IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan BCS 1721 v. Watson,* 2018 BCSC 164

Date: 20180202
Docket: S172144
Registry: Vancouver

As to an appeal of: Cody Watson v. The Owners, Strata Plan BCS 1721, 2017 CRTBC 10

Between:

The Owners, Strata Plan BCS 1721

Appellant

And

Cody Watson and Civil Resolution Tribunal

Respondent

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for Appellant:	P. Dougan
Counsel for the Respondent, Cody Watson:	D. Wu
Counsel for the Respondent, Civil Resolution Tribunal:	V. Ryan
Place and Date of Hearing:	Vancouver, B.C. August 1, 2017
Place and Date of Judgment:	Vancouver, B.C. February 2, 2018

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INTRODUCTION

[1] The appellant, the Owners, Strata Plan BCS 1721 (the "Strata Corporation"), appeals from the decision of the Civil Resolution Tribunal (the "CRT") issued on March 1, 2017, determining that certain $100 moving fees charged by the Strata Corporation pursuant to its Bylaws 36 and 4(8) were not reasonable and were significantly unfair. The Strata Corporation seeks an order setting aside the decision of the CRT.

[2] The respondent, Cody Watson, is a tenant who occupies a rented unit in the Strata Corporation with two roommates. Mr. Watson brought the claim before the CRT to dispute two $100 moving fees charged by the Strata Corporation for the move out of his former roommate in 2013 and the move in of his girlfriend in 2016. They each used the elevator to move their personal effects, but did not move any furniture in or out of the unit.

[3] Mr. Watson's landlord, the owner of the strata unit, paid the moving fees charged by the appellant. Later, Mr. Watson repaid the landlord for the moving fees.

[4] The CRT held that the $100 moving fee which the Strata Corporation's Bylaw 4(8) makes applicable "to any person moving in or out of a strata unit regardless of whether any furniture is moved", was not reasonable when the actual cost of moves without furniture was approximately $25. On that basis, the CRT concluded that Bylaw 4(8) contravened s. 6.9 of the *Strata Property Regulation*, B.C. Reg. 43/2000, which permits a strata corporation to impose user fees for the use of common property if the amount of the fee is reasonable and the fee is set out in a bylaw.

[5] The CRT also found that the two $100 moving fees charged in this case were significantly unfair, as were the Strata Corporation's actions in waiting two and a half years to levy the fees, and then cancelling the respondent's current roommate's fob access without notice in order to obtain payment. The CRT ordered the Strata Corporation to repay Mr. Watson's landlord the sum of $200, together with interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, and to notify

Mr. Watson when the payment was made so that he could request reimbursement of the moving fees from his landlord.

[6] By reasons for judgment indexed as *The Owners, Strata Plan BCS 1721 v. Watson*, 2017 BCSC 763, the Honourable Mr. Justice Kent granted the application of the Strata Corporation, brought pursuant to s. 56.5 of the *Civil Resolution Tribunal Act*, SBC 2012, c. 25 ("*CRTA*") for leave to appeal to the Supreme Court on the following questions of law:

> i. did the CRT fail to address the question of Mr. Watson's standing to claim the relief sought?
>
> ii. did the CRT err in law in its application of the test for reasonableness of the bylaw?
>
> iii. does the CRT have jurisdiction to remedy a significantly unfair act or decision of the Strata Corporation and, if so, did the CRT err in law in its application of the test for significant unfairness?

[7] In order to address these issues, it will also be necessary to determine the standard of review that applies on this statutory appeal from the decision of the CRT.

THE LEGISLATIVE FRAMEWORK

[8] Before turning to the standard of review, I will begin by setting out the legislative framework concerning the CRT's role, process and jurisdiction relating to strata property disputes.

[9] The CRT is an online tribunal with the mandate, under s. 2 of the *CRTA*, to provide dispute resolution services in relation to matters that are within its authority in a manner that is accessible, speedy, economical, informal and flexible; uses electronic communication tools to facilitate dispute resolution; and encourages the resolution of disputes by agreement between the parties.

[10] Under s. 3.1 of the *CRTA* and the *Civil Resolution Tribunal Small Claim Regulation*, B.C. Reg. 111/2017, the CRT has jurisdiction to resolve small claims disputes in the amount of $5,000 or less.

[11] Section 3.6(1) confers jurisdiction on the CRT to resolve strata property claims concerning one or more of the following:

> (a) the interpretation or application of the *Strata Property Act* or a regulation, bylaw or rule under that Act;
>
> (b) the common property or common assets of the strata corporation;
>
> (c) the use or enjoyment of a strata lot;
>
> (d) money owing, including money owing as a fine, under the *Strata Property Act* or a regulation, bylaw or rule under that Act;
>
> (e) an action or threatened action by the strata corporation, including the council, in relation to an owner or tenant;
>
> (f) a decision of the strata corporation, including the council, in relation to an owner or tenant;
>
> (g) the exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

[12] Section 3.6(2) provides the CRT does not have jurisdiction in relation to various claims that may be dealt with by the Supreme Court under specified provisions of the *Strata Property Act*, S.B.C. 1998, c. 43 ("*SPA*"), including:

> . . .
>
> (e) section 90 *[removal of liens and other charges]*;
>
> (f) section 117 *[forced sale of owner's strata lot to collect money owing]*;
>
> (g) section 160 *[court orders respecting rebuilding damaged property]*;
>
> . . .

[13] The tribunal does not have jurisdiction to decided constitutional questions and has limited jurisdiction concerning the application of the *Human Rights Code*, R.S.B.C. 1996, c. 210: *CRTA* s. 3.8.

[14] By s. 3.5, words and expressions in the *CRTA* concerning strata property claims have the same meaning as in the *SPA* and its Regulations.

