 5, 2024

Summary:

The appellant appeals the dismissal of his application for judicial review of a decision of the Civil Resolution Tribunal. The Tribunal dismissed the appellant’s numerous complaints against the respondent strata. Held: Appeal dismissed. The Tribunal’s decision is not patently unreasonable, and its process was not unfair.

HORSMAN J.A.:

Introduction

[1] The appellant, Mr. Macdonald, applied for judicial review of a decision of the Civil Resolution Tribunal (the “Tribunal”) dismissing his numerous complaints against the respondent strata corporation (the “Strata”). He appeals the dismissal of his petition.

The Tribunal decision

[2] The appellant is an owner in the Strata, which is located in Victoria, B.C. The Strata is governed by a strata council of elected members (the “Strata Council”).

[3] In December 2020, the appellant submitted a dispute application to the Tribunal, raising a number of complaints against the Strata. The complaints fell within the jurisdiction of the Tribunal over claims under the *Strata Property Act*, S.B.C. 1998, c. 43, pursuant to s. 121(1) of the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 (the “*CRT Act*”). Section 121(2) provides that for the purposes of the *CRT Act*, the Tribunal is considered to have specialized expertise in respect of these claims.

[4] On September 17, 2021, the Tribunal issued a decision dismissing all of the appellant’s complaints.

[5] The appellant filed a petition for judicial review challenging the Tribunal’s dismissal of seven of his complaints. The petition was dismissed: *Macdonald v. The Owners, EPS 522*, 2023 BCSC 1215 (“Petition Reasons”). The appellant now appeals the dismissal of the petition in relation to five of his complaints.

Standard of review on appeal

[6] An appellate court ordinarily owes no deference to the reviewing judge on a judicial review appeal. A reviewing judge's selection and application of the standard of review involve questions of law that are reviewable for correctness on appeal. In effect, the appellate court steps into the shoes of the reviewing judge and conducts a *de novo* review of the tribunal's decision: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at para. 10; *British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd.*, 2023 BCCA 168 at para. 55.

[7] Accordingly, the focus of this Court on the appeal is the Tribunal's decision, rather than the decision of the chambers judge.

Analysis

Standard of review applicable to the Tribunal's decision

[8] The parties agree that the standard of review set out in s. 56.7 of the *CRT Act* applies on the judicial review. Under this section, a finding of fact or law or exercise of discretion by the tribunal must not be interfered with unless it is patently unreasonable. Pursuant to s. 56.9 of the *CRT Act*, a discretionary decision is patently unreasonable if the discretion:

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors, or
- (d) fails to take statutory requirements into account.

[9] The standard of review of patent unreasonableness is highly deferential. A patently unreasonable decision is one that is "openly, clearly, evidently unreasonable" and "almost borders on the absurd": *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 28. To be considered patently unreasonable, the decision must be so flawed that no amount of curial deference can justify letting it stand: *Maung v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2023 BCCA 371 at para. 42.

[10] Where a petitioner alleges that a tribunal has breached common law principles of natural justice and procedural fairness, the questions raised must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly: *CRT Act*, s. 56.7(2)(b).

The issues on appeal

The substantive challenge

[11] On appeal, the appellant says the judge erred in dismissing his petition in respect of five of the complaints he made to the Tribunal. He says that the Tribunal’s decision was patently unreasonable in dismissing his complaints that:

- 1) a non-owner was permitted to sit on the Strata Council;
- 2) the Strata improperly altered a resolution after an owners’ vote;
- 3) the Strata improperly used Strata resources to affect Strata Council elections;
- 4) the Strata did not provide reasons for its Strata Council meeting decisions;
and
- 5) the Strata failed to properly consider the appellant’s complaints about barbeque smoke.

[12] I will address each of these issues in turn. As a general comment, I note that the appellant’s arguments on appeal consist largely of a re-argument of issues that are addressed in the Tribunal’s decision, rather than an explanation of why the Tribunal’s decision is said to be patently unreasonable. Again, it is not the role of this Court to re-weigh evidence, substitute its views for those of the Tribunal, or even to determine whether the Tribunal’s decision is correct. The only question on appeal as it relates to the appellant’s challenge to the substance of the Tribunal’s decision is whether the decision is “openly, clearly, evidently unreasonable” and “almost borders on the absurd”.

