IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Williams v. British Columbia (Civil Resolution Tribunal),* 2023 BCSC 239

Date: 20230217
Docket: L243449
Registry: New Westminster

Between:

David Williams and Tanya Williams

Petitioners

And

BC Civil Resolution Tribunal and The Owners, Strata Plan BCS 184

Respondents

Before: The Honourable Madam Justice J. Hughes

On judicial review from: An order of the BC Civil Resolution Tribunal, dated February 1, 2022 (*Williams v. The Owners, Strata Plan BCS 184*, 2022 BCCRT 118, File No. ST-2021-004713).

Reasons for Judgment

The Petitioners, appearing on their own behalf:	D. Williams T. Williams
Counsel for the Respondent, The Owners, Strata Plan BCS 184:	J. Jaffer
No other appearances	
Place and Date of Hearing:	New Westminster, B.C. August 23, 2022
Place and Date of Judgment:	New Westminster, B.C. February 17, 2023

Overview

[1] The petitioners seek judicial review of a decision of the Civil Resolution Tribunal ("CRT") in the exercise of its jurisdiction over strata property disputes pursuant to the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 [*CRTA*]. The underlying dispute arises from a multitude of complaints made by the petitioners regarding noise emanating from an adjoining strata unit. The petitioners' noise complaints have been long-standing and were the subject of an earlier decision of the CRT.

[2] In June 2021, the petitioners initiated dispute resolution proceedings in the CRT against the respondent strata corporation, The Owners, Strata Plan BCS 184 ("Strata"). The parties were unable to resolve the dispute and the matter proceeded to a hearing on written submissions before a tribunal member. On February 1, 2022, the CRT issued reasons for decision indexed at 2022 BCCRT 118 ("Decision"), dismissing the petitioners' claims against the Strata.

[3] For the reasons that follow, I find that the Decision was patently unreasonable and that the petitioners were denied procedural fairness. As such, I remit the matter back to the CRT for reconsideration.

Background Facts

[4] The Stata is a townhouse-style residential development located at 15233 34th Avenue, in Surrey, British Columbia. The Strata is a 93-unit complex comprising of 14 residential buildings and one amenity building.

[5] The petitioners are the owners and occupants of strata lot 29 ("SL29"). SL29 is a three-story townhouse and is adjoined by strata lot 30 ("SL30"). SL30 is also a three-story townhouse and is occupied by a family with children.

[6] The petitioners' complaints arise from noise emanating into their unit from SL30. The noise complained of involves thumping, running, door slamming, TV noise, and banging against shared walls, particularly the wall of the petitioners' master bedroom.

[7] The noise complaints presently in issue span the period from November 2019 to November 2021 ("Complaints"). The petitioners also made noise complaints against the prior occupants of SL30. Those complaints were addressed in a prior decision of the CRT indexed at 2017 BCCRT 107. The Decision in issue here relates only to the Complaints involving the current occupants of SL30.

The Petitioners' Noise Complaints

[8] The Strata has registered bylaws ("Bylaws") that, among other things, impose restrictions on the permissible use of strata lots. Pursuant to the Bylaws, an owner, tenant or occupant must not use a strata lot in a way that:

a) causes a nuisance or hazard to another person;

b) causes undue smell or unreasonable or repetitive noise; or

c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or the common property or another strata lot.

[9] The Bylaws also prohibit a strata lot from being used for any purpose that involves undue traffic or noise in or about the strata lot or common property between the hours of 10:30 p.m. and 7:00 a.m., and require that occupants ensure that noise caused by children does not disturb the quiet enjoyment of others.

[10] From November 30, 2019, to November 25, 2021, the Stata issued 13 Bylaw Violation Notices to SL30 in response to the Complaints ("Violation Notices").

[11] In the spring of 2021, the Strata retained BKL Consultants Ltd. ("BKL") to perform a week-long noise investigation in response to the Complaints. On May 3, 2021, BKL provided a report to the Strata summarizing the results of the noise investigation ("Initial BKL Report"). The Initial BKL Report concluded, among other things, that "instantaneous footfall, speech and music noise from Unit 30 is clearly audible within Unit 29, partly due to the relatively low background noise levels" and

that "[t]he exceedances noted above would indicate that the intrusive noise levels are very clearly audible and potentially very disturbing".

[12] On May 19, 2021, the Strata's legal counsel sent an email to the Strata's property manager raising issues with the Initial BKL Report. Legal counsel specifically identified BKL's finding that noise from SL30 was "clearly audible" and "potentially very disturbing" to SL29. The property manager forwarded legal counsel's correspondence to BKL. Following receipt of that correspondence, on May 20, 2021, BKL produced a revised version of its noise investigation report ("Revised BKL Report"). The statement regarding intrusive noise levels being clearly audible and potentially very disturbing in SL29 was removed.

[13] The petitioners were provided with a copy of the Initial BKL Report, but were not provided with the Revised BKL Report until July 2021, after they filed their dispute notice with the CRT.

