



Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Booth et al v. The Owners, Strata Plan NW2575*, 2018 BCCRT 8

B E T W E E N :

George Booth and Verna Booth

APPLICANTS

A N D :

The Owners, Strata Plan NW2575

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Shannon Salter, Chair

INTRODUCTION

1. This is a preliminary decision about whether the Civil Resolution Tribunal (tribunal) should exercise its discretion to suspend this tribunal proceeding pending a Supreme Court of British Columbia (court) application for judicial review by the

respondent, The Owners, Strata Plan NW2575 (strata). The strata has applied to judicially review the tribunal's previous preliminary decision to decline its request for a representative (see *Booth et al v. The Owners, Strata Plan NW2575*, 2017 BCCRT 61). The applicant strata lot owners (owners) oppose the strata's request for a suspension. This is not a final decision on the merits of the dispute. Only the evidence and submissions relevant to this issue is referenced below.

JURISDICTION AND PROCEDURE

2. These are the tribunal's formal written reasons. The tribunal has jurisdiction over strata property claims brought under section 3.6 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
3. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to resolve the issue in this decision through written submissions, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
4. Under section 61 of the Act, the tribunal may make any order or give any direction in relation to a tribunal proceeding it thinks necessary to achieve the objects of the tribunal in accordance with its mandate. In particular, the tribunal may make such an order on its own initiative, on request by a party, or on recommendation by a case manager (also known as a tribunal facilitator).
5. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

6. Under tribunal rule 121, in resolving this dispute the tribunal may make one or more of the following orders:
 - a. order a party to do or stop doing something;
 - b. order a party to pay money;
 - c. order any other terms or conditions the tribunal considers appropriate.
7. The Act and the tribunal rules are silent with respect to the status of a tribunal dispute after a party has filed an application for judicial review. For this reason, the tribunal must make a discretionary decision about the procedure to be followed in this case.

ISSUE

8. Should the tribunal exercise its discretion to suspend the tribunal proceeding pending the court's decision on the strata's judicial review application?

POSITION OF THE PARTIES

9. The parties made submissions on this issue, which I have carefully reviewed. Some of the parties' submissions involved arguments about whether the court should permit the judicial review application, as well as about the merits of the issues in the dispute. Neither of those matters are before me in this decision. For this reason, the parties' main arguments on the narrow issue of whether to suspend the tribunal proceeding are summarized below.
10. The owners oppose the suspension request. In short, they argue that the delay this would cause is contrary to the tribunal's mandate and would prejudice their interests, given that they have been living with the issues giving rise to the dispute for a number of years.
11. As detailed below, the strata argues that the three-part test for a stay of proceedings (or suspension) has been met in this case. The strata requests that I grant its request for a suspension.

ANALYSIS

12. The owners' application for dispute resolution involves the authorization and maintenance of a sunroom and related issues.
13. It is undisputed that the test for whether to suspend a proceeding pending an appeal of an interlocutory decision is as follows:
 1. Is there a serious issue to be determined?
 2. Will the party applying for the suspension suffer irreparable harm if the relief is not granted?
 3. Does the balance of convenience, taking into account the public interest, favour the granting of the relief?

(RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 at 334)

14. The general rule is that preliminary, or interlocutory decisions, such as the tribunal's preliminary decision not to permit a representative, are not subject to judicial review. This rule applies unless the judicial review relates to either the tribunal's jurisdiction, or to the impartiality of the tribunal member, neither of which is in issue in this case. This general rule is called the "prematurity doctrine." (See *Zündel v. Canada (Human Rights Commission)*, 2000 CanLII 17138 (FCA) at para. 10 and *Szczecka v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 9425 (FCA) at 335.)
15. The prematurity doctrine prevents the judicial review of preliminary decisions for a few reasons. First, a preliminary decision that a party disagrees with may not matter in the end, depending on how the tribunal decides the merits of the dispute. Second, judicial reviews of preliminary decisions fracture the dispute resolution process by creating multiple court and tribunal proceedings, causing considerable delay and additional cost. This undermines the mandates of administrative

tribunals like the CRT, which are designed to be accessible, affordable, and efficient. (See section 2 of the Act, *Zündel*, and *Torres* at para. 20).

