IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan NW 2575 v. Booth,* 2018 BCSC 715

Date: 20180503
Docket: S184435
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

The Owners, Strata Plan NW 2575

Petitioner

And

Verna Booth and George Booth

Respondents

Before: The Honourable Madam Justice DeWitt-Van Oosten

Reasons for Judgment

Counsel for the Petitioner:	Lisa N. Mackie
Respondents:	No one appearing
Place and Date of Hearing:	Vancouver, B.C. April 25, 2018
Place and Date of Judgment:	Vancouver, B.C. May 3, 2018

BACKGROUND

[1] The petitioner is a 28-unit residential strata corporation known as Tiffany Lane, located in Surrey. The respondents own one of the strata lots.

[2] In June 2017, the respondents filed a dispute against the petitioner with the Civil Resolution Tribunal ("CRT"). They allege that the strata corporation failed to repair and maintain a deck that constitutes limited common property, but contains an enclosure (a sunroom). The respondent owners further allege they have been threatened and harassed by other owners within Tiffany Lane, including members of the strata council.

[3] In July 2017, the petitioner filed a response in the CRT dispute, denying all allegations. The dispute is currently moving into the CRT's "tribunal hearing phase".

[4] The petitioner has now filed two petitions for judicial review arising out of the CRT proceedings. The petitions have not yet been set for hearing.

[5] The first of these petitions challenges a decision by the CRT to deny the strata corporation's request to be represented by legal counsel.

[6] This decision was rendered on August 18, 2017, and is indexed at *Booth et al. v. The Owners, Strata Plan NW2575*, 2017 BCCRT 61.

[7] In denying the request, the CRT placed "significant weight" on: (a) the fact that the respondent owners did not agree to representation because it would "tip the scales of justice" against them; (b) the respondent owners are not represented and cannot afford legal counsel; and (c) there is "nothing exceptionally unusual or complex about the subject-matter of the dispute": 2017 BCCRT 61 at para. 14.

[8] After reviewing this decision, the petitioner advised the CRT that it intended to seek judicial review. The petitioner requested that the proceedings before the CRT be suspended (or "stayed") pending the review.

[9] The second petition arises out of the CRT's decision, on January 3, 2018, to refuse the request for a suspension.

[10] In reaching this decision, the CRT accepted "that there is a serious issue to be determined with respect to the tribunal's discretionary decision to decline to permit the strata to have a representative in [the] dispute": *Booth et al v. The Owners, Strata Plan NW2575*, 2018 BCCRT 8 at para. 17.

[11] However, it also found that the strata corporation had not established that "irreparable harm" would flow from denying a stay. The CRT was of the view that the request for suspending the proceedings was premature. Until the final outcome of the tribunal process was known, claims of irreparable harm were speculative: 2018 BCCRT 8 at para. 19.

[12] Moreover, after considering multiple factors, including prejudice to the respondent owners that would result from a suspension, the CRT determined that "[o]n balance … the public interest lies in the tribunal's discharge of its legislative mandate to provide dispute resolution services in a manner that is "accessible, speedy, economical, informal and flexible"": 2018 BCCRT 8 at para. 27.

[13] On April 25, 2018, the petitioner appeared before me on the second of the two petitions, seeking a judicial stay of the CRT proceedings pending a determination on the judicial review. It also asked that its petitions be heard together. Both requests were unopposed.

[14] Although served with notice of the application, the respondent owners did not appear. Thus far, they have not filed a response to either petition.

[15] Counsel with the provincial Attorney General's Ministry was served with notice of the application and accepted service on behalf of the CRT. However, he did not appear at the hearing. Instead, the petitioner was informed that the CRT takes "no position" on the application for a stay.

[16] I am told that counsel with the Attorney General's Ministry agrees the two petitions should be heard together and he will work with counsel for the petitioner to find a hearing date. The parties anticipate hearing availability in August 2018.

[17] I note that the CRT has filed a response to the first petition, opposing the request to have the decision on legal representation set aside. The CRT submits it should receive standing on the first petition "to defend the merits of the decision under review if the [respondent owners] do not file and serve responsive materials in [the] action". Among other things, the CRT's response to the first petition addresses its enabling legislative framework; the availability of judicial review for interim (or interlocutory) CRT decisions; and principles of procedural fairness as they apply to the CRT process.

