IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McKnight v. Bourque,*
2017 BCSC 2280

Date: 20171211
Docket: S172587
Registry: Victoria

2017 BCSC 2280 (CanLII)

Between:

Wendy McKnight and
The Owners, Strata Plan VIS 2963

Petitioners

And:

Joseph (Wayne) Bourque, Ann Lloyd,
and the Civil Resolution Tribunal

Respondents

Before: The Honourable Mr. Justice D.M. Masuhara

Application for Leave to Appeal: An order and decision of the Civil Resolution Tribunal, dated June 6, 2017 (*Bourque v. McKnight*, 2017 CRTBC 26, DO-ST-2016-00019).

Reasons for Judgment

Counsel for the Petitioner McKnight:	A.J. Broadley
Counsel for the Respondents Bourque and Lloyd:	J. Hanson
Counsel for the Civil Resolution Tribunal:	V. Ryan
Place and Date of Hearing:	Victoria, B.C. October 6, 2017
Place and Date of Judgment:	Victoria, B.C. December 11, 2017

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I. INTRODUCTION

[1] Ms. McKnight seeks leave to appeal a decision of the Civil Resolution Tribunal ("CRT"), *Bourque et al v. McKnight et al*, 2017 BCCRT 26, File: ST-2016-00019 (the "Decision"). The dispute relates to a duplex strata property; a one-storey oceanfront building in Sooke, B.C. Ms. McKnight lives on one side (the southern side), Lot A; and Mr. Bourque and Ms. Lloyd ("Bourque/Lloyd") live on the other side (the northern side), Lot B. There is equal unit entitlement between Lot A and Lot B.

[2] The CRT has made certain orders in relation to the maintenance and repair on the property which Ms. McKnight seeks to overturn. The Decision was made by a single member of the CRT (the "CRT member").

[3] The CRT is a recently created tribunal of the provincial government to provide for the resolution of small claims and strata property disputes under the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25, (the "Act").

[4] The application for leave to appeal is brought under s. 56.5 of the Act.

II. BACKGROUND

[5] Bourque/Lloyd purchased Lot B in 1994, shortly after the strata plan had been filed in 1993. In 2008, Ms. McKnight came to own Lot A. She was the fourth owner of the lot.

[6] The property and the management over its affairs were described in the Decision as follows:

> 13) To date, the strata has operated informally without complying with the SPA and the applicable bylaws. In particular, there have been no regular strata council meetings, no regular annual general meetings, no strata fees collected, no contingency reserve fund, and no strata bank account. The Lot B owners were unaware of the SPA until these disputes arose in 2010 and up to that point had amicably resolved any issues with the previous owners of Lot A informally. Such agreements included replacement of an electrical line pole on the common property and roof repairs in 2007.
>
> 14) The strata plan shows Lot B is to the north of Lot A, with waterfront yards to the west, side yards at the outer north and south boundary

> edges, and front or street-facing yards to the east. The parties agree that these "private yards" on the strata plan form part of the respective strata lots, as identified on the strata plan. There is an oceanfront seawall that runs the length of the entire strata property. Apart from certain parts of the duplex building itself, the only common property is a paved driveway to the building from the street to the east, which serves to divide the two strata lots, along with an area at the top of the driveway in front of both strata lots. There is no limited common property designated on the strata plan.
>
> 15) The strata has never adopted bylaws that replace or amend the Schedule of Standard Bylaws under the SPA. Thus, the Schedule of Standard Bylaws (bylaws) applies.

[7] In the Decision, the CRT member notes that the parties have maintained civility but that Bourque/Lloyd have tried without much success to communicate with Ms. McKnight in 2010-2011 and since 2015 to obtain cooperation in terms of upkeep to Lot A, the common property, and the seawall. The seawall runs along the western side of the property. The CRT member observes that for the most part Ms. McKnight has either ignored Bourque/Lloyd or claimed they are improperly harassing her without any legal basis, in that she says she has acted reasonably. The CRT member notes that Ms. McKnight also argues there is nothing the strata can compel her to do under the bylaws because any action requires both council members (i.e. Ms. McKnight one member and Bourque/Lloyd the other) to agree. The CRT member notes Ms. McKnight says that the owners are not permanently deadlocked, but also that mediation is unlikely to resolve their disputes.