[14] From May 26, 2021 to November 25, 2021, following receipt of both the Initial and Revised BKL Reports, the Strata sent 12 Violation Notices to SL30. The Violation Notices each included a statement to the effect that the occupants of SL30 were "causing unreasonable noise, which has been affecting the wellbeing of neighboring units".

[15] The Violation Notices also referred to the prospect of fines being issued for contraventions of the Bylaws, and noted that fines could be imposed every seven days in respect of continuing contraventions, in accordance with ss. 28 and 29 thereof. The Violation Notices also noted that the SL30 had the right to respond to the Violation Notices within 21 days, failing which the Strata would decide the matter as it considered appropriate. There is no evidence in the record before the CRT that the Strata issued any fines to SL30 in response to the Violation Notices.

Procedural History Before the CRT

[16] The CRT proceedings were commenced by the petitioners on June 12, 2021. The relief sought by the petitioners in their dispute notice was to have the Strata

enforce the Bylaws, and damages of $3,500. The Strata filed its dispute response on July 27, 2021.

[17] The parties were unable to resolve the dispute and it proceeded to the adjudication phase of the CRT process.

[18] The CRT has wide discretion over its procedure, including the discretion to conduct a hearing by written submissions, telephone or email: *CRTA*, ss. 38, 39; *Time Share Section of The Owners, Strata Plan N 50 v. Residential Section of The Owners, Strata Plan N 50*, 2021 BCSC 486 at para. 13. The CRT can accept and admit any evidence it considers necessary and is not bound by the rules of evidence: *CRTA*, s. 42.

The CRT Decision

[19] The present dispute proceeded by way of written submissions. The CRT determined that a written hearing was appropriate because it was of the view that it could properly assess and weigh the evidence and submissions before it and saw no reason for an oral hearing: Decision at para. 7.

[20] On February 1, 2022, Tribunal Member Laylí Antinuk issued the Decision, dismissing all of the petitioners' claims. The CRT framed the issues in dispute before it as (Decision at para. 16):

a) whether the Strata properly investigated the Complaints and enforced the Bylaws;

b) whether SL30's occupants caused unreasonable noise;

c) whether the Strata treated the petitioners significantly unfairly; and

d) whether the Strata should be ordered to pay $3,500 in damages.

[21] The CRT decided all of these issues in favour of the Strata. On the issue of whether the Strata properly investigated the Complaints and enforced the Bylaws, the CRT first set out the applicable test—which the parties agree is properly stated—

to the effect that a strata has the discretion to investigate bylaw complaints as it sees fit, provided it complies with the principles of procedural fairness and is not significantly unfair to anyone: Decision at para. 23. It also noted the applicable standard of care being "reasonable action and fair regard for the interests of all concerned": Decision at para. 24.

[22] The CRT then reviewed the steps taken by the Strata to investigate the Complaints, which included testing the insulation in the wall between SL29 and SL30 and having a hearing to address the petitioners' Complaints. Importantly for the purpose of this judicial review, the CRT made a finding of fact that the Strata gave Strata council members' phone numbers to the petitioners, and despite having that contact information, the petitioners chose not to call council members to investigate the noise:

> 27. The strata's email evidence also shows that it gave the [petitioners] all the council members' phone numbers and availability at November's end. It undisputedly did this so the [petitioners] could call council members to have them visit SL29 when unreasonable noise occurred in the future. However, the strata says the [petitioners] never called any council members to attend SL29. The [petitioners] do not deny this. So, I find that, despite having the opportunity to do so, the [petitioners] chose not to call any council members to hear the noise allegedly caused by SL30's occupants.
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> 37. To summarize, I find that the strata sent SL30 a total of 11 bylaw violation notices in response to the [petitioners] numerous noise complaints. I also find that the strata discussed the noise complaints with the [petitioners] in a hearing. In addition, I find that, after receiving the first noise complaint at issue, the strata gave the [petitioners] its council members' contact information and availability. Yet, the [petitioners] never called any council member to hear the alleged unreasonable noise when it was occurring. Additionally, the undisputed evidence shows that since the prior CRT decision, the strata has hired 2 sound testing companies to investigate the sound issues in SL29. I find that neither company found any significant sound issues in SL29 that would compel the strata to take further actions, such as hiring more sound professionals or performing soundproofing upgrades to the wall.
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> [emphasis added]

[23] Based on these factual findings, along with the Strata having issued the Violation Notices and conducted sound testing, the CRT concluded that the Strata

properly investigated the petitioners' Complaints and enforced the Bylaws, and acted fairly towards the petitioners: Decision at para. 38. In so concluding, the CRT specifically repeated and relied on its finding that the petitioners had not contacted Strata council members to hear the noise despite having their contact information:

> 39. I recognize that the [petitioners] say council did not try to "properly investigate these complaints in person." However, as noted, I find that the [petitioners] chose not to call any council member(s) to investigate in person despite having the opportunity to do so. I acknowledge that the [petitioners] say that council's meeting minutes tell occupants to contact the manager instead of communicating directly with council. However, I am not satisfied that this general statement applied in the circumstances. Instead, I find that the evidence shows that council made it clear to the [petitioners] that they could contact its members to attend SL29 to hear the alleged noise.
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> [emphasis added]