The procedural fairness challenge

[13] The appellant also advances three procedural fairness complaints:

- 1) the Strata included introductory comments in each of its arguments to the Tribunal that disparaged the appellant, and the decision failed to state that the Tribunal was not influenced by these comments;
- 2) the close correlation between the Strata’s arguments and the Tribunal’s findings suggests insufficient independence; and
- 3) the Tribunal failed to address his argument that the Strata’s credibility was undermined by its reversal of positions during the hearing.

[14] In addressing these issues, the question is whether, in all the circumstances, the Tribunal’s process was fair.

Is the Tribunal’s decision patently unreasonable?

Issue 1: Non-owner’s eligibility to sit on the Strata Council

[15] Before the Tribunal, the appellant challenged eligibility of an individual (referred to in the material as “T.O.”) to serve on the Strata Council. T.O. was not a strata owner but, rather, a representative of the Beacon Community Association, which has an operating agreement with BC Housing to manage units in the Strata that are owned by BC Housing. The appellant argued that, pursuant to s. 28(1)(b) of the *Strata Property Act* and s. 145 of the *Business Corporations Act*, S.B.C. 2002, c. 57, BC Housing must specifically assign owners’ rights for the corporate representative appointed by a governing group (such as its board of directors) to represent it.

[16] The Tribunal dismissed this claim on the basis that the issue of T.O.’s eligibility to serve on the Strata Council had been finally determined in a previous petition proceeding brought by the appellant: *Macdonald v. The Owners, EPS 522*, 2019 BCSC 876 [*Macdonald #1*]. As such, the appellant was barred by the doctrine of issue estoppel from relitigating the point. The appellant had taken the position that

the requested relief in *Macdonald #1* did not mention T.O., or his eligibility to sit on the Strata Council. Rather, in that proceeding the appellant had sought a general declaration “resolving whether an employee of the Beacon Community Association can represent BC Housing by proxy” at annual general meetings. The appellant argued that in light of the nature of the relief sought, it could not be said that *Macdonald #1* finally determined the issue of T.O.’s eligibility to sit on the Strata Council.

[17] However, the Tribunal interpreted *Macdonald #1* to include a determination of the question of T.O.’s eligibility to sit on the Strata Council. The Tribunal reasoned as follows:

16. At paragraph 5 of the BCSC’s decision, the judge says that Mr. Macdonald challenged the eligibility of certain council members to sit on the strata council in the BCSC. At paragraph 92, the judge clarified that Macdonald’s challenge specifically included TO’s membership. Based on this, I find that the issue of TO’s strata council membership was raised in the BCSC action. Further, at paragraph 96 of the decision, the judge found that TO was eligible to sit on the strata council because the strata lot owner’s corporate representative issued a proxy to TO. I find that this was a final decision on this issue. For the above reasons, I find that issue estoppel applies to the issue of TO’s eligibility for strata council membership and I find that this issue has already been decided.

[18] I see no grounds upon which it can be said that the Tribunal’s reasoning in this passage is patently unreasonable. It was open to the Tribunal to interpret *Macdonald #1* as finally deciding the question of T.O.’s eligibility to sit on the Strata Council. The passages from *Macdonald #1* cited by the Tribunal provide support for this interpretation. The Tribunal correctly set out the test for issue estoppel. Its reasoning is not openly, clearly, and evidently unreasonable.

[19] The Tribunal’s decision on this issue is not patently unreasonable.

Issue 2: Alteration of resolution after vote

[20] The appellant complained that the Strata altered the text of a bylaw after it was approved at a Special General Meeting. The Strata acknowledged that the meeting minutes had been changed after the vote, but demonstrated that they had

subsequently rectified the error in accordance with the *Strata Property Act* by repealing the incorrectly-filed bylaws and replacing them with the correct ones.