[8] The CRT member further states that:

> 63) It is undisputed that since 2010 the applicants have spent thousands of dollars in professional and legal assistance in numerous unsuccessful attempts to resolve these disputes with the respondent owner. It is also undisputed that the respondent owner has refused to permit the strata to act because she has never agreed to the applicants' requests, which requests I find reflected a reasonable and fair reading of the bylaws. As noted above, repair and maintenance issues have been addressed *ad hoc*, and after the respondent owner became the Lot A owner in 2008 with much dispute. I find it is clear the informal arrangement has not worked well for these particular parties.

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[9] On July 14, 2016, Bourque/Lloyd filed a Notice of Dispute with the CRT seeking an order requiring:

(a) a professional inspection of Ms. McKnight's strata residence with a report to Bourque/Lloyd;

(b) revision of the strata bylaws to detail required maintenance and a dispute resolution process;

(c) stabilization of a seawall and the removal of weeds from Ms. McKnight's strata lot;

(d) removal of debris and Ms. McKnight 's personal belongings from her strata lot; and

(e) regular maintenance of grass, trees, and bushes on Ms. McKnight's strata lot.

[10] On July 28, 2016, Ms. McKnight submitted a Dispute Response opposing the relief sought by Bourque/Lloyd.

[11] The parties proceeded through the CRT's dispute resolution process, engaging in direct negotiation, facilitated mediation and, ultimately, to adjudication by a CRT member.

[12] The CRT member considered written argument and documentary evidence as submitted by the parties and compiled by a CRT facilitator.

[13] On June 6, 2017, the CRT member issued her final decision and resulting order, requiring, *inter alia,* that:

(a) Ms. McKnight pay for the repair of the seawall abutting her strata lot;

(b) Ms. McKnight remove Scotch Broom from her strata lot and not plant weeds without the consent of Bourque/Lloyd;

(c) the strata arrange for annual inspections of each strata residence and yard by a professional inspector who will set standards and make recommendations regarding the upkeep of the strata lots. Contractors must be retained to implement those recommendations within 30 days. Ms. McKnight must be consulted but her agreement is not required for the inspections or work to be performed;

(d) the strata become a member of the Condominium Home Owner's Association (CHOA), with the owners to share the membership cost equally; and

(e) the parties may refer disputes to the CHOA and its decisions will be binding on the parties.

[14] On June 7, 2017, Ms. McKnight's lawyer forwarded the June 6 CRT final decision to the CHOA for comment on their binding arbitration role.

[15] On June 8, 2017, the CRT member issued an amended decision and amended order that included removal of reference to the CHOA's binding decision making and instead stating the parties should follow the CHOA's opinion if one is provided.

[16] On July 7, 2017, Ms. McKnight filed the present application for leave to appeal pursuant to s. 56.5 of the Act. The provision reads as follows:

> **Appeal to Supreme Court**
>
> 56.5(1) Subject to this section, a party that is given notice of a final decision in a strata property claim may appeal to the Supreme Court on a question of law arising out of the decision.
>
> (2) A party may appeal to the Supreme Court only if
>
> (a) all parties consent, or
>
> (b) the court grants leave to appeal.
>
> (3) A party may not file an appeal under subsection (1) later than 28 days after the party is given notice of the final decision.
>
> (4) The court may grant leave to appeal under subsection (2)(b) if it determines that it is in the interests of justice and fairness to do so.
>
> (5) When deciding whether it is in the interests of justice and fairness to grant leave, the court may consider the following:
>
> (a) whether an issue raised by the claim or dispute that is the subject of the appeal is of such importance that it would benefit from being resolved by the Supreme Court to establish a precedent;
>
> (b) whether an issue raised by the claim or dispute relates to the constitution or the Human Rights Code;
>
> (c) the importance of the issue to the parties, or to a class of persons of which one of the parties is a member;
>
> (d) the principle of proportionality.
>
> (6) On appeal, the court may do one of the following:
>
> (a) confirm, vary or set aside the decision of the tribunal;
>
> (b) refer the claim back to the tribunal with the court's directions on the question of law that was the subject of the appeal.