[15] Under s. 1 of the *SPA*, "tenant" is defined as:

> a person who rents all or part of a strata lot, and includes a subtenant but does not include a leasehold tenant in a leasehold strata plan as defined in section 199 or a tenant for life under a registered life estate. . .

[16] Section 189.1 of the *SPA* provides that a strata corporation, owner or tenant may make a request for dispute resolution under s. 4 of the *CRTA*:

> Strata corporations, owners and tenants initiating tribunal proceeding
>
> 189.1(1) Subject to subsection (2), a strata corporation, owner or tenant may make a request under section 4 of the *Civil Resolution Tribunal Act* asking the civil resolution tribunal to resolve a dispute concerning any strata property matter over which the civil resolution tribunal has jurisdiction.
>
> (2) An owner or tenant may not make a request referred to in subsection (1) unless
>
> (a) the owner or tenant requested a council hearing under section 34.1, or
>
> (b) the civil resolution tribunal, on request by the strata corporation, owner or tenant, directs that the requirements of paragraph (a) of this subsection do not apply.

[17] CRT proceedings have both a case management phase, where the tribunal seeks to facilitate resolution by agreement between the parties, and a tribunal hearing phase, where the dispute is heard and the CRT renders a final decision if the dispute is not resolved at the case management phase: *CRTA*, s. 17.

[18] Here, the parties were unable to resolve their dispute through a facilitated mediation at the case management phase. Accordingly, the matter was assigned to a CRT member for adjudication.

[19] Under the CRT's adjudicative process, the parties each made submissions incorporated in a Decision Plan, which set out the particulars of the dispute, the evidence, a statement of facts and the arguments of the parties. The adjudicator then reviewed the Decision Plan and rendered her decision on March 1, 2017.

[20] The CRT has broad discretion over its own procedure and may conduct a hearing in writing, by telephone, video conferencing or email. The CRT will only hold

an in-person hearing where it considers that the nature of the dispute or extraordinary circumstances make an in-person hearing necessary in the interests of justice: *CRTA*, s. 39(1) and (3).

[21] The CRT may receive and admit any evidence that it considers necessary and relevant, and is not bound by the rules of evidence: *CRTA*, s. 42.

[22] Under s. 46, the CRT must provide reasons for its decision, and subject to the *CRTA*, may make any order it considers necessary to give effect to the decision.

[23] Section 48.1 sets out the powers of the CRT to make orders regarding strata property claims. At the time the CRT rendered its decision, s. 48.1 provided:

> Orders available in strata property claims
>
> 48.1(1) In resolving a strata property claim, the tribunal may make one or more of the following orders:
>
> (a) an order requiring a party to do something;
>
> (b) an order requiring a party to refrain from doing something;
>
> (c) an order requiring a party to pay money.
>
> (2) In resolving a strata property claim brought to the tribunal under section 3.6 (2) (e) to (g) *[strata property claims within jurisdiction of tribunal]*, the tribunal may make an order directed at the strata corporation, the council or a person who holds 50% or more of the votes, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights.
>
> (3) Despite subsections (1) and (2), the tribunal may not make
>
> (a) an order requiring the sale or other disposition of a strata lot, or
>
> (b) any other order prescribed by regulation.

[24] By s. 8 of Bill 9 - 2017, the *Miscellaneous Statutes (Minor Corrections) Amendment Act*, 2017, the Legislature has amended section 48.1(2) of the *CRTA* by striking out “section 3.6 (2) (e) to (g)” and substituting “section 3.6 (1) (e) to (g)”. That amendment came into effect by Royal Assent on November 2, 2017, subsequent to the hearing of this appeal.

[25] Because the question of whether the imposition of the $100 moving fees constituted a significantly unfair action or decision of the Strata Corporation is in issue on this appeal, I also set out s. 164 of the *SPA*. As we shall see, that section, which permits the Supreme Court to make orders to prevent or remedy significantly unfair actions or decisions of a strata corporation, received judicial consideration in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, where the Court stated an objective test for finding significant unfairness. Section 164 of the *SPA* provides:

> Preventing or remedying unfair acts
>
> 164(1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
>
> (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
>
> (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.
>
> (2) For the purposes of subsection (1), the court may
>
> (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
>
> (b) vary a transaction or resolution, and
>
> (c) regulate the conduct of the strata corporation's future affairs.

[26] Under s. 56.5 of the *CRTA*, a party may appeal a final decision of the CRT on a strata property claim to the Supreme Court on a question of law only if all parties consent or the court grants leave to appeal. Section 56.5 provides:

> 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.

[27] Here, on the appellant's leave application, Justice Kent was persuaded that resolution by the Supreme Court of the issues concerning the CRT's application of the tests for reasonableness of the Bylaw and the determination of significant unfairness would establish a potentially helpful precedent for similar cases before the CRT: *The Owners, Strata Plan BCS 1721* at paras. 30-35.

[28] The court granted leave on terms that no new evidence might be adduced on appeal without leave of the court first being granted.

STANDARD OF REVIEW

[29] The appellant submits that in the absence of a strong privative clause, the standard of review on an appeal on a question of law under s. 56.5 of the *CRTA* is correctness.

[30] For their part, the respondent and the CRT contend that the appropriate standard of review is reasonableness.

[31] The *CRTA* does not incorporate the statutory standards of review legislated under ss. 58 and 59 of the *Administrative Tribunal Act*, SBC 2004, c. 45. Accordingly, the common law regarding the standard of review applies.

The Presumptive Standard of Reasonableness

[32] Here, where there is no established body of jurisprudence settling the applicable standard of review, I must begin by considering whether the issues in dispute involve the interpretation by the CRT of its own statute, or statutes closely connected to its function. If so, the presumptive standard of review is reasonableness: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para. 22.

[33] As Justice Karakatsanis, writing for the majority, explained in *Edmonton (City)* at para. 22:

> 22. . . This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.