[18] After reviewing the material filed by the petitioner, I granted the orders sought on April 26, 2018, with reasons to follow. These are my *Reasons for Judgment* on the application.

ANALYSIS

[19] The CRT is a relatively new dispute resolution scheme that was established under the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 [*Act*], and is governed by its own set of rules, the *Civil Resolution Tribunal Rules* (effective July 12, 2017).

[20] The mandate of the CRT is set out in s. 2(2) of the *Act*:

> (2) The mandate of the tribunal is to provide dispute resolution services in relation to matters that are within its authority, in a manner that
>
> (a) is accessible, speedy, economical, informal and flexible,
>
> (b) applies principles of law and fairness, and recognizes any relationships between parties to a dispute that will likely continue after the tribunal proceeding is concluded,
>
> (c) uses electronic communication tools to facilitate resolution of disputes brought to the tribunal, and
>
> (d) accommodates, so far as the tribunal considers reasonably practicable, the diversity of circumstances of the persons using the services of the tribunal.

[21] As a general rule, legal counsel are not expected to be involved in CRT proceedings. However, there are exceptions detailed in s. 20 of the *Act*:

> 20(1) Unless otherwise provided under this Act, the parties are to represent themselves in a tribunal proceeding.
>
> (2) A party may be represented by a lawyer or another individual with authority to bind the party in relation to the dispute if
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> (a) the party is a child or a person with impaired capacity,
>
> (b) the rules permit the party to be represented, or
>
> (c) the tribunal, in the interests of justice and fairness, permits the party to be represented.
>
> (3) Without limiting the authority of the tribunal under subsection (2)(c), the tribunal may consider the following as circumstances supporting giving the permission:
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> (a) another party is represented in the proceeding;
>
> (b) the other parties have agreed to the representation.
>
> (4) A person representing a party in a tribunal proceeding must be a lawyer unless
>
> (a) the rules otherwise permit, or
>
> (b) the tribunal is satisfied that the person being proposed to represent the party is an appropriate person to do this.
>
> (5) In the case of a party that is a corporation, partnership or other form of organization or office with capacity to be a party to a court proceeding, the person acting for the party in the tribunal proceeding must be
>
> (a) a director, officer or partner of the party,
>
> (b) an individual permitted under the rules, or
>
> (c) an individual permitted by the tribunal.

[22] Rule 36 of the *Civil Resolution Tribunal Rules* provides a non-exhaustive list of factors for the CRT to consider in exercising its discretion under s. 20(2) of the *Act*. This includes whether any other party is represented; whether all parties have agreed to representation; whether the person proposed as a representative is "appropriate"; and whether it is "in the interests of justice and fairness" that the party seeking to be represented is allowed that opportunity.

[23] Under s. 56.5(1) of the *Act*, a party to a CRT proceeding that receives a final decision in a strata property claim has a right to appeal the decision to this Court on

a question of law. The right may be exercised with the consent of all parties or where leave is granted: s. 56.5(2).

[24] In filing its petitions, the strata corporation is not exercising a right of appeal under s. 56.5(1). Rather, the petitions seek judicial review of two decisions made by the CRT before a final decision is given. The *Act* is silent on challenging interlocutory rulings.

[25] I am told by counsel that the petitions brought by the strata corporation constitute the first petitions for judicial review that have been filed in relation to the CRT since the new process came into being. I note that there have been appeals launched under s. 56.5(1). See, for example, *The Owners, Strata Plan BCS 1589 v. Nacht*, 2018 BCSC 455 and *The Owners, Strata Plan BCS 1721 v. Watson*, 2018 BCSC 164.

[26] Apparently, this is also the first application of its kind for an interim order that, if granted, would stay the CRT proceedings pending completion of the judicial review process.

[27] Under s. 10 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*], this Court has authority to make "interim orders" in petition proceedings that it "considers appropriate".

[28] As noted in *Coast Mountain Bus v. CAW-Canada*, 2008 BCSC 1135 at para. 19, this includes stays of proceedings.

[29] There is no one before me taking issue with the availability of s. 10 of the *JRPA* in matters arising out of the CRT. Although s. 15(1)(a) of the *Act* prohibits a party to an existing CRT dispute from commencing a "court proceeding or other legally binding process in relation to an issue or claim that is to be resolved in the tribunal proceeding", there is nothing in the *Act* specific to the availability of judicial review; the jurisdiction to issue a stay under s. 10 of the *JRPA*; or a provision that otherwise seeks to restrict the form of interim relief available once a petition has been filed.