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III. PRELIMINARY MATTER: THE FORM FOR THE APPLICATION FOR LEAVE TO APPEAL

[17] The form for an application for leave is an issue because the original form used was rejected by the Victoria Registry of this court. The form used was Form 73, Notice of Appeal if Directions Required. The applicant was advised that the proper form was a petition. I am not aware of any reason why a petition is the required form.

[18] Rule 18-3 provides:

> (1) If an appeal or an application in the nature of an appeal from a decision, direction or order of any person or body, including the Provincial Court, is authorized by an enactment to be made to the court or to a judge, the appeal is governed by this rule to the extent that this rule is not inconsistent with any procedure provided for in the enactment.
>
> (2) An appeal is to be started by filing in a registry a notice of appeal in Form 73 or 74.

[19] The Act does not provide for any inconsistent procedure with the aforementioned rules.

[20] My view is that Form 73 is the appropriate form.

[21] Form 73 should be entitled Notice of Appeal if Directions required and Application for Leave to Appeal. The required information for each is to be included. There should be specific language to permit a person to register their interest in an appeal (if granted) as opposed to necessarily being involved in a leave application.

[22] I will forward this aspect of these reasons to the Court Rules Committee to consider if any adjustment to the rules is required to address the leave requirement under the Act.

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IV. GROUNDS FOR APPEAL

[23] Ms. McKnight submits that the CRT member erred in law on the following grounds:

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(a) Contrary to the *Civil Resolution Tribunal Act* and the doctrine of *functus officio,* the CRT member made substantive amendments to a previously delivered and validated order;

(b) The CRT member exceeded her statutory authority and acted contrary to the doctrine of *delegatus non potest delegare* by delegating the CRT's dispute resolution authority to the CHOA and ordering that the parties be bound by the CHOA's decision making;

(c) The CRT member exceeded her statutory authority by ordering binding third party decision making by a professional inspector in the nature of, or exceeding, the powers of an administrator under the *Strata Property Act,* S.B.C 1998, c. 43, where the appointment of such an administrator is a power reserved exclusively for this Court;

(d) The CRT member misinterpreted the definition of "natural boundary" as it appears in the *Land Act,* R.S.B.C. 1996, c. 245, thereby incorrectly concluding that the seawall is within the bounds of the strata property and therefore the duty of the strata corporation to repair;

(e) The CRT member, while correctly stating the burden of proof, incorrectly applied it by shifting the burden to Ms. McKnight to prove the sufficiency of repairs and maintenance rather than requiring Bourque/Lloyd to prove the insufficiency;

(f) The CRT member erred in her finding of the evidentiary basis required for intervention in decisions of a strata corporation regarding repairs and maintenance;

(g) The CRT member incorrectly decided without legal foundation that Ms. McKnight must not allow various plant species on her strata lot, basing this decision on a finding that they blocked Bourque/Lloyd's view from their own strata lot and that one such species is considered invasive by the Invasive Species Council of BC;

(h) The CRT member erred in applying an incorrect definition of "nuisance" as it appears in the Schedule of Standard Bylaws to the *Strata Property Act* in finding that the aesthetic appearance of a property may constitute a nuisance;

(i) The CRT member misapplied the legal standard for unreasonable interference in the use or enjoyment of property in regard to nuisance by applying the incorrect standard of

"significant unfairness" as it applies to s. 164 of the *Strata Property Act,*

(j) The CRT member ordered the annual inspection of Ms. McKnight's residence without finding a factual foundation that could support such an order; and

(k) The CRT member failed to exercise its gatekeeper function in accepting and relying upon Bourque/Lloyds' realtor's evidence as expert opinion evidence, contrary to the *Civil Resolution Tribunal Rules*.