[34] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 58 to 61, the court identified four categories of issues to which the correctness standard applies, and which rebut the presumption of reasonableness. Those categories are constitutional questions regarding the division of powers; issues “both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise”; true questions of jurisdiction; and issues concerning the jurisdictional lines between two or more competing specialized tribunals. None of those categories apply to the case at bar.

[35] In *Edmonton (City)*, the Court, at para. 28 declined to recognize issues arising on statutory appeals as a new category to which the correctness standard would

apply. At para. 30, the Court affirmed that the same principles of administrative law apply whether the review of a decision of an administrative tribunal is conducted on an application for judicial review or by way of a statutory appeal.

[36] The issues of the respondent's standing to pursue his claim before the CRT; whether the CRT erred its application of the test for reasonable moving fees levied under s. 6.9(2) of the *Strata Property Regulation;* and whether the CRT had jurisdiction under s. 48.1(2) to make an order remedying a significantly unfair action or decision; and if so, whether the CRT erred in applying the legal test for significant unfairness all involve the CRT's interpretation of its own statute and the *SPA*.

[37] However, "[t]he presumption of reasonableness may be rebutted if the context indicates the legislature intended the standard of review to be correctness": *Edmonton (City)* at para. 32.

Contextual Analysis

[38] A contextual analysis determines the legislature's intent by consideration of relevant factors including the presence or absence of a privative clause; the purpose of the tribunal as determined by interpretation of its enabling legislation; the nature of the question at issue; and the expertise of the tribunal: *Dunsmuir* at para. 64.

[39] Here, as we have seen, under s. 3.6 (1) (a), the CRT has jurisdiction over the interpretation or application of the *SPA* or a regulation, bylaw or rule under that Act.

[40] Under s. 11(1) of the *CRTA*, the CRT may refuse to resolve a claim within its jurisdiction if it considers that certain factors apply, including the following:

> 11 (1) The tribunal may refuse to resolve a claim within its jurisdiction if it considers that any of the following apply:
>
> . . .
>
> (c) issues in the claim or dispute are too complex for the dispute resolution process of the tribunal or otherwise impractical for the tribunal to case manage or resolve;
>
> (d) resolving the claim or dispute may involve a constitutional question or the application of the Human Rights Code;

> . . .
>
> (f) in the case of a strata property claim, the tribunal is satisfied that if an application under section 12.3 [Supreme Court may order that tribunal not resolve strata property claim] were brought, the Supreme Court would grant an order that the tribunal not resolve the claim or dispute.

[41] Section 12.3(1) provides that the Supreme Court may order that the CRT not resolve a strata property claim if the CRT does not have jurisdiction to resolve the claim, or it is not in the interests of justice and fairness for the CRT to resolve the claim. Under s. 12.3(2) the factors the court may consider when deciding whether it is in the interests of justice and fairness for the CRT to resolve a claim or dispute are:

> 12.3 (2) When deciding whether it is in the interests of justice and fairness for the tribunal to resolve a claim or dispute, the Supreme Court may consider the following:
>
> (a) whether the use of electronic tools in the process of the tribunal would be unfair to one or more parties in a way that cannot be accommodated by the tribunal;
>
> (b) whether an issue raised by the claim or dispute is of such importance that the claim or dispute would benefit from being resolved by the Supreme Court to establish a precedent;
>
> (c) whether an issue raised by the claim or dispute relates to the constitution or the Human Rights Code;
>
> (d) whether an issue raised by the claim or dispute is sufficiently complex to benefit from being resolved by the Supreme Court;
>
> (e) whether all of the parties to the claim or dispute agree that the claim or dispute should be resolved by the Supreme Court;
>
> (f) whether the claim or dispute should be heard together with a claim or dispute currently before the Supreme Court.

[42] The CRT is the master of its own processes, which are designed to be flexible, inexpensive, informal and speedy. Unless otherwise provided, parties are to represent themselves in the proceedings: *CRTA, s.* 20(1).

Contextual Factors

a) Presence or absence of a privative cause

[43] While the *CRTA* contains no privative clause, the statute addresses the duty of the CRT to make a "final decision", makes provision for giving effect to final decisions, and provides for appeals, limited to questions of law only, from final decisions.

[44] Under s. 46(1) the tribunal must, within the applicable time period established by the rules, give its final decision, provide reasons for the decision, and make any order that it considers is required to give effect to the decision. Section 48, in addition to authorizing the CRT to make an order giving effect to a final decision on the terms and conditions it considers appropriate, also provides the CRT may vary the terms and conditions of an order giving effect to a final decision.

[45] For appeals on questions of law, the Supreme Court may either confirm, vary, or set aside the decision of the CRT, or "refer the claim back to the tribunal with the court's directions on the question of law that was the subject of the appeal": *CRTA, s.* 56.5(6)(b). One factor the court may consider in deciding whether to grant leave is whether the issue raised by the claim is of such importance that it would benefit from being resolved by the Supreme Court to establish a precedent, *CRTA*, s. 56.5(5)(a).

[46] Those provisions, and the absence of a strong privative clause, suggest the legislature intended that the Supreme Court would provide guidance to the CRT on questions of law, including the correct interpretation of its home statute and the *SPA*.

[47] On the other side of the ledger, under s. 189.6 of the *SPA*, if the Supreme Court determines that all matters in a proceeding before it are within the jurisdiction of the CRT, the court must dismiss the proceeding unless it determines that it is not in the interests of justice and fairness for the CRT to resolve the dispute. Section 189.6 requires the court to defer the CRT where all matters in a proceeding before it are within the jurisdiction of that tribunal, unless the court determines it is

not in the interests of justice and fairness for the CRT to resolve the dispute upon consideration of the following factors:

> (a) whether the use of electronic tools in the process of the civil resolution tribunal would be unfair to one or more parties in a way that cannot be accommodated by the civil resolution tribunal;
>
> (b) whether an issue raised by the dispute is of such public interest or importance that the dispute would benefit from being resolved by the Supreme Court to establish a precedent;
>
> (c) whether an issue raised by the dispute relates to the constitution or the Human Rights Code;
>
> (d) whether an issue raised by the dispute is sufficiently complex to benefit from being resolved by the Supreme Court;
>
> (e) whether all of the parties to the dispute agree that the dispute should be resolved by the Supreme Court;
>
> (f) whether the claim should be heard together with a claim currently before the Supreme Court.