[24] The CRT also concluded that the Strata followed the principles of procedural fairness in addressing the Complaints and did not treat the petitioners unfairly. In doing so, it once again relied on the finding that the Strata had provided council members' contact information to the petitioners:

> 56. As explained above, I have found that SL30 did not cause unreasonable noise. I have also found that the strata followed the principles of procedural fairness when addressing the noise complaints. For example, it held a hearing when the [petitioners] requested it. The strata also consulted independent sound professionals who did objective sound testing in SL29. In addition, the strata gave the [petitioners] all the council members' contact information and council members were ready and willing to attend SL29 when the [petitioners] called. I find nothing oppressive or unfairly prejudicial in the strata's decisions or actions. In fact, quite the opposite.
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> [emphasis added]

[25] Finally, the CRT concluded that the noise emanating from SL30 was not unreasonable. In doing so, it relied heavily on BKL's evidence as set out in the Revised BKL Report, which it characterized as providing objective evidence: Decision at para. 45. The CRT was aware that the Initial BKL Report had been revised to "clarify" issues following input from the Strata's legal counsel and relied on the Revised BKL Report: Decision at para. 31. The CRT placed "significant weight" on the Revised BKL Report and accepted all of the findings contained therein:

> 34. Neither party disputes the accuracy of BLK's findings or BLK's qualifications as sound testing professionals. So, I accept all the findings in the report and find that the report qualifies as expert opinion evidence. I place significant weight on the report because it provides objective expert evidence about the noise experienced in SL29.

[26] In concluding that the noise emanating from SL30 was not unreasonable, the CRT reasoned as follows:

> 51. To summarize, the visitor and the owner both agree that SL30's occupants cause nothing more than normal, everyday living noises. I recognize that the relevant case law establishes that even normal living noises can be unreasonable, depending on their intensity, timing and duration. For example, see *Tran v. The Owners, Strata Plan VIS 6828*, 2021 BCCRT 28 at paragraph 43. However, based on the report, the logs and the audio recordings, I find on balance that noise caused by SL30's occupants was not intense, nor did it occur at unreasonable hours or for unreasonably long periods of time.
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> [emphasis added]

[27] In the result, the CRT concluded that the Strata properly investigated and enforced the Bylaws, was not significantly unfair to the petitioners, and SL30 did not violate the Bylaws, such that no order of damages was warranted: Decision at para. 60. The CRT thus dismissed the petitioners' claims and the dispute: Decision at para. 63.

Grounds of Review

[28] As I interpret the petitioners' written and oral submissions, they raise two primary grounds of review in respect of the Decision:

a) The CRT's conclusion that the Strata properly investigated the Complaints and enforced the Bylaws was patently unreasonable because it relied in material part on a factual finding that was unsupported by the evidence before it, namely that the Strata provided the petitioners with council's contact information; and

b) The CRT's conclusion that the Strata's investigation process was fair and reasonable was patently unreasonable because the Strata did not follow its own process in investigating and enforcing the Complaints.

[29] The petitioners also allege that the CRT acted in a procedurally unfair manner by deciding a matter not before it, namely whether the noise emanating from SL30 was unreasonable.

Standard of Review

[30] Section 121 of the *CRTA*, establishes that the CRT is considered to have specialized expertise over the following in respect of disputes under the *Strata Property Act*, S.B.C. 1998, c. 43, among others:

a) the interpretation or application of the *Strata Property Act* or a regulation, bylaw or rule under that Act;

b) the use or enjoyment of a strata lot; and

c) a decision of a strata corporation, including the council, in relation to an owner or tenant.

[31] It is undisputed that the issues before the CRT in the underlying dispute fell within those matters in respect of which the CRT is considered to have specialized expertise under s. 121 of the *CRTA*.

Patent Unreasonableness

[32] Section 56.7 of the *CRTA* in turn provides that where the tribunal is deemed to have specialized expertise over the subject matter, a finding of fact or law or an exercise of discretion must not be interfered with unless it is patently unreasonable:

> **56.7** (1) The tribunal must be considered to be an expert tribunal relative to the courts in relation to a decision of the tribunal
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> (a) concerning a claim within the exclusive jurisdiction of the tribunal, or
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> (b) concerning a claim in respect of which the tribunal is to be considered to have specialized expertise, other than a decision of the tribunal concerning a claim described in section 133 (1) (c) [*claims within jurisdiction of tribunal for accident claims].*
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> (2) On an application for judicial review of a decision of the tribunal for which the tribunal must be considered to be an expert tribunal, the standard of review to be applied is as follows:

> (a) a finding of fact or law or an exercise of discretion by the tribunal must not be interfered with unless it is patently unreasonable;
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> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly;
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> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

See also *Downing v. Strata Plan VR2356*, 2022 BCSC 590 at para. 62.