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[24] Ms. McKnight submits it would be in the interests of justice and fairness to grant leave as a determination of the extent of the CRT's jurisdiction in making orders is of such importance that precedent from this Court would be highly beneficial to guide future decisions of the CRT, the mandatory decision maker for all future strata litigation in British Columbia.

[25] She argues *inter alia* that the definition of "nuisance" as found by the CRT member fundamentally alters the common law definition and greatly extends the obligations of strata property owners. Moreover, it is submitted that the power granted to third parties to decide what expenses, without limit, must be incurred by Ms. McKnight in regard to the upkeep of her strata property is of crucial financial importance to her. A review by this court of the validity of this potentially unlimited expense is in keeping with the proportionality of these potential obligations.

V. FRAMEWORK FOR LEAVE TO APPEAL

[26] In this case, the requirements of notice of a final decision and an appeal being filed within 28 days have been met.

[27] Under s. 56.5, an appeal may be brought on a question of law. Questions of law "are questions about what the correct legal test is", as distinct from questions of fact ("what actually took place") or questions of mixed fact and law ("whether the facts satisfy the legal tests"): *Canada (Director of Investigation and Research) v. Southam Inc.,* [1997] 1 S.C.R. 748 at para. 35.

[28] It has been observed that may be difficult to neatly distinguish between questions of law and questions of mixed fact and law (*Southam* at para. 35). Given

that the statutory language here is less restrictive than others, allowing appeals "on a question of law" rather than "on a question of law alone", it seems appeals may also be brought "on questions that are predominantly, if not exclusively, issues of law": *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.,* 2013 BCCA 55 at para. 41.

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[29] Further, there must be a demonstration that leave is in the interests of justice and fairness. In considering this question, the court may consider the factors listed in s. 56.5(5) of the Act:

> a) whether an issue raised by the claim or dispute that is the subject of the appeal is of such importance that it would benefit from being resolved by the Supreme Court to establish a precedent;
>
> b) whether an issue raised by the claim or dispute relates to the constitution or the *Human Rights Code*;
>
> c) the importance of the issue to the parties, or to a class of persons of which one of the parties is a member;
>
> d) the principle of proportionality.

[30] Given that the statute says the court "may" consider these factors, it is my view that they are not exhaustive and the relevant factors may depend on the individual circumstances of a case. Guidance may also be found in *Queens Plate Development Ltd. v. Vancouver Assessor, Area 09* (1987), 16 B.C.L.R. (2d) 104 (C.A.) at para. 14. I note that Kent J., in the only case to date on a leave application, *The Owners, Strata Plan BCS 1721 v. Watson*, 2017 BCSC 763, held that the standard for leave to appeal from the CRT was "arguable merit": para. 6.

[31] The focus is on whether the issues raised are arguable or whether on the other hand they can be dismissed on a preliminary basis. I note the following comments of the Supreme Court of Canada to similar effect on the "arguable merit" standard found in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 74:

> [T]he appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit. The arguable merit standard is often used to assess, on a preliminary basis, the merits of an appeal at the

> leave stage (see for example *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262, at para. 5; and *R. v. Fedossenko*, 2013 ABCA 164, at para. 7). "Arguable merit" is a well-known phrase whose meaning has been expressed in a variety of ways: "a reasonable prospect of success" (*Quick Auto Lease*, at para. 5; and *Enns v. Hansey*, 2013 MBCA 23, at para. 2); "some hope of success" and "sufficient merit" (*R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174, at para. 11); and "credible argument" (*R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270, at para. 8). In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law.