[48] Absent those factors, s. 189.6 mandates judicial deference toward the CRT in proceedings within its jurisdiction.

b) The purpose of the CRT

[49] The purpose of the CRT is to provide an accessible, flexible and speedy dispute resolution process to parties involved in strata claims falling within s. 3.6(1) of the *CRTA*. The CRT's online processes and emphasis on facilitated dispute resolution are intended to provide the parties with a quick and less expensive form of decision making than adjudication in the Supreme Court. This factor militates in favour of the presumptive standard of reasonableness.

c) Tribunal expertise

[50] The *CRTA* does not specify any qualifications for tribunal members. Under s. 62, the tribunal may make rules respecting its practice and procedure and under s. 63, the chair may issue practice directives.

[51] The CRT may refuse to resolve a claim within its jurisdiction if the issues are too complex for the dispute resolution process of the tribunal: s. 11(1)(c). Further, the Supreme Court may order the CRT not to resolve a strata property claim if the issue raised is sufficiently complex to benefit from resolution by the Supreme Court: s. 12.3(2)(d).

[52] The CRT exercises a limited and specialized jurisdiction for the speedy and flexible resolution of strata property claims. However, relative to the court, it does not possess any specialized expertise for the determination of questions of law relating to strata property claims. This factor would tend to support a correctness standard.

d) Nature of the question at issue

[53] Only questions of law may be appealed to the Supreme Court. Here, the questions of whether the Strata Corporation's bylaws are unreasonable and whether they were applied in a significantly unfair manner fall squarely within the CRT's jurisdiction under ss. 3.6(1)(a) and 48.1 to interpret and apply its own statute and the *SPA*.

Conclusion on Standard of Review

[54] In this case, where the CRT interpreted and applied its own statute and the *SPA*, a statute closely connected to its function, the presumptive standard of review is reasonableness. Weighing all of the relevant factors, I find that on balance, the contextual analysis does not indicate that the legislature intended the standard of review to be correctness. While the jurisdiction of the CRT is not protected by a strong privative clause, the tribunal's purpose, its specialized jurisdiction for the economical resolution of strata property claims and the particular questions at issue on this appeal all weigh in favour of the reasonableness standard of review.

Application of the Reasonableness Standard

[55] In *Dunsmuir*, the Court explained the reasonableness standard at para. 47:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend

> themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[56] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board*), 2011 SCC 62 at para. 15, Justice Abella wrote:

> 15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[57] If the reasons of the tribunal allow the reviewing court to understand why the tribunal made its decision and permit the court to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met: *Newfoundland and Labrador Nurses' Union* at para. 16.

[58] The standard of reasonableness does not require perfection. Not every flaw in a tribunal's reasoning will attract judicial intervention. As the Court observed in *Kenyon v. British Columbia (Superintendent of Motor Vehicles)*, 2015 BCCA 485 at para. 55:

> 55 . . . The fact that the adjudicator's reasoning is flawed in one respect does not necessarily lead to the conclusion that the reasoning as a whole is unreasonable. It is necessary to consider the reasons as a whole and determine whether the flaw is central to the conclusion.

[59] With those principles in mind, I turn to the issues raised on this appeal

STANDING OF THE RESPONDENT

[60] The appellant submits that the CRT erred in law by failing to address the issue of whether the respondent had standing to claim the relief sought.

[61] Further, the appellant contends that Mr. Watson has no interest entitling him to pursue a claim for reversal and repayment of the moving fees. In support of that position, the appellant argues the challenged Bylaw relates to the move in or out of a resident; that the respondent was not charged any moving fee, as he did not move in or out during the period in question; and that Mr. Watson could not acquire standing by voluntarily paying fees levied in relation to other residents of the strata unit. In addition, the appellant submits that Mr. Watson is not an owner and therefore, without the assignment of an owner's right, which has not been granted, cannot vote to create or change the bylaws: see *SPA*, ss. 53-58, 128 and 147.

[62] The appellant also submits that Mr. Watson is not a tenant affected in a significantly unfair manner because the actions or decision of the Strata Corporation were not "in relation to" the respondent. The appellant says it was not informed of the moves until well after they had occurred and then charged the moving fees to the owner, who voluntarily paid them.

The CRT Decision

[63] At paras. 5 through 9 of its reasons for decision, the CRT made the following findings of fact:

> a) Mr. Watson rents a unit in the strata from the strata owner and has lived there together with roommates since July of 2012.
>
> b) On November 21, 2013 Mr. Watson's former roommate moved out and approximately a week later his current roommate moved in. On April 29, 2016, Mr. Watson's girlfriend also moved in.
>
> c) On May 16, 2016 the Strata Corporation's property manager advised the landlord that the current roommate's key fob had been disabled. On the same day, in order to reactivate fob, the landlord paid a $100 moving out fee for the former roommate's departure in 2013, a $100 moving in fee for Mr. Watson's current roommate, and a $100 moving in fee for Mr. Watson's girlfriend.
>
> d) Mr. Watson repaid the landlord for the moving fees charged by the Strata Corporation.
>
> e) Mr. Watson seeks a reversal of the two $100 fees charged by the strata Corporation for the move out of his former roommate, and the move in of his girlfriend, neither of whom moved any furniture.