[33] Pursuant to s. 56.9 of the *CRTA* (which parallels s. 58(3) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45), for the purpose of s. 56.7(2)(a), a discretionary decision is patently unreasonable if the discretion is:

a) exercised arbitrarily or in bad faith;

b) is exercised for an improper purpose;

c) is based entirely or predominantly on irrelevant factors; or

d) fails to take statutory requirements into account.

[34] The patent unreasonableness standard requires a high degree of deference on judicial review. This standard of review was described by the Supreme Court of Canada in *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25, as follows:

> [30] … That finding is therefore entitled to deference unless Fraser Health demonstrates that it is patently unreasonable—that is, that "evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact" (*Toronto (City) Board of Education*, at para. 45). Because a court must defer where there is evidence capable of supporting (as opposed to conclusively demonstrating) a finding of fact, patent unreasonableness is not established where the reviewing court considers the evidence merely to be insufficient (*Speckling v. Workers' Compensation Board (B.C.)*, 2005 BCCA 80, 209 B.C.A.C. 86, at para. 37). Simply put, this standard precludes curial re-weighing of evidence, or rejecting the inferences drawn by the fact-finder from that evidence, or substituting the reviewing court's preferred inferences for those drawn by the fact-finder.

[35] The application of the patently unreasonable standard in the context of CRT decisions was recently explained in *Downing* as follows:

> [65] Citing the recent decision of a five-judge division of our Court of Appeal in *The College of Physicians and Surgeons of British Columbia v. The Health Professions Review Board*, 2022 BCCA 10 at paras. 129-131 [*College of Physicians*], the CRT and the Strata submit that the patently unreasonable standard of review has "remained stable" and has not been altered by developments in the common law reasonableness standard.
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> [66] I agree with the CRT and the Strata on this point. In my view, *College of Physicians* at paras. 129 - 131, and the cases referred to therein, provides a clear explanation of the patently unreasonable standard that must be applied in this case:
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> > [129] While there have occasionally been calls for judicial reinterpretation of the patent unreasonable standard (see, for example, Paul Daly, "Patent Unreasonableness After *Vavilov*", 2021 CanLIIDocs 654), this Court has not reinterpreted the standard. In *Team Transport Services Ltd. v. Unifor, Local No. VCTA*, 2021 BCCA 211, Saunders J.A., speaking for the Court said:
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> > > [27] … [A] court may only interfere with a decision of the Board when the court is satisfied that the Board's decision is patently unreasonable. That standard continues to apply notwithstanding developments of the common law standards of review, and it continues to mean what it meant when the *Administrative Tribunals Act* came into force: *Red Chris* [*Red Chris Development Company Ltd. v. United Steelworkers, Local 1-1937*, 2021 BCCA 152] at para. 29.
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> > > [28] Patent unreasonableness is the standard that is most highly deferential to the decision maker. There are many descriptions of the standard. The explanation found in *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109 (aff'd *Victoria Times Colonist, a Division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 25-G*, 2009 BCCA 229) is useful:
> > > > [65] When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the *Ryan* [*Law Society of New Brunswick v. Ryan*, 2003 SCC 20] formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree described in *Ryan*, it cannot be said to be patently unreasonable. This is so regardless

> > of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.
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> [29] In other words, the standard is at the most deferential end of the reasonableness standard ….
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> [130] The patently unreasonable standard remains the most deferential standard of review known to Canadian law. Because it lies at the constitutional limit of deference to a tribunal, its definition has remained stable. This is in contrast to the definition of the "reasonableness" standard, which has gradually been refined.
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> [131] In *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, the Supreme Court of Canada described the standard as follows:
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> > [28] A legal determination like the interpretation of a statute will be patently unreasonable where it "almost border[s] on the absurd": *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, [2004] 1 S.C.R. 609, at para. 18. In the workers' compensation context in British Columbia, a patently unreasonable decision is one that is "openly, clearly, evidently unreasonable": *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80, 46 B.C.L.R. (4th) 77, at para. 33; *Vandale v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2013 BCCA 391, 342 B.C.A.C. 112, at para. 42 (emphasis deleted).

[36] Both the reasons and the result must be examined: *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at paras. 69–70; *Bhullar v. Workers' Compensation Appeal Tribunal*, 2019 BCSC 1673 at para. 63. Not every element of the tribunal's reasoning must independently pass a reasonableness test: if there is a rational basis for the decision on the record, it should not be disturbed simply because of defects in reasoning: *Bhullar* at para. 63, citing *Asquini v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 62 at para. 85.

[37] A decision will be patently unreasonable where the decision maker makes findings of fact that are unsupported in the evidence: *Metro Vancouver (Regional District) v. Belcarra South Preservation Society*, 2020 BCSC 662 at paras. 62, 65, aff'd 2021 BCCA 121. However, a decision is not patently unreasonable if the

evidence is merely insufficient. As the Court of Appeal noted in *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80:

> [37] As the chambers judge noted, a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable. …
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> [emphasis added]

[38] Finally, inferences drawn by a decision maker should not be interfered with if they were available on the evidence and the inference-making process was sound: *Chavez-Salinas v. Tower*, 2022 BCCA 43 at para. 28, citing *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 10, 21–23. Conversely, inferences that lack support in the record are speculation, which, when arising in respect of a material fact, may constitute palpable and overriding error: *Chavez-Salinas* at para. 29.