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[32] As I have noted, the test requires that it is in the interests of justice and fairness to grant leave. This is a broader inquiry that ought to be undertaken in a holistic manner. A merely arguable case may be sufficient where other factors pull in favour of granting leave, whereas a case may need a very high level of merit where other factors are weak or absent. Obviously, though, a case with no merit should not be granted leave.

[33] In terms of the standard of review, there is disagreement about whether the standard of review ought to be considered in this analysis and, if so, what it is. While the standard of review is clearly relevant to an assessment of the merits (*Sattva* at para. 75), in my view, given the absence of case law on the issue and its importance to the substance of the appeal, it would be better that the standard of review be determined by the judge in the appeal.

[34] As a result, I will conduct the preliminary assessment of the merits of the appeal as though correctness were the standard of review, an approach favourable to the applicant. I recognize that this may tip the balance in favour of granting leave. However, given that the standard of review has not yet been decided, this is fairer.

VI. DISCUSSION OF THE GROUNDS FOR APPROVAL

[35] I turn now to address the grounds raised by Ms. McKnight in the order set out above.

A. Whether the Tribunal was *Functus*

[36] In my view, ground (a) raises a question of law. It concerns primarily an issue of statutory interpretation. Section 64 of the Act provides:

> **Authority to correct decisions and orders**
>
> 64 On its own initiative or on request by a party, the tribunal may amend a decision or order to correct any of the following:
>
> (a) a clerical or typographical error;
>
> (b) an accidental or inadvertent error, omission or other similar mistake;
>
> (c) an arithmetical error made in a computation.

[37] There is a real question as to whether the variation made by the CRT member was one authorized under s. 64.

[38] I also note that s. 48(4), which was not identified by either party, states:

> **Order giving effect to final decision**
>
> 48(4) The tribunal may make an order varying the terms and conditions of an order giving effect to a final decision, but may not vary the final decision.

[39] Section 48(4) appears to prevent the variation of a final decision. There is no question that the CRT member varied the final decision.

[40] The variation is clearly related to a key aspect of the appeal. This question appears to be one of specific importance to Ms. McKnight and of general importance given the CRT is still in its early stages and the scope of its authority is yet to be fully determined.

[41] Leave to appeal on this ground is granted.

B. Sub-Delegation

[42] Turning to ground (b), the issue is whether the CRT has the statutory authority to order the parties to submit to binding decision-making authority of another entity respecting matters that would otherwise be decided by the CRT. This is a question of law. The appropriateness of such an order in the particular circumstances of a case is a question of mixed fact and law, and moreover one

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which would be intimately bound up with the facts, but whether such an order can be made at all is not.

[43] Given that the CRT member's first order required the parties to submit to binding dispute resolution by CHOA respecting matters that might otherwise be decided by the CRT, it is at arguable that the rule against sub-delegation is engaged. I note also that no party has pointed me to a provision in the Act that might authorize sub-delegation. The question here is both of specific and general importance. In my view it would be in the interests of justice and fairness to grant leave to appeal on this issue.

[44] Leave to appeal on this ground is granted.

C. Appointing an Administrator

[45] Turning to ground (c). This issue is whether the CRT member ordered binding third party decision-making by an inspector and in effect appointed an administrator, thereby exceeding her authority. This is a question of law.

[46] Bourque/Lloyd submit that the CRT member did not grant a professional inspector binding decision-making powers which event remotely approach those of an administrator or, any decision-making powers at all. Rather, Bourque/Lloyd argue that the inspector is merely making recommendations. In my view Ms. McKnight's position has merit given that the recommendations are to be implemented. The issue is very important to the parties. There are significant, long-term obligations potentially occasioned by the orders around inspections and following through on recommendations. Proportionality also favours granting leave to appeal.

[47] Leave to appeal is granted.