[64] At para. 24, the CRT referred to the appellant's challenge of Mr. Watson's standing:

> The strata also questions Mr. Watson's standing as a tenant to challenge bylaws which were duly enacted by the strata owners. It argues that Mr. Watson chose to live there and signed the Form K and OTIF binding himself to obey the bylaws, and seeks dismissal of Mr. Watson's claim.

[65] Later at para. 36, the CRT said this:

> The strata submits that the unfair action by the strata should be construed as the passing and enforcement of the bylaw. It argues that Mr. Watson was not a resident of the building six years ago when the moving fee was added to the bylaw, that the bylaw was enforced against his roommates and the landlord, and that no action was taken in relation to Mr. Watson. Mr. Watson was a resident, however, in September 2013 when bylaw 4(8) enacted. And although it was his landlord who paid the fees after the fob was disabled, Mr. Watson's evidence is that he repaid his landlord.

[66] At para. 37, the CRT made findings of fact that the Strata Corporation charged the moving fees in May 2016, two and a half years after Mr. Watson's former roommate moved out and his current roommate moved in; that the Strata Corporation was aware of the move out at the time; that the Strata Corporation terminated Mr. Watson's roommate's access to the property on May 16, 2016 without any notice to the respondent, his roommate or the landlord, and that the moving fees were paid under duress.

[67] Those findings of fact are not subject to challenge on this appeal, which is limited to questions of law.

[68] On reading the CRT's reasons as a whole, I find that the tribunal member made an implicit finding, at para. 36, that Mr. Watson, by his repayment of the moving fees to his landlord had a sufficient interest in the proceedings to establish his standing. In my view, that determination was reasonable and falls within the range of acceptable outcomes which are defensible in respect of both the facts found by the CRT and the law.

[69] Mr. Watson is a tenant as that term is defined in the *SPA*.

[70] As we have seen, under s. 3.6(1)(a), the CRT has jurisdiction over "the interpretation or application of the *Strata Property Act* or a regulation, bylaw or rule under that Act".

[71] Section 4(1) provides that a "person" who has a claim within the jurisdiction of the CRT may ask the tribunal to resolve the claim.

[72] Section 3.7(1) of the *CRTA* provides:

> 3.7 (1) If another enactment gives the tribunal jurisdiction in relation to a claim, the provisions of this Act are subject to that enactment.

[73] Here, s. 189.1 of the *SPA* limits the class of persons who may bring a claim under s. 4 of the *CRTA* for resolution of a strata property dispute over which the CRT has jurisdiction to "a strata corporation, owner or tenant". Under s. 189.1(2), an owner or tenant may not make a request under s. 189.1(1) unless:

> a) the owner or tenant requested a council hearing under section 34.1, or
>
> b) the civil resolution tribunal, on request by the strata corporation, owner or tenant, directs the requirements of paragraph (a) of this subsection do not apply.

[74] Thus, pursuant to s. 189.1 of the *SPA*, a tenant must first request a council hearing under s. 34.1 of the *SPA* before he or she can make a request to the CRT, or the CRT must direct the s. 189.1(2)(a) does not apply.

[75] Section 34.1 requires an owner or tenant to apply in writing for a hearing at a council meeting. The strata council must hold a meeting within four weeks after the request and give the applicant a written decision one week after the hearing.

[76] Here, the CRT made no ruling dispensing with the requirement that the tenant request a council hearing.

[77] There is no evidence in the record about whether the respondent requested a hearing before the strata council before he requested the CRT to resolve this dispute. However, the CRT screened the respondent's application at the case management phase. The CRT is required by s. 10 of the *CRTA* to refuse to resolve

claims that it considers are not within its jurisdiction. The Strata Corporation does not allege any failing on the part of the respondent to request a council meeting. In my view, in these circumstances, and in the absence of any evidence to the contrary, the presumption of regularity applies with respect to the requirements of ss. 189.1 and 34.1 of the *SPA*.

The Respondent's Interest in the Proceedings

[78] In order to establish standing, Mr. Watson had to demonstrate that he has a sufficient interest in the CRT's decision, and that the *CRTA* provides an express or implied right to a person in his position to complain about the impugned bylaws and the imposition of the disputed moving fees: see *Emerman v. Assn. of Professional Engineers and Geoscientists of British Columbia*, 2008 BCSC 1186; *Alberta Liquor Store Assn. v. Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 at paras. 7-11 and 13-15; *Sandhu v. British Columbia (Provincial Court)*, 2013 BCCA 88 and *Bradshaw v. British Columbia (Workers' Compensation Board)*, 2017 BCSC 1092 at para. 87.

[79] Here, the CRT accepted the respondent's evidence that he repaid the landlord for the levied fees. The appellant also concedes, albeit "only for the sake of argument", that Mr. Watson repaid $300 to the landlord. In the circumstances, the Board's implicit finding that Mr. Watson had a sufficient interest in the fees to establish standing was reasonable. Further, the bylaws of the Strata Corporation apply to the respondent, together with all other owners and tenants of the strata premises. The fact that Mr. Watson, as a tenant, has no vote on the adoption or amendment of the bylaws of the Strata Corporation does not mean that he, and other tenants, are not affected by the bylaws.

[80] Mr. Watson, as a tenant directly affected by the actions or decisions of the Strata Corporation had standing to invoke the jurisdiction of the CRT concerning the interpretation or application of the *SPA* and the bylaws made by the Strata Corporation under that Act.

DID THE CRT ERR IN LAW IN APPLYING THE TEST FOR REASONABLENESS OF THE BYLAW?

[81] The appellant submits that the CRT, rather than applying an objective test of reasonableness of the fees charged by the Strata Corporation for moves generally, erred in law by engaging in a subjective examination of the costs incurred by the Strata Corporation in relation to the move out of the respondent's former roommate and the move in of his girlfriend.