Procedural Fairness

[39] The court owes no deference to administrative decision makers on questions of procedural fairness, but must ensure that a decision was made fairly: *Nova-BioRubber Green Technologies Inc. v. Investment Agriculture Foundation British Columbia*, 2022 BCCA 247 at para. 71 [*Nova-BioRubber*]. The applicable standard of review is whether, in all of the circumstances, the CRT acted fairly: *Downing* at para. 92; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 77.

[40] A tribunal is entitled to choose its own procedures, as long as those procedures are consistent with statutory requirements. On review, the court determines whether the procedures adopted by the tribunal conformed with the requirements of procedural fairness. The court will not interfere if it concludes that the tribunal's procedures met the requirements of procedural fairness: *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc*., 2013 BCCA 55 at para.

52. While the CRT must provide a fairly high level of procedural fairness, the proportionality principle must be emphasized in assessing the fairness of its process: *Downing* at para. 97.

[41] Where a tribunal is alleged to have decided an issue not raised by the parties, this is treated as a matter of procedural fairness on judicial review: *Economical Mutual Insurance Company v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 903 at para. 85, citing *Amacon Property Management Services Inc. v. Dutt*, 2008 BCSC 889 at paras. 27–39.

Analysis

Error #1: Finding Regarding Strata Council Contact Information

[42] The petitioners say that the Decision is patently unreasonable because it was based on an erroneous factual finding, namely the CRT's finding that the Strata provided the petitioners with council members' contact information. The petitioners say this was not done. While they were given contact information for the prior council in the context of their earlier complaints, that was not the case for the current council in the context of the Complaints in issue here. As such, the CRT's finding at paragraph 27 of the Decision that the petitioners did not deny not calling any council members is accurate, but this was because the petitioners were not provided with the contact information, not because they chose not to call.

[43] The Strata concedes that a factual finding made on a material point in the absence of any evidence supporting it will be patently unreasonable. The Strata also concedes that there is no evidence in the record before the CRT establishing that the Strata in fact provided the petitioners with the current council members' contact information. This concession is properly made. There is no support in the record for the CRT's finding that the Strata provided the current council members' phone numbers to the petitioners.

[44] Internal email correspondence between the Strata council and the property manager suggests (but does not confirm) that the petitioners were provided with the

prior Strata council's contact information in the context of their prior noise complaints against the former occupants of SL30. However, this email correspondence does not establish that contact information for current Strata council members was provided to the petitioners in the context of the Complaints in issue here. As such, the CRT's finding at paragraph 37 of the Decision that "[the Strata] gave the [the petitioners] its council members' contact information and availability" is unsupported by the evidence.

[45] Moreover, this erroneous factual finding was, in my view, material to its conclusion that the Strata properly investigated the Complaints and enforced the Bylaws. This is evident from the CRT's reasoning at paragraph 39 of the Decision that "the [petitioners] chose not to call any council member(s) to investigate in person despite having the opportunity to do so" and that "council made it clear to the [petitioners] that they could contact its members" to attend and investigate the noise complaints.

[46] The Strata accepts that the CRT's conclusion that the petitioners had Strata council's contact information was unsupported by the evidence. However, it nonetheless submits that this was not a factual finding, but rather an inference that was available to the CRT on the record before it. The Strata points to the internal email correspondence between Strata council members discussing the petitioners' prior interactions with the prior Strata council and says that it supports the inference drawn by the CRT. In the Strata's submission, the inference drawn by the CRT was "clearly rational" and therefore not patently unreasonable. I disagree.

[47] The Strata's attempt to reframe the issue as an inference drawn from the evidence rather than a factual finding does not assist. Inferences that lack support in the record amount to speculation and arise in respect of a material fact constitute palpable and overriding error: *Chavez-Salinas* at para. 29. Thus whether characterized as a factual finding or an inference, the fact remains that the CRT's finding that the petitioners were provided with council members' contact information is unsupported in the evidence. That finding was also material to the CRT's

reasoning, as is evident from paragraphs 27, 37, 39 and 56 of the Decision, all of which are excerpted above.

[48] The CRT then relied on its erroneous factual finding that the petitioners had strata council's contact information but chose not to use it in rejecting the petitioners' claim that the Strata failed to properly investigate the Complaints in person: Decision at para. 39. It also relied on the Strata having provided contact information to the petitioners as one of the actions taken by the Strata in support of its conclusion that the Complaints were properly investigated: Decision at paragraph 38 ("Given all the [Strata]'s actions outlined above…").

[49] The CRT's finding that the Strata properly investigated the Complaints turned in material part on its erroneous finding that the Strata provided the petitioners with council's contact information. In the result, I find that the CRT's conclusion that the Strata properly investigated the Complaints was based on a factual finding that was unsupported in the evidence and is, therefore, patently unreasonable.