[21] The Tribunal found that the appellant’s complaint was moot in light of the fact that the Strata had taken steps to correct the error. The Tribunal further declined to grant the general declaration sought by the appellant to the effect that the Strata should not change resolutions after they are approved. The Tribunal observed that the Strata is already obliged to comply with the *Strata Property Act*, and, thus, it is unnecessary to direct the Strata to comply with an existing legal obligation.

[22] On appeal, the appellant says that the Tribunal was wrong to characterize the issue as moot because the wrongdoing of the Strata in amending the bylaw had not been addressed. There remained, he says, a live issue. The fact that the Strata had corrected the error is, the appellant says “incidental and [does] not give rise to mootness”: Appellant’s Factum at para. 102. Further, the appellant says, the Tribunal ought to have issued the declaration he sought because the requested relief was consistent with s. 123 of the *CRT Act*, which authorizes the Tribunal to order a party to do something or refrain from doing something.

[23] The Tribunal’s conclusion that the issue was moot was open to it on the record, and consistent with the principles underlying the doctrine of mootness. There was no apparent live issue in light of the steps the Strata had taken to correct the error that was the subject matter of the appellant’s complaint. More to the point, it was not openly, clearly, or evidently unreasonable for the Tribunal to conclude that there was no live issue remaining.

[24] As to the general declaration sought by the appellant, there is no question that the Tribunal had the jurisdiction to grant the remedy. However, its decision as to whether to issue the declaration was discretionary. The Tribunal’s reasons for declining to grant the relief sought are logical and principled. The Tribunal did not exercise its discretion arbitrarily, in bad faith, for an improper purpose, or on the basis of irrelevant considerations.

[25] The Tribunal's decision on this issue is not patently unreasonable.

Issue 3: Use of Strata resources in elections

[26] The appellant alleged that the Strata Council improperly used Strata resources, including the services of the Strata's property manager and legal counsel, to influence elections to the Strata Council and to get T.O. elected. The appellant relied on emails exchanged between the Strata's legal counsel, property manager, and T.O., arranging for proxies for T.O. and corporate representative certificates for the 2017 and 2019 annual general meetings. The appellant argued to the Tribunal that it should infer that the Strata was aligned with T.O. He argued that a strata council should remain neutral and uninvolved in strata council elections.

[27] The Tribunal reviewed this evidence, along with the relevant provisions of the *Strata Property Act*. The Tribunal noted that the appellant did not identify provisions of the *Strata Property Act* that the Strata was alleged to have breached. The Tribunal did not draw the inference urged by the appellant. Rather, the Tribunal found that the communications in issue related to efforts by the Strata Council to "confirm the owners' voting rights and proxies in preparation for annual general meetings": at para. 28. The Tribunal found that the Strata's conduct was not unreasonable or a breach of the *Strata Property Act* or the bylaws.

[28] On appeal, the appellant says that the Tribunal mischaracterized his claim. He says his evidence showed that the Strata's actions were directed at assisting one council member in particular, and the actions were inconsistent with the separation of rights and responsibilities as between owners and the strata corporation. The appellant invites this Court to draw inferences from the evidence that the Tribunal declined to draw.

[29] It was for the Tribunal to decide what inferences could be drawn from the evidence before it. It is not the role of this Court to re-weigh the evidence, or to substitute its views for that of the Tribunal. The appellant has not demonstrated any manifest flaw in the Tribunal's conclusion that would warrant the intervention of this Court in the face of the highly deferential standard of review that applies.

[30] The Tribunal's decision on this issue is not patently unreasonable.

Issue 4: Failure to provide reasons

[31] This complaint relates to the Strata Council's decision to refuse the appellant's request for an amendment of the strata bylaws to prohibit the use of barbeques on balconies. The request was discussed at a Strata Council meeting on November 3, 2020, which the appellant attended. The meeting minutes indicate that council members unanimously decided not to approve the bylaw amendments sought by the appellant. On November 5, 2020, the Strata sent the appellant a letter notifying him of this decision.