[82] For his part, the respondent maintains the CRT, in the course of properly applying the objective test of reasonableness, simply preferred the evidence Mr. Watson provided of the actual costs incurred by the Strata Corporation over the evidence adduced by the appellant regarding reasonable costs.

[83] Section 110 of the *SPA* prohibits a strata corporation from imposing user fees for the use of common property by owners, tenants or occupants, or their visitors, other than as set out in the regulations.

[84] Section 6.9 of the *Strata Property Regulation* provides:

> 6.9 For the purposes of section 110 of the Act, a strata corporation may impose user fees for the use of common property or common assets only if all of the following requirements are met:
>
> (a) the amount of the fee is reasonable;
>
> (b) the fee is set out
>
> (i) in a bylaw, or
>
> (ii) in a rule and the rule has been ratified under section 125 (6) of the Act.

[85] Bylaw 36, as amended in September 2013, authorizes the Strata Corporation to levy a non-refundable fee of $100 to the owner, tenant or occupant of any unit on any move in or move out to defray the costs to the Strata Corporation. Bylaw 36 provides that those costs include, but are not limited to, wear and tear of common areas, administration, security access coding, the installation of elevator pads, and issuance of the elevator control key.

[86] Bylaw 4(8) provides:

> Every time the occupant of a strata unit changes, the rental part of the Act and the bylaws apply; including move in or move out fees. Any person seeking a change of occupancy must apply to the Strata for permission to move in or out. The actual moving of furniture or personal belongings in or out at the change of an occupancy is not necessary for the move in or move out fee to apply to the unit in question. As a move in/out fee defrays administrative costs such as updating office records, reprogramming building fobs and access cards, programming the resident enterphone system, providing access for telephone and interest installation and locker/parking staff assignments, the move fee will apply to any person moving into or out of a strata unit regardless of whether any furniture is being moved.

[87] Bylaw 4(9) requires that all requests to move in or move out must be made seven days in advance and must be accompanied by payment of the fee. No move is to be commenced without confirmation from the Strata Corporation.

[88] The CRT found the appellant had complied with s. 6.9(b) of the *Strata Property Regulation*, which requires that user fees be set out in a bylaw or rule.

[89] The CRT correctly held that under s. 6.9(a) of the *Strata Property Regulation*, the reasonableness of a bylaw is determined on an objective standard.

[90] At para. 25 of her reasons, the tribunal member set out the applicable test:

> 25) The British Columbia Supreme Court considered the reasonableness of moving fees under s. 6.9(a) of the Regulation in *The Owners, Strata Plan LMS 3883 v. De Vuys*t, 2011 BCSC 1252. In that case the court held that the correct approach in determining whether fees are reasonable means objectively reasonable, i.e. on an assessment of objective evidence. Whether fees are “reasonable” should depend on:
>
> a. prevailing market conditions at the time; and/or
>
> b. the costs incurred by the strata corporation in facilitating moves in and out of the property.

[91] The appellant contends the CRT, after framing the correct legal test, fell into error by engaging in a subjective review when it compared the costs the Strata Corporation estimated might arise on any move in or out with Mr. Watson’s estimate of the actual costs incurred for the moves of the respondent’s roommates.

[92] With respect, I disagree. The tribunal member applied both branches of the *De Vuyst* test on an objective standard.

[93] Regarding prevailing market conditions, the tribunal member accepted the appellant's evidence that the fee range for move ins and move outs was between $50 and $200 month and found that the fees set out in Bylaw 36 fell within that range.

[94] The CRT then observed there was no evidence on whether other strata corporations applied their moving fees in situations where no furniture was moved. As the tribunal member noted, it was the application of the fee in that situation that Mr. Watson disputed.

[95] On the second branch of the test, the tribunal member considered the appellant's estimate of the costs it incurred for move ins and move outs. Those costs totalled $138.81 for 5.25 hours at the building manager's regular time rate of $26.44 per hour.

[96] The tribunal member also considered the evidence presented by Mr. Watson concerning the limited number of tasks performed by the Strata Corporation where no furniture is moved and there is only a partial change of occupancy of a strata unit. She also took into account the respondent's evidence concerning the time required and costs incurred by the corporation for those services.

[97] The tribunal member summarized her findings on reasonableness at para. 33 of her reasons:

> 33) Applying the test for whether fees are reasonable as set out in *De Vuyst,* there is no evidence that other strata corporations have applied the full moving fee to "any person moving out of a strata unit regardless of whether any furniture is moved". The second element is what actual costs are incurred by the strata corporation when a move in or out occurs. I have found that one hour for a partial change in occupancy with no moving of furniture is a reasonable estimate of the time spent by the building manager. That equates to a cost of approximately $25. I find, therefore, that the $100 moving fee applied in bylaw 4(8) "to any person moving into or out of a strata unit regardless of whether any furniture is moved" is not reasonable.

[98] Ultimately, as it was entitled to do, the CRT preferred Mr. Watson's evidence regarding the actual costs incurred by the Strata Corporation in facilitating moves without furniture to the appellant's evidence of the costs incurred in facilitating moves.

[99] In *De Vuyst*, Justice Kelleher addressed a similar problem. There, the arbitrator concluded that Mr. De Vuyst's evidence was more specific and reliable than that provided by the Strata Corporation's representative. Based on the two factors, the arbitrator concluded the moving fee assessed was not reasonable and contravened s. 6.9 of the *Strata Property Regulation*.