Error #2: Finding Regarding the Strata's Investigation Process

[50] The petitioners agree that the Strata has latitude in terms of how to investigate the Complaints. However, they say that the CRT's conclusion that the Strata's investigation process was fair was patently unreasonable because there was no evidence before the CRT to show that the Strata actually followed the process it set out in dealing with these particular Complaints. The process that the Strata advised the petitioners would be followed included issuance of the Violation Notices and an opportunity for SL30 to respond, following which the Strata would investigate and determine the next course of action, e.g. imposition of a fine, warning letter or further bylaw action against the subject unit.

[51] The Strata says that the CRT's decision was not patently unreasonable in this respect because the Strata issued the Violation Notices, hired BKL to conduct sound testing, and had a meeting with the petitioners. In the Strata's submission, the CRT

had a substantial amount of evidence before it to support its finding that the investigation was proper, such that the CRT's conclusion was not clearly irrational.

[52] In my view, the petitioners' position is well-founded. Rather that considering whether the Strata followed its own process for dealing with the Complaints and the Violation Notices, the CRT interpreted the Revised BKL Report as concluding the noise was "not unexpected" and then relied on that finding in support of its conclusion that the Strata acted reasonably in both investigating and enforcing the Bylaws: Decision at paras. 37–48.

Investigation of the Complaints

[53] The CRT's finding that the Strata properly investigated the Complaints is clearly predicated in large part on the Strata having engaged BKL and the outcome of their work as reflected in the Revised BKL Report.

[54] In this regard, the CRT made the following findings based on the Revised BKL Report in support of its conclusion that the Strata properly investigated the Complaints and enforced the Bylaws:

> 33. The report also says that short-term noise disturbances, like vacuuming and TV sounds from SL30, were "often clearly audible" in SL29 and ranged from 40 to 56 dBA. With 1 exception, all noise disturbances occurred during daylight hours. The only nighttime disturbance occurred at around 8pm and was 41 dBA, which does not exceed the WHO sleep disturbance criterion of 45 dBA. The report says the sleep disturbance criterion is a relevant point of reference since "annoyance may occur at even lower levels" than the sleep disturbance criterion. The report concludes by saying that the clear audibility of noise intruding into SL29 can be partly attributed to the low levels of background noise, which make the disturbance reported by the [petitioners] "not unexpected."
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> 34. Neither party disputes the accuracy of BLK's findings or BLK's qualifications as sound testing professionals. So, I accept all the findings in the report and find that the report qualifies as expert opinion evidence. I place significant weight on the report because it provides objective expert evidence about the noise experienced in SL29.
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> [emphasis added]

[55] However, as the CRT noted at paragraph 44 of the Decision, the Initial BKL Report was revised following a request for clarification from the Strata's legal counsel:

> 44. Notably, despite being asked a direct question about this, the report does not include BLK's opinion about whether the noise caused by SL30 was unreasonable. I say this because, after BLK released its original report, the strata's lawyer asked it a direct question about whether the noises experienced in SL29 were normal/reasonable for daytime indoor dwelling noises. BLK did not answer this question, saying instead that the situation is "very difficult to assess and report on." It then released the revised report, which does not say anything about whether the noise caused by SL30's occupants was unreasonable.

[56] This is consistent with the evidence the Strata submitted to the CRT, which shows that upon receipt of the Initial BKL Report, the Strata's legal counsel took issue with the finding that noise from SL30 was "very clearly audible and potentially very disturbing". Legal counsel then asked the Strata's property manager to contact BKL to obtain clarity and confirm whether the conclusion that the background noise in SL29 was exceeded by 10–26 dBA was "normal/reasonable for daytime indoor dwelling noises".

[57] The revisions made by BKL following input from the Strata's legal counsel appear aimed at downplaying the impact of the noise on SL29. By way of example, the Initial BKL Report contained the following statements:

> Based on this data, and the data shown also in Table 2, noise disturbances due to activity in Unit 30 exceed the background noise levels within Unit 29 by 10 to 26 dBA. Therefore, while there may be no recorded evidence that the WHO thresholds for '*moderate disturbance*' from *continuous noise* are exceeded, instantaneous footfall, speech and music noise from Unit 30 is clearly audible within Unit 29, partly due to the relatively low background noise levels. Ideally, intrusive noise levels would be less than the background levels in order for them to be inaudible. The exceedances noted above would indicate that the intrusive noise levels are very clearly audible and potentially very disturbing.
>
> [italics in original, emphasis added]

[58] The conclusory paragraph of the Revised BKL Report remained the same. However, the paragraph excerpted above appears to have been significantly revised, and the statement that the noise levels experienced in SL29 were "very

clearly audible and potentially very disturbing" was removed. Instead, the Revised BKL Report contained the following paragraph, which appears to have replaced the prior excerpt and now frames the issue as one of subjective perception of the occupants rather than BKL's independent expert opinion:

> Many of the maximum levels shown in Table 3 exceed the WHO 45 dBA criterion and are well above the background noise level of 30 dBA. Ideally, intrusive noise levels would be less than the background levels in order for them to be inaudible and to avoid any annoyance. Subjectively an increase in noise level of 10 dB is perceived as being approximately twice as loud and an increase of 20 dB is perceived as being four times as loud. Hence, many of the intruding events would be perceived as being more than four times louder than the background noise level.