[30] The test for a stay under s. 10 of the *JRPA* is equivalent to the test applied on an application for interlocutory injunctive relief. To obtain a stay of proceedings, a petitioner must show that: (1) it has raised a serious issue for adjudication; (2) it will suffer irreparable harm if a stay is not granted; and (3) the balance of convenience favours a stay of proceedings: *Livent Inc. v. Deloitte & Touche*, 2016 ONCA 395 at para. 5, citing *BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust*, 2011 ONCA 620 at para. 16; and *Northburn Prescriptions Ltd. v. British Columbia*, 2014 BCSC 2124 at paras. 32–33.

[31] See also: *RJR-MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311. The "overarching consideration [in a stay application] is whether the interests of justice call for a stay": *Livent Inc.* at para. 5.

[32] As noted, the application for a stay is unopposed. I have nonetheless applied the *RJR-MacDonald* three-part test, set out above, to the petitioner's request. In doing so, I have taken both outstanding petitions into account, even though the application for an interim order has been filed only in respect of the second petition.

[33] The two petitions arise out of the same administrative process and are inextricably linked. The request made before the CRT to suspend its proceedings flowed out of, and was in response to, the earlier decision to deny the petitioner strata corporation the opportunity to be represented by legal counsel.

[34] Applying *RJR-MacDonald*, I am satisfied that the threshold for an interim stay of proceedings has been established:

Serious Issue for Adjudication

[35] The test for showing a "serious question" to be tried is generally met if an applicant can demonstrate that the issues sought to be raised on the petition are not frivolous or vexatious: *RJR-MacDonald* at paras. 44 and 49.

[36] In this case, the first petition raises substantive questions about the manner in which s. 20 of the *Act* and Rule 36 of the *Civil Resolution Tribunal Rules* should be

interpreted and applied within the context of an administrative scheme mandated to provide an "accessible, speedy, economical, informal and flexible" resolution process. Answering these questions engages principles of statutory construction, as well as public policy considerations relevant to due process and, potentially, access to justice.

[37] Both petitions raise questions about the appropriate process when a party before the CRT seeks to challenge an interim decision of the tribunal; the powers of the CRT in responding to the challenge; the relevant factors for consideration in exercising discretion; and the interplay between the *Act* and the process of judicial review as provided under the *JRPA*.

[38] To my understanding, this Court has not yet considered or pronounced on these questions. Within this context, it cannot be said that the issues raised by the petitioner are frivolous.

[39] Indeed, in its filed response to the first petition, the CRT has said that the petition "raises several important and complex matters of administrative law, including the availability of judicial review, the doctrine of prematurity, the presumptive self-representation of disputants in the tribunal process, the appropriate standard of review to be applied to the decision, and the issue of remedy".

[40] In its January 2018 decision denying a suspension of the proceedings, the CRT acknowledged that the strata corporation's challenge to the ruling on legal representation raised a "serious issue to be determined".

[41] I agree. The first aspect of the *RJR-MacDonald* test is met.

Irreparable Harm

[42] Under this heading, the Court must consider whether a refusal to grant a stay "could so adversely affect the [petitioner's] own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application": *RJR-MacDonald* at para. 58.

[43] The notion of irreparable harm was explained this way in *Vancouver Musicians' Association (Canadian Federation of Musicians, Local 145) v. American Federation of Musicians of the United States and Canada*, 2016 BCSC 1427:

> [49] Irreparable harm means that which cannot be satisfied by an order for damages or which cannot be cured because one party cannot collect damages from the other. It is the nature of the harm suffered that is relevant rather than the magnitude of the harm … [Internal references omitted.]

[44] Here, the petitioner says it will suffer irreparable harm in a variety of ways. This includes (but is not limited to):

(a) the denial of legal representation cannot be addressed or remedied by monetary means;

(b) the strata corporation's ability to adequately defend the dispute will be unfairly hindered without counsel;

(c) in defending the dispute through a sole representative, the strata corporation may be required to act in a way that contravenes well-established principles of strata governance; and

(d) the respondent owners are alleging harassment by individual council members. Any resulting judgment may affect personal reputations, without these individuals having had an opportunity to defend the allegations through the assistance of legal counsel as arranged for them.