[100] In *De Vuyst*, the appellant argued the arbitrator erred in law in failing to take into account the "very careful process" the owners engaged in when they set the moving fee, and in confining his consideration of reasonableness to the objective evidence of comparable fees of other buildings and of the actual cost of a move in or move out of the premises. At paras. 19-21, Kelleher J. held:

> 19 Here, the Arbitrator concluded correctly that reasonableness means objectively reasonable. He then decided that, on an assessment of the objective evidence, the fee was not reasonable.
>
> 20 The question before this Court is not whether I agree with that conclusion.
>
> 21 The Arbitrator was entitled to approach the question of reasonableness in the manner that he did. Reasonableness is not a question of law. The Arbitrator applied the legal standard of reasonableness to the facts before him. On that basis, he preferred the evidence of Mr. De Vuyst to the evidence of Mr. McInnis. He was entitled to do so.

[101] Here, the tribunal member applied an objective standard of reasonableness to the evidence before her. The CRT's determination that the $100 moving fee was not reasonable and contravenes s. 6.9 of the *Strata Property Regulation* falls within the range of defensible outcomes and satisfies the standard of reasonableness. I conclude that the CRT made no reviewable error in applying the test for reasonableness of the Bylaw.

DID THE CRT HAVE JURISDICTION TO REMEDY A SIGNIFICANTLY UNFAIR ACT OR DECISION OF THE STRATA CORPORATION?

[102] The appellant submits that as a result of a legislative drafting error in s. 48.1(2), the CRT has no jurisdiction to address and remedy allegations of significantly unfair actions or decisions of a strata corporation.

[103] For ease of reference, I reproduce s. 48.1, as it was in force at the time of the proceedings before the CRT:

> Orders available in strata property claims
>
> 48.1 (1) In resolving a strata property claim, the tribunal may make one or more of the following orders:
>
> (a) an order requiring a party to do something;
>
> (b) an order requiring a party to refrain from doing something;
>
> (c) an order requiring a party to pay money.
>
> (2) In resolving a strata property claim brought to the tribunal under section 3.6 (1) (e) to (g) [strata property claims within jurisdiction of tribunal], the tribunal may make an order directed at the strata corporation, the council or a person who holds 50% or more of the votes, if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights.
>
> (3) Despite subsections (1) and (2), the tribunal may not make
>
> (a) an order requiring the sale or other disposition of a strata lot, or
>
> (b) any other order prescribed by regulation.
>
> [emphasis added]

[104] Under s. 1 of the *CRTA*, a "strata property claim" means a "claim over which the tribunal has jurisdiction under section 3.6 *[strata property claims within jurisdiction of tribunal]*".

[105] The strata property claims within the jurisdiction of the tribunal are set out in s. 3.6(1) and include:

> . . .

> (e) an action or threatened action by the strata corporation, including the council, in relation to an owner or tenant;
>
> (f) a decision of the strata corporation, including the council, in relation to an owner or tenant;
>
> (g) the exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

[106] As discussed earlier in these reasons, s. 3.6(2) provides the CRT does not have jurisdiction in relation to claims that may be dealt with by the Supreme Court under the provisions of the *SPA*, which include:

> . . .
>
> (e) section 90 [removal of liens and other charges];
>
> (f) section 117 [forced sale of owner's strata lot to collect money owing];
>
> (g) section 160 [court orders respecting rebuilding damaged property];
>
> . . .

[107] The appellant says that it because s. 48.1(2) provided only for orders to remedy significant unfairness related to subsections 3.6(2)(e) to (g), the orders made by the tribunal member relating to significant unfairness must be struck down as *ultra vires*.

[108] The respondent argues that the CRT did not expressly state that it was granting relief under s. 48.1(2). Mr. Watson suggests the CRT had made its order under s. 48.1(1) where its authority to grant a remedy concerning an action or decision of the Strata Corporation would not be constrained by the drafting error in s. 48.1(2).

[109] Alternatively, Mr. Watson invited the court to correct an obvious drafting error by substituting the words “section 3.6(1)” for “section 3.6(2)” in section 48.1(2) of the Act to avoid absurdity. As we have seen, the Legislature has since corrected the error.

[110] The tribunal member, after determining that Bylaw 4(8) was not reasonable, went on to find that the manner in which the moving fee in the bylaw was applied was also significantly unfair. The tribunal member's reference in para. 35 of her reasons to making an order "if the order is necessary to prevent or remedy a significantly unfair action or decision" tracks the language of s. 48.1(2). I find that in granting relief for significant unfairness, the tribunal member sought to exercise her jurisdiction under section 48.1(2).

[111] The legislative drafting error in s. 48.1(2) was not raised in the proceedings before the CRT.

[112] Canadian courts are generally reluctant to presume or correct errors in the drafting of legislation. As Estey J. observed in *Morguard Properties Ltd. v. Winnipeg (City)*, [1983] 2 SCR 493 at 509:

> . . .the Legislature is guided and assisted by a well-staffed and ordinarily very articulate Executive. The resources at hand in the preparation and enactment of the legislation are such that a court must be slow to presume oversight or inarticulate intentions. . . The Legislature has complete control of the process of legislation, and when it has not for any reason clearly expressed itself, it has all the resources available to correct that inadequacy of expression. This is more true today than ever before in our history of parliamentary rule.

[113] However, in the case of obvious absurdity, courts may intervene to correct a drafting mistake.

[114] In *Sullivan on the Construction Statutes*, 6th ed.,(Markham: Lexis Nexis Canada Inc., 2014), Ruth Sullivan writes:

> §12.6 *Jurisdiction to correct mistakes.* Most courts acknowledge their jurisdiction to correct drafting mistakes when there is reason to believe that the text of legislation does not express the rule that the legislature intended to enact. This breakdown of communication is generally signalled in one of the following ways:
>
> - the words of the text are meaningless, contradictory, or incoherent, or
> - the provision as drafted states a rule or leads to a result that cannot have been intended.
>
> . . .