[59] Both the Initial and Revised BKL Reports were before the CRT, yet it did not grapple with the issue of whether the revisions to the report—made based on input from the Strata's legal counsel—affected the weight to be given to BKL's evidence. To the contrary, the CRT accepted the Revised BKL Report as expert opinion evidence and placed significant weight on it because it provided "objective" evidence about the noise experienced in SL29.

[60] Having reviewed both BLK Reports along with legal counsel's correspondence that was provided to BKL and resulted in the Revised BKL Report being issued—all of which evidence was before the CRT—I find that that the CRT misapprehended BKL's evidence when it concluded that BKL did "not say anything about whether the noise caused by SL30's occupants was unreasonable": Decision at paras. 33, 44. In so concluding, the CRT appears to have ignored the BKL's initial opinion that the "instantaneous footfall, speech and music noise from Unit 30 is clearly audible within Unit 29" and that "[t]he exceedances noted above would indicate that the intrusive noise levels are very clearly audible and potentially very disturbing". The CRT also appears to have ignored the conclusory paragraph of both reports, where BKL found that the noise emanating from SL30 was more than four times louder than background noise levels in SL29.

[61] The CRT's statement at paragraph 34 of the Decision that neither party disputed the accuracy of BKL's findings is difficult to reconcile with the petitioners'

express reliance in their written submissions to the CRT on the Initial BKL Report's conclusion that intrusive noise levels are "very clearly audible and potentially very disturbing". That statement was not included in the Revised BKL Report.

[62] In my view, the CRT failed to consider BKL's evidence as a whole and failed to account for material revisions to BKL's evidence as set out in the Revised BKL Report following communication from the Strata's legal counsel. By consequence, the CRT misapprehended BKL's evidence and therefore erroneously concluding that the noise emanating from SL30 was not unexpected or unreasonable. The CRT's conclusion that the Strata properly investigated the Complaints was predicated on a misapprehension of the evidence and is, therefore, patently unreasonable.

[63] Considering the Decision in its entirety, the CRT essentially concluded that had the background noise in SL29 been higher (i.e. had there been higher levels of noise in SL29), then the noise emanating from SL30 would not have been so much of a disturbance or would not have been "unexpected". This conclusion was founded on a misapprehension of BKL's evidence and I can deduce no "rational or tenable line of analysis" supporting it: *Downing* at para. 66, citing *The College of Physicians and Surgeons of British Columbia v. The Health Professions Review Board*, 2022 BCCA 10 at para. 129, leave to appeal to SCC ref'd, 40106 (24 November 2022) [*College of Physicians*].

[64] Put differently, and leaving aside the CRT's misapprehension of BKL's evidence, I am unable to find a rational basis in the record to support the CRT's conclusion that the noise emanating from SL30 would not have been so disturbing if the petitioners had simply been louder themselves. These errors were central to the CRT's reasoning in support of its conclusion that the Strata properly investigated the Complaints. The CRT's decision in that regard is, therefore, patently unreasonable.

Enforcement of the Bylaws

[65] Nor is there, in my view, any rational or tenable line of analysis supporting the CRT's conclusion that the Strata properly enforced the Bylaws. Simply put, the CRT does not appear to have considered the enforcement issue separate and apart from

the Strata's efforts to investigate. This is a notable omission given that the relief sought by the petitioners in their dispute notice was, in the main, to have the Strata enforce the Bylaws.

[66] The CRT found that the Strata sent SL30 ten bylaw Violation Notices in 2021 in response to the Complaints and had a discussion with the petitioners about those Complaints: Decision at paras. 36–37. This appears to have been the extent of the CRT's analysis of the Strata's enforcement of the Bylaws. In particular, the CRT does not appear to have considered whether the Strata took any steps to enforce the Bylaws other than issuing serial violation notices to SL30. Despite the Violation Notices indicating that fines could be imposed for each contravention or continuing contravention of the Bylaws, the CRT did not consider whether the Strata's enforcement of the Bylaws was reasonable in the absence of any such steps having been taken, despite 12 Violation Notices having been issued within a span of six months.

[67] Nor did the CRT address the petitioners' complaint that the Strata failed to adhere to the process it communicated to them would be followed for investigating the Complaints. In March 2020, the Strata advised the petitioners that each complaint council received would be investigated individually by members of council with the following steps being taken:

a) a Violation Notice is sent to the unit owner subject to the complaint;

b) the owner subject to the complaint has 21 days to respond to the Strata council;

c) after 21 days, the Strata council will determine the next course of action in the investigative process, i.e. talking to the parties involved, noise testing by members of council to attempt to recreate the noise, or contracting professional sound professionals to measure the actual decibel levels of the noise; and

d) after the investigative process, council will determine the next course of action, i.e. bylaw fine, warning letter or further bylaw action against the subject unit.