[45] I am satisfied that, cumulatively, the petitioner's asserted harms support a stay pending judicial review.

[46] In particular, the fact that the dispute includes allegations of "abuse" by one or more council members weighs heavily with me. The Dispute Notice seeks $25,000 in "compensation for loss of enjoyment of life, threats, abuse, stress". In responding to the strata corporation's request for legal representation, the respondent owners described the request as "a continuation of the intimidation" against them and said the "Strata Corporation should not be rewarded for the physical and verbal abuse they have inflicted on [the respondents] for the past 6 years". The respondent owners assert "dishonesty and lack of acting in good faith" on the part of the strata council. A "physical attack and threat of bodily harm" is alleged against a particular

strata council member. There is also reference to "dishonest statements" and "oppressive acts".

[47] Assertions such as these, if found to be substantiated, can carry significant reputational consequences. Even if not substantiated, the nature of the allegations made and the public determination of their validity can have material impact. It is for this reason, as noted in *Dennis Thomas v. Association of New Brunswick Registered Nursing Assistants*, 2003 NBCA 58 at para. 25, that the common law recognizes that persons whose "reputation or livelihood is at stake" are *generally* entitled to be represented by an agent of their choosing before an adjudicative tribunal.

Balance of Convenience

[48] The third stage of the *RJR-MacDonald* framework requires the Court to assess "which of the two [sides to the dispute] will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits": at para. 62. This is a highly individualized enquiry informed by the unique circumstances of each case.

[49] When the petitioner strata corporation sought a suspension of the proceedings from the CRT, the respondent owners filed a position on the application with the tribunal. They: "[objected] to the [petitioner] applying to the Supreme Court of BC for a judicial review of the CRT Decision. To involve the Supreme Court of BC defeats the purpose of the CIVIL Resolutions Tribunal, simple, economical, fair access to the decision". The respondent owners also expressed concern about the amount of time it has taken to resolve their dispute with the strata corporation and the "acrimony" that has arisen from the dispute. In their words, "It has taken six long years of argument ….".

[50] Although I appreciate the respondent owners' frustration with the length of time this matter has been outstanding for them, as well as further delay and complexity attributable to the judicial review process, I am satisfied that within the circumstances of this particular case, the balance of convenience weighs in favour of a stay.

[51] The respondent owners filed their notice of dispute with the CRT on June 28, 2017. As such, the CRT process itself (as opposed to the existence of a dispute) has been underway for less than one year. Working with counsel for the Attorney General's Ministry, the petitioner seeks to have the two petitions heard around/about August 2018. The CRT has acknowledged that the first petition raises "serious" issues that, among other things, speak to complex matters of procedural fairness. Given the nature of the issues, I am satisfied that the balance of convenience weighs in favour of the petitioner.

[52] In reaching this determination, I am also mindful of the fact that the CRT has filed a response to the first petition, asking for standing to "defend the merits of the decision [to deny legal representation]" if the respondent owners do not participate in the review hearing. To my understanding, the respondent owners have not filed any materials in response to the first petition. Staying the CRT proceedings until the petitions are heard, including a decision on the appropriateness of the CRT's participation, avoids the risk of compromising the tribunal's continued adjudication of the dispute through a possible perception of impartiality: *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494 at paras. 38–54.

[53] In addition to its application for a stay, the petitioner requests that the two petitions be heard at the same time. Rule 22-5(8) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, provides that "Proceedings may be consolidated at any time by order of the court or may be ordered to be tried at the same time or on the same day".

[54] Given the substantive and procedural commonalities raised in the two petitions; the fact that the same parties are involved; the risk of inconsistent findings on identical issues arising out of the same factual matrix; and the time saving that will be achieved through a joint proceeding, hearing the petitions together within the circumstances of this case makes sense. See *Hui v. Hoa*, 2012 BCSC 1045 at paras. 33–35.

DISPOSITION

[55] For the reasons provided, on April 26, 2018, I granted the petitioner strata corporation the orders sought in Part 1 of its notice of application in S184435 (Vancouver Registry), filed with this Court on April 9, 2018.

[56] This included an order that pursuant to s. 10 of the *JRPA*, the proceedings before the CRT in Dispute #ST-2017-002675 are stayed pending final determination of the within petition.

"DeWitt-Van Oosten J."