> §12.8 *Unacceptable absurdity.* Sometimes it is possible to give meaning to a provision, but that meaning is so absurd that, in the view of the court, it cannot have been intended. If there is no way to interpret the provision so as to avoid the absurdity, the court may consider that it has no choice but to redraft. Ideally in such cases it will be apparent how the error came about - - through careless amendment or "bad translation", for example. Ideally, too, it will be clear to the court what the legislature in fact meant to say. When all three of these factors are present, namely (a) a manifest absurdity, (b) a traceable error, and (c) an obvious correction, most courts do not hesitate to correct the drafting mistake. In borderline cases, however, the response of the courts can be difficult to predict. Much depends on the individual court's conception of its institutional role.

[115] In *United States of America v. Allard*, [1991] 1 SCR 861, the Court found and corrected a manifest absurdity where the legislative draftsperson had followed British precedent and failed to ensure the *Extradition Act* applied to all extradition crimes, not just those listed in a schedule.

[116] The words "section 3.6(2)(e) to (g)" render section 48.1(2), as it was in force at the time of the proceedings before the CRT, manifestly absurd. The legislature clearly did not intend to confer power on the CRT to make orders with respect to claims excluded from its jurisdiction.

[117] As the respondent submits, substitution of the phrase "section 3.6(1)(e) to (g)" would be consistent with the description "*[strata property claims within the jurisdiction of the tribunal]* " and would be harmonious with the purpose of s. 48.1(2), which is to prevent or remedy a significantly unfair action, decision or exercise of voting rights.

[118] Here, there was a manifest absurdity, a traceable error and an obvious correction, which the legislature has since made. To the extent it is necessary for the disposition of this appeal, I would adopt and apply the same correction to the manifest clerical error in s. 48.1(2) as it was originally enacted as the legislature has now made.

[119] Accordingly, the CRT had, and continues to have jurisdiction to remedy significant unfairness on the part a strata corporation.

DID THE CRT ERR IN LAW IN ITS APPLICATION OF THE TEST FOR SIGNIFICANT UNFAIRNESS?

[120] The CRT found that both the application of the moving fee in bylaw 4(8) and the manner in which it was levied were significantly unfair.

[121] In *Dollan v. The Owners, Strata Plan BCS 1589,* 2012 BCCA 44, where a strata unit owner applied under s. 164 of the *SPA* for relief against significantly unfair conduct of a strata corporation, the Court of Appeal cited the following test at para. 30:

> 30 In the case of a strata unit owner seeking redress under s. 164, I would adapt the test, suggested by Greyell J. slightly to the context of s. 164 and articulate it in this manner:
>
> > 1. Examined objectively, does the evidence support the asserted reasonable expectations of the petitioner?
> >
> > 2. Does the evidence establish that the reasonable expectation of the petitioner was violated by action that was significantly unfair?

[122] The tribunal member applied the *Dollan* test in her assessment of significant unfairness. At paras. 39, 40 and 41, the tribunal member held:

> 39) The strata says that in seeking relief on the basis of unfairness it is necessary to examine whether the evidence supports the asserted reasonable expectations of the applicant: *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. It says that Mr. Watson signed both the OTIF and Form K agreeing to the bylaws and therefore should have expected that moving fees would be charged. It is clear from the evidence, however, that the opposite is true. Mr. Watson's former roommate moved out in November 2013 and no fee was applied until two and half years later. His girlfriend also moved in on April 29, 2016 without the fee being charged.
>
> 40) The courts have considered the meaning of "significantly unfair" in a wide number of factual contexts, equating it to oppressive or unfairly prejudicial conduct. In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126 the court interpreted a significantly unfair action as one that is burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith and/or unjust or inequitable.
>
> 41) I find the imposition of the two moving fees of $100 each when Mr. Watson's roommates moved in and out was significantly unfair when the actual cost incurred by the strata was approximately $25. While an order reducing the fees to $25 each might have been an adequate remedy I find that the manner in which the strata levied the fee 2 ½ years after his former roommate moved out and cancelled his current roommate's fob access to

> obtain payment was also significantly unfair. The imposition of the former roommate's fee was also beyond the two year limitation period to commence a court proceeding set out in s. 6(1) of the *Limitation Act*, SBC 2012, c. 213.

[123] In my view, the CRT's findings on significant unfairness, and more particularly, on the significantly unfair manner in which the Strata Corporation levied the fees are defensible on the standard of reasonableness, and would survive a review for correctness. The manner of imposition of the moving fees 2 ½ years after the departure of Mr. Watson's former roommate and the move in of his current roommate, together with the cancellation of the current roommate's fob access in order to compel payment was burdensome, unjust and inequitable, and constituted significantly unfair action on the part of the Strata Corporation.

[124] The CRT made no error of law and its application of the test for substantial unfairness.

CONCLUSION

[125] The appeal of the Strata Corporation from the decision of the CRT is dismissed.

[126] The respondent is entitled to the costs of the appeal at scale B.

[127] Finally, in determining this appeal, I have not considered any of the evidence the respondent sought to adduce on his fresh evidence application.

[128] The test for adducing fresh evidence on appeal, as stated in *Jens v. Jens*, 2008 BCCA 392 at para. 28, requires the applicant to establish:

a) the evidence was not discoverable by reasonable diligence before the end of the trial;

b) that the evidence is credible;

c) that the evidence be practically conclusive of an issue before the court; and

d) if believed the evidence could have affected the result of the trial.

[129] The tenancy agreements attached as exhibits A and B to Mr. Watson's second affidavit were discoverable by reasonable diligence at the time of the proceedings before the CRT and were unnecessary for the resolution of the questions of law raised on this appeal. The same considerations apply to exhibit C, Residential Tenancy Policy Guideline No. 13. Nor am I persuaded that the remaining materials tendered as fresh evidence, including the print out from the Ministry of Justice website entitled "Civil Resolution Tribunal Act" would have been practically conclusive of any of the issues of law before the court. Accordingly, the respondent's application to adduce fresh evidence is dismissed, with costs at scale B to the appellant.

PEARLMAN J.