[32] The appellant argued to the Tribunal that this was insufficient because the Strata was obliged under the *Strata Property Act* to provide reasons for its decisions. This raised an issue of the proper interpretation of s. 34.1 of the *Strata Property Act*. Section 34.1 provides that if a strata council holds a hearing at the request of an owner who is seeking a decision of the council, "the council must give the applicant a written decision within one week after the hearing". The appellant relied on a previous decision of the Tribunal in *Doig et al. v. The Owners, Strata Plan VR 1712*, 2017 BCCRT 36, which held that a strata corporation owes a duty to provide reasons for their decisions.

[33] The Tribunal noted that *Doig* was non-binding, and declined to follow it. The Tribunal found there was no provision in the *Strata Property Act* or the bylaws requiring strata corporations to provide written reasons of their decision. While s. 34.1 of the *Strata Property Act* requires a strata to provide a "written decision", it does not require reasons. The Tribunal stated:

46. I find that the relevant standard applicable here is that the strata must act reasonably in fulfilling its duties under the SPA, including its duties under SPA section 34.1. I find that Mr. Macdonald has failed to prove that the strata has acted unreasonably by not providing reasons with its written council hearing decisions. So, I dismiss this claim.

[34] On appeal, the appellant argues that the Tribunal's decision that reasons are never required in any circumstances is untenable in light of case law, including *Doig*,

which has held that a strata council may be required to provide reasons in some circumstances. However, the Tribunal did not hold that a strata is never required to provide reasons for a decision in any context. Rather, the Tribunal held that a strata must act reasonably in fulfilling its duties under the *Strata Property Act*, including under s. 34.1. The Tribunal was not persuaded that the Strata had acted unreasonably in not providing reasons in this case.

[35] The Tribunal's reasoning on this issue is clear and logical. While the appellant takes issue with the Tribunal's conclusion, he has not demonstrated that the decision is openly, clearly or evidently unreasonable.

[36] The Tribunal's decision on this issue is not patently unreasonable.

Issue 5: The Strata's consideration of the appellant's complaints about barbeque smoke

[37] There is some confusion regarding the nature of the appellant's final complaint. It is clear that the appellant wished to have the Strata ban the use of barbeques on patios. As noted, the Strata Council decided unanimously not to approve an amendment to the bylaws to ban barbeques. The appellant alleged before the Tribunal that barbeque smoke was entering his strata unit, and affecting his health. The Tribunal interpreted the appellant's submission to be that smoke emission from barbeques violates the existing nuisance bylaw, and that he was requesting an order requiring the Strata to enforce the bylaws. The Strata's evidence was that it had considered the appellant's complaints, but could not address them in the absence of any indication of the source of the smoke. The Tribunal found that the appellant could not have had an objectively reasonable expectation that the Strata would enforce a nuisance bylaw when the source of the nuisance was unknown.

[38] The appellant argues that the Tribunal mischaracterized his claim. This submission was accepted by the chambers judge on the petition for judicial review: *Petition Reasons* at paras. 205–206. The chambers judge agreed with the appellant that his real complaint was that the Strata Council did not add the appellant's

request for a barbeque ban to the smoking ban the Council was already in the process of presenting to the owners. However, the chambers judge observed that the Strata Council did, in fact, consider the appellant's request for a barbeque ban, and it was rejected. Thus, she found that even if the Tribunal had properly conceived the appellant's claim, the outcome would be the same. The Tribunal has no authority to force the Strata Council to approve a bylaw amendment that was unanimously voted down by council members.

[39] The appellant says that the chambers judge, having found the Tribunal mischaracterized his claim, erred in failing to find the Tribunal's decision to be patently unreasonable. There is no merit to this argument. If the Tribunal did mischaracterize the appellant's claim, this is, perhaps, understandable. By the time of the hearing before the Tribunal, the Strata Council had decided unanimously against amending the strata bylaws to ban barbeques. As the appellant appears to have acknowledged before the chambers judge, he does not have the ability to force the Strata Council to adopt a barbeque ban when they have unanimously voted not to approve such a ban. Accordingly, the Tribunal interpreted the appellant's claim in a manner that was most favourable to him in giving rise to an available remedy; that is, as a complaint that existing bylaws were not being enforced.