[68] The CRT's analysis of whether the Strata properly enforced the Bylaws appears to have been truncated by its reliance on the Revised BKL Report and its conclusion that the noise emanating from SL30 was not unexpected and therefore not unreasonable. At no point did the CRT consider whether the Strata properly enforced the Bylaws. Nor did it attempt to reconcile the number and frequency of Violation Notices issued with the lack of any evidence before it of further steps having been taken by the Strata to enforce the Bylaws. Notably, the Violation Notices all indicated that SL30 was causing "unreasonable noise", and the majority were sent after the Strata had obtained BKL's reports. The CRT did not address what was, in my view, the key issue raised by the petitioners in their written argument, namely the lack of action by the Strata to enforce the Bylaws other than issuing serial Violation Notices without any apparent follow-up action being taken.

[69] This may have been the result of the CRT's misapprehension of BKL's opinion regarding the audibility and disturbance potential of that noise on SL29 and resulting conclusion that the noise was not unreasonable, I am nonetheless unable to deduce a rational or tenable line of analysis for the CRT's conclusion that the Strata properly enforced the Bylaws. In the result, I find that the CRT's conclusion in that regard is patently unreasonable.

Error #3: Decision on Whether the Noise was Unreasonable

[70] The requirement that the parties to be made aware of the issues under consideration by the tribunal, in order to make submissions on those issues, is a central component of the duty of procedural fairness: *Fairgrieve v. British Columbia Review Board*, 2022 BCSC 1882 at para. 90. Procedural unfairness will arise where a tribunal rejects a party's position for reasons that the party did not have notice of or an opportunity to respond to: *Nova-BioRubber* at paras. 74, 76.

[71] This is a manifestation of the *audi alteram partem* principle, under which each party must be given a fair opportunity to be heard on material issues that could have a bearing upon the tribunal's decision: *Nova-BioRubber* at paras. 74, 76. That principle has been described as one of the most fundamental principles of natural justice and includes the "right to notice, right to a hearing, right to know the case one has to meet, and the right to answer it": *Oleman v. Laura Jamieson Housing Co-Operative*, 2022 BCSC 483 at para. 36.

[72] The petitioners assert that the CRT acted unfairly by determining an issue not before it, namely that the noise emanating from SL30 was not unreasonable. In response, the Strata appears to concede the point, but says that the CRT having decided an issue not put before it does not render the CRT's determination that the Strata properly investigated the petitioners' Complaints unreasonable.

[73] This submission does not assist the Strata. The issue here is not whether the CRT's conclusion was reasonable, but rather whether, in all of the circumstances, the CRT acted fairly in deciding that issue: *Downing* at para. 92. A tribunal will act unfairly when it decides an issue not placed before it by the parties and in the absence of the parties having had an opportunity to address that issue: *Bhullar* at para. 75, *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at para. 65.

[74] The petitioners' dispute notice did not ask the CRT to determine whether the noise emanating from SL30 was unreasonable. Rather, the primary relief sought by the petitioners was to have the Bylaws enforced and damages in the amount of $3,500. This is reflected in both their dispute notice and written submissions.

[75] In seeking this relief, the petitioners relied on the Initial BKL Report, quoting its conclusion that the noise levels were "very clearly audible and potentially very disturbing" in the "Claim Description" section of the dispute notice. In response, the Strata took the position that it was willing to enforce the Bylaws if a contravention was established, but was "still in the process of gathering all the evidence to support

both sides of the noise complaint, though this process has been halted temporarily as the CRT case is processed".

[76] In deciding the dispute in the manner that it did, the CRT appears to have conflated the issue of whether the Strata was enforcing the Bylaws with the underlying issue of whether the noise was unreasonable. The CRT determined that the noise was not unreasonable and then relied on that determination to conclude that the Strata properly investigated and enforced the Bylaws. In doing so, the CRT failed to provide the petitioners with a fair opportunity to be heard on a material issue that bore on the Decision.

[77] In the circumstances, the issue of whether the noise was unreasonable was not, therefore, put before the CRT for determination. Indeed, had a decision on that point been sought, the issue of the revisions to the Revised BKL Report would likely have been raised by the petitioners, though of course this cannot be known with any certainty given that they were not afforded the opportunity to do so.

[78] By determining that the noise was not unreasonable despite that issue not being put before it and then relying on that finding in concluding that the Strata had properly investigated and enforced the Bylaws, the CRT deprived the petitioners of the opportunity to address the ultimate issue that the CRT determined against them and relied on in dismissing the dispute.

[79] In going beyond the matters properly before it as framed in the dispute notice and the Strata's response and deciding the issue of whether the noise emanating from SL30 was unreasonable—without notice to the parties that it was going to do so—the CRT breached its duty of procedural fairness. By consequence, I find that the CRT acted unfairly.

Conclusion

[80] The petition is granted, and the matter is remitted back to the CRT for reconsideration.

[81] The petitioners are entitled to their costs of this petition, payable at Scale B. The CRT is not entitled to costs, nor do I make any costs order against it.

"Hughes J."