D. Interpretation of "Natural Boundary"

[48] Turning to ground (d). The question is whether the CRT member erred in interpreting the definition of "natural boundary" found in the *Land Act* is a question of law. However, the conclusion that the seawall is within the bounds of the strata property is a determination of a question of mixed fact and law. It required the

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application of the definition of "natural boundary" to the facts. This is an exercise intimately tied to the facts, not law, and appears to be at the core of Ms. McKnight's argument. As a result, leave to appeal on this ground is denied.

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E. Burden of Proof

[49] Ground (e) raises the question of whether the CRT member incorrectly applied the burden of proof. Which party bears the burden of proof is a question of law, even if deciding the issue requires the court to look beyond what the CRT member stated and into its application.

[50] I do not find merit in this ground. There was evidence before the CRT member respecting repair and maintenance of the property. There is no suggestion in the CRT member's reasons that she decided against Ms. McKnight because she did not prove that her repairs were adequate.

[51] Leave to appeal on this ground is denied.

F. Error in Finding Evidentiary Basis

[52] It is trite law that a finding based on no evidence is an error of law. To the extent that Ms. McKnight alleges that the CRT member's finding that the strata's efforts were based on no evidence, this is a question of law. However, it has no merit here. The CRT member based her conclusion on the evidence of the maintenance and repairs conducted, including professional recommendations, and found that they were unreasonable. She found that Ms. McKnight had:

> (a) Refused to repair the portion of the sea wall located on Strata Lot A in accordance with the expert recommendations received in 2010;
>
> (b) Refused to address the moss accumulation on the roof over Strata Lot A;
>
> (c) Had dumped, stored, or deposited junk, yard waste, garbage and other belongings in her yard which she failed or refused to clean up;
>
> (d) Allowed weeds and invasive species to proliferate in the private yard of Strata Lot A and left the private yard in an unkempt stage for extended periods of time;
>
> (e) Failed or refused to maintain or use the air exchange units in her property;

(f) Failed or refused to co-operate with Bourque/Lloyd in addressing the above noted issues; and

(g) Expressly stated that mediation between the parties is unlikely to resolve their disputes.

[53] Ms. McKnight refers to *Weir v. Owners, Strata Plan NW17*, 2010 BCSC 784, but that case provides no support. The CRT member did not find that the actions taken by Ms. McKnight were as reasonable as other options, and then proceed to interfere to impose the best option. Further, the deference rationale referred to by the court at paras. 28-32 has less relevance where the strata's actions (or inaction) are attributable to the intransigence of a single owner at the expense of the only other owner.

[54] To the extent that this ground alleges that the CRT member erred by finding that the strata's efforts were unreasonable based on the evidence before her, this is not a question of law. Rather it is a question of mixed fact and law, one which is intimately bound up with the assessment of the facts and not law.

[55] Leave to appeal on this ground is denied.

G. Plant Species

[56] Ground (g) raises the question of whether there was a proper foundation for the prohibition against planting Scotch Broom on Lot A. This is not a question of law. Ms. McKnight takes issue with the facts and evidence relied on by the tribunal to justify this order without identifying any legal error.

[57] In any case there is no merit to this argument. Ms. McKnight refers to a case on nuisance, but whether the CRT member applied the incorrect test for finding a nuisance is a separate issue. The CRT member did not find that certain plant species were a nuisance but rather addressed them as part of the analysis of Ms. McKnight's failure to repair and maintain the property. Further, the CRT member based her order not just on the obstruction of the view and the evidence respecting invasive species, but also on her finding that it "may well have aggravated" the erosion of the seawall: para. 95.

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[58] Leave to appeal on this ground is denied.

H. Test for Nuisance

[59] Whether the CRT member applied an incorrect definition of "nuisance" is a question of law.

[60] In my view there is arguable merit to this ground. While administrative tribunals certainly may be entitled to adapt or even ignore common law rules when interpreting similar statutory terms, and the CRT member provided reasons for her departure, it is at least arguable that it is an error to include aesthetic appearance in the definition of nuisance. Further, a precedent from this court on this issue is potentially of considerable significance for strata property owners in general.