[40] The Tribunal's decision is, therefore, logical and consistent with the evidence and submissions that were before the Tribunal. The decision is not openly, clearly or evidently unreasonable.

[41] The Tribunal's decision on the fifth issue is not patently unreasonable.

Was the Tribunal's process unfair?

Issues 1 and 2: Lack of impartiality

[42] The appellant's first two procedural fairness issues raise a complaint about the Tribunal's purported lack of independence. The appellant cites: (1) the Tribunal's failure to expressly disclaim reliance on the Strata's allegedly disparaging comments about the appellant, and (2) the correlation between the Strata's arguments and the

Tribunal's findings. The appellant says these circumstances create a concern about the Tribunal's lack of impartiality and independence from the Strata. In effect, the appellant alleges a reasonable apprehension of bias on the part of the Tribunal.

[43] The well-established test for a reasonable apprehension of bias is set out in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 [*Yukon*]:

[20] ... what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[44] In *Yukon*, the Supreme Court of Canada explained that bias is linked to the need for impartiality. The essence of impartiality is the requirement that the decision-maker approach the case with an open mind: *Yukon* at paras. 22–23. There is a strong presumption of impartiality that is not easily displaced. It must be shown that there is a “real likelihood or probability of bias”. There is a high burden of proving the claim on the party alleging bias: *Yukon* at paras. 25–26.

[45] The grounds that the appellant relies on to support his allegation of a lack of impartiality are not evidence of bias. It was not necessary for the Tribunal to explicitly state that it was not influenced by disparaging comments about him made by the Strata in order to demonstrate its impartiality. Rather, the Tribunal is presumed to be impartial. The Tribunal comprehensively addressed the appellant's many complaints, and provided thorough and transparent reasons for its decision. The fact that the Tribunal rejected the appellant's arguments, and accepted the arguments of the Strata, is not, on its own, evidence of bias: *Miller v. The Union of British Columbia Performers*, 2022 BCCA 358 at para. 43.

[46] The appellant has not displaced the presumption of impartiality in this case. An informed person, viewing the matter realistically and practically, would not think it more likely than not that the Tribunal would not decide his complaints fairly.

Issue 3: The Strata’s credibility

[47] Finally, the appellant says that the Tribunal did not address his argument that the Strata’s credibility was undermined by its change in position during the course of the hearing. While the appellant frames this as a breach of procedural fairness, he is effectively challenging the Tribunal’s substantive decision to dismiss his complaints. It was for the Tribunal to assess the credibility and reliability of the evidence tendered by both sides in deciding the appellant’s various complaints. For the reasons I have already stated, the appellant has not demonstrated that the impugned findings of the Tribunal are patently unreasonable.

Disposition

[48] I conclude that the appellant has not established that the Tribunal’s decision was patently unreasonable, or that its process was unfair. Accordingly, I would dismiss the appeal, with costs to the respondent Strata.

[49] The Tribunal appeared on the appeal. The Tribunal says no costs should be ordered for or against it. This is consistent with the usual no costs rule that applies to a tribunal on judicial review. Therefore, I would make no order as to costs in relation to the Tribunal.

[50] The Tribunal does seek an order amending the style of cause in this proceeding so that it refers to the “Civil Resolution Tribunal”, rather than the “B.C. Civil Resolution Tribunal”. I would order that amendment so as to ensure the correct description of the Tribunal.

[51] **STROMBERG-STEIN J.A.:** I agree.

[52] **GRAUER J.A.:** I agree.

[53] **STROMBERG-STEIN J.A.:** The appeal is dismissed. The respondent Strata is granted costs. No costs are awarded for or against the Tribunal. The style of cause is amended to the “Civil Resolution Tribunal”.

“The Honourable Madam Justice Horsman”