[61] Leave to appeal on this issue is granted.

I. Unreasonable Interference in Use or Enjoyment

[62] Whether the CRT member applied the wrong legal standard for unreasonable interference in the use or enjoyment of property by applying the test from s. 164 of the *Strata Property Act* is a question of law.

[63] However, there is no merit to this argument. Through the CRT member refers to the test from an unrelated section, it is clear that the CRT member did not apply the test from s. 164 to determine whether there was unreasonable interference. It was expressed in addition to the findings of nuisance and unreasonable interference:

> I find the laws of private nuisance are not necessarily determinative here. Rather, the SPA governs this dispute and bylaw 3 clearly prohibits a party from causing a nuisance or interfering with another owner's right to use and enjoy their property. Further, the respondent owner's conduct in leaving the property in an unsightly state was significantly unfair, because it was burdensome, lacked in fair dealing, and was more than a mere prejudice or trifling unfairness (*Reid v. The Owners, Strata Plan LMS 2503*, 2001 BCSC 1578). The respondent owner's conduct meets that threshold. Aesthetic appearance, including the unreasonable obstruction of a view, may well be relevant and in this case I find it is, particularly given the photos and the realtor's opinion. That the District of Sooke's bylaw exists supports this conclusion as does the applicants' inability to sell their property. I also accept

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the applicants' undisputed evidence about the social standard in the neighbourhood.

[Emphasis added.]

[64] Leave to appeal is denied.

J. No Factual Foundation for Inspections

[65] To the extent that this concerns a merely inadequate factual foundation, it does not raise a question of law. To the extent that it concerns a complete absence of factual findings that could support the annual inspection order, it has no merit. Although all of the CRT member's factual findings concerning the parties' history and relationship are relevant, some of the tribunal's most directly relevant findings are set out at paras. 100-101:

> 100) The roof is common property, which the strata must repair and maintain along with exterior windows and skylights. The strata is also responsible for the repair of the interior wall dividing Lot A and Lot B, as per bylaw 8(d)(i) and section 69 of the SPA. Section 149(1)(d) of the SPA also requires the strata to insure fixtures, although I recognize that responsibility to insure does not necessarily mean responsibility to repair. The SPA Regulation defines fixtures to include things attached to a building, including plumbing fixtures. I find the air exchange systems are fixtures, even though each strata lot may have its own. As noted above, the systems are not common property. Based on the CMHC documentation before me, an air exchange system is an important tool to control moisture, and there is no evidence before me that a dehumidifier is adequate, other than the respondent owner's preference and statement she has no moisture problems. Overall, I find that it may be that the air exchange units in both Lot A and Lot B should be maintained and used by the respective strata lot owners, in order to comply with bylaw 2(1). I find whether that is so is best left to an appropriately qualified inspector to decide.
>
> 101) Further, it is not disputed that where there has been a leak moisture can collect and over time mould can grow along with wood rot and structural decay. While I accept that the leaking skylight over Lot A was replaced in Lot A in March 2015, it is unknown whether there may be other perhaps unknown moisture problems in either strata lot that may fall within common property. Bylaw 7 expressly contemplates inspections. An annual inspection by a qualified home inspection professional is a relatively small interference that I consider justified to protect the combined interests of both strata lot owners. In fairness, both strata lots should be inspected as the same common property considerations apply to both.

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[66] The CRT member clearly found a number of facts that would justify inspections.

[67] Leave to appeal is denied.

K. Improper Opinion Evidence

[68] Ms. McKnight argues that the CRT member accepted opinion evidence from Bourque/Lloyd's realtor in contravention of the CRT Rules.

[69] The CRT Rules provide:

> 113) Expert opinion evidence will only be accepted from a person the tribunal decides is qualified by education, training, or experience to give that opinion.
>
> 114) An expert must state his or her qualifications in any written expert opinion evidence or other reports.
>
> 115) The tribunal can
>
> a) direct a party to obtain expert opinion evidence, or
>
> b) direct multiple parties to retain a joint expert to produce expert opinion evidence.
>
> 116) If the tribunal is directing a party to obtain expert opinion evidence, it can
>
> a) decide who must pay for it, and
>
> b) include the cost of that expert opinion evidence as an expense a party is ordered to pay to another party at the end of the tribunal decision process.
>
> 117) An expert giving evidence to the tribunal is there to assist the tribunal and not to advocate for any side or party in a dispute.
>
> 118) A party providing written expert opinion evidence to the tribunal must provide a copy of it to every other party by the deadline shown in the Tribunal Decision Plan, together with the expert's invoice and any correspondence with that expert relating to the requested opinion.

[70] Bourque/Lloyd argue that the realtor's evidence was not provided or used as expert opinion evidence but rather solely concerned the realtor's own observations and experiences. In the alternative, they submit that it does not appear that the CRT member's decision or order turned on any opinion evidence by the realtor.

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[71] The CRT member summarized the realtor's evidence as follows:

> 54) On May 3, 2015 the applicants obtained a market analysis from a realtor. There is no contrary realtor opinion before me. The applicants' realtor wrote that the sale of Lot B was hampered by the lack of maintenance on Lot A. In particular, the realtor identified the "overgrown gardens, debris build-up, moss on the roof, and overgrown weeds" on Lot A would be "hard to ignore for any potential buyer" coming to look at the Lot B property. The realtor wrote that these matters would greatly affect the buyers even wanting to put in an offer. During the summer of 2015 when Lot B was listed for sale, the applicants say there were only 4 showings and 3 "drive-bys" from potential purchasers. The realtor further advised she had spoken with the potential buyers' realtors who advised that the buyers were "put off" by the condition of Lot A as being "very unkempt" with a lack of roof maintenance, 'garbage and refuse … all over the lawn" and that no buyer would want "to move next to that". The realtor stated that the 3 drive-bys did not make appointments to view the inside of Lot B because they were not prepared to live next to someone who had no pride of ownership. The realtor stated she believed the state of Lot A was a contributing factor as to why Lot B did not sell during its listing. Because Lot B could not be sold due to these issues, the applicant Mr. Bourque assumed half ownership from his brother who needed to move away. Land Title Office documents indicate the property value for Lot B was around $285,000.

[72] It was further discussed at para. 103:

> 103) I turn then to the issue of unsightly conditions, which the home inspector will also address. The applicants argue the unkempt yards on Lot A and common property (the driveway top area in front of the residences) are a nuisance and interfere with their rights to use and enjoy the property. I recognize that the line where property changes from "sightly" to "unsightly" is not necessarily a clear one. However, based on the historical photos between 2010 and at least December 2016, and the realtor's opinion, I find the evidence is clear the property was unsightly and I agree with the applicants' submission here.

[73] Whether the CRT member was admitted evidence in contravention of its Rules is a question of law.

[74] There is arguable merit to this ground. The realtor's evidence appears to be mainly opinion evidence rather than evidence about experiences and observations. It is also arguable that it ought not to have been accepted as such except in accordance with the CRT Rules. While the admission of evidence is discretionary,

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particularly where, as here, the tribunal may accept evidence not admissible in a court (Act, s. 42(1)), s. 38 expressly makes the tribunal's discretion regarding procedure subject to the Rules.

[75] In these circumstances, I would grant leave to appeal on this ground. I recognize the potentially binding nature of the Rules respecting the admission of expert evidence may establish an important precedent for practice before the tribunal.

[76] Leave to appeal on this ground is granted.

VII. CONCLUSION

[77] While I share the concern over the duplex deadlock between the parties in managing the affairs of the property, there is arguable merit to certain grounds raised.

[78] Leave to appeal is granted on the grounds that I have approved above.

"The Honourable Mr. Justice Masuhara"

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