16. The application of the prematurity doctrine to the judicial review in this case is a matter for the court to decide. However, it is also a relevant consideration for the tribunal with respect to each part of the three-part test for a suspension, set out above. (*Torres v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 1115 (CanLII) at paras. 18, 19 and 23)
17. For the purpose of this preliminary decision, I accept 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 this dispute. However, like the court in *Torres*, I note that this may have no practical consequence, as we do not yet know how the tribunal will ultimately decide the issues in this dispute.
18. With respect to the second factor, the strata says it will suffer irreparable harm if the tribunal proceeding is not suspended because its ability to defend the tribunal action and pursue the judicial review will be severely compromised. The strata argues there is no remedy available to a party who has been deprived legal representation. It says that whether or not the strata is permitted legal representation will also invariably impact the conduct of the tribunal proceeding and the strata council's and insurer's participation for the balance of this dispute. The strata argues that the harm of denied legal representation is irreparable, although the strata does not explain why.
19. Courts have determined that proof of irreparable harm must be clear and not speculative (see, for example, *Nature Co. v. Sci-Tech Educational Inc. (1992)*, 41 C.P.R. (3d) 359 at 367). In *Torres*, the court found that where, as in this case, the final outcome of the tribunal process is unknown, claims of irreparable harm are "entirely speculative." This is because if the strata is successful in the final determination of the dispute, it will have suffered no harm, let alone irreparable harm. While it would be inconvenient for the strata to have to commence a new judicial review after the final tribunal decision is issued, this does not amount to

irreparable harm. Again, the prematurity doctrine generally requires parties to wait for a final decision before seeking to judicially review procedural decisions made by the tribunal in the course of the tribunal proceeding. For all of these reasons, I find that the strata has not established that it will suffer irreparable harm, should the tribunal decline to suspend the tribunal proceeding.

20. The strata also relies on *B.C. Teachers' Federation v. British Columbia (Minister of Education)*, 2012 BCSC 960, in which the court referred to *Syndicat des travailleurs et travailleuses des postes c. Société canadienne des postes*, 2011 CF 1207. In that case, the court held that irreparable harm would occur if the legality of the appointment of the arbitrator was not determined. However, the strata acknowledges that this case is distinguishable. There is no suggestion that as the tribunal member who wrote the preliminary decision on representation, I was not authorized to do so. For this reason, I do not find this argument persuasive.
21. Lastly, I must consider the balance of convenience, including any public interest factors. The strata argues that its impending judicial review is meritorious and will lead to a line of authority that will provide the strata and the tribunal with case law addressing its rules regarding representation, and in particular, the application of representation requests for insured defense matters. The strata also argues that its judicial review application will highlight serious issues of "procedural fairness and reasonableness," and in this regard, the strata identified several arguments it intends to make in the judicial review application. However, I find that these are matters for the court to determine in deciding whether to hear the strata's judicial review application, and if so, how to decide it. In my view, this is a separate question from whether the tribunal proceeding should continue in the meantime. In this regard, I note that the strata is free to have a helper, without needing the tribunal's permission. This helper may be a lawyer, who can provide it with legal advice and help preparing materials, including filling out forms, among other assistance. I therefore do not find the strata's arguments about the merits of its judicial review application tilt the balance of convenience in favour of the strata.

22. The strata also submits there would be no prejudice to either party or, alternatively, the prejudice would be greater for the strata, if the tribunal proceeding continued at the same time as the judicial review.
23. However, in their submissions, the owners expressed frustration at the delay in resolving their dispute caused by the judicial review application. The owners also point to the years they have already spent living with this dispute, and the “lost security and peace” they say they have endured. I accept the owners’ evidence and I find that the owners would be prejudiced by the further delay in resolving this dispute.
24. I also find that, given the prematurity doctrine, and the general presumption that parties are not entitled to judicially review preliminary decisions, the prejudice to the strata in proceeding in the normal course is significantly less than the prejudice to the owners in suspending the tribunal proceeding.
25. I have also considered the strata’s argument that it would be in the public interest to have a court decision on the representation issue. However, continuing the tribunal proceeding will not impede the strata from pursuing its judicial review on the representation issue. In this regard, I do not consider that the public interest is served by suspending the tribunal proceeding in this case.
26. I note that in *RJR*, the court found that when a private applicant, like the strata, alleges that the public interest is at risk, that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In that case, the court found that, “In considering the balance of convenience and the public interest...the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.”
27. On balance, I find that 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.” Declining the strata’s

request to suspend the tribunal proceedings will allow the owners' dispute to be resolved in a manner that is most consistent with the tribunal's mandate.

28. For the reasons set out above, I have decided to exercise my discretion to refuse the strata's request that the tribunal proceeding be suspended pending the hearing of its judicial review application on the issue of whether it is entitled to have legal representation in this dispute. The strata's request is therefore denied.

DECISION AND ORDERS

29. I order that the strata's request that the tribunal proceeding be suspended pending the judicial review application is refused.
30. As this is a preliminary decision, I make no order with respect to the reimbursement of tribunal fees. While I note the tribunal's general rule is to not award reimbursement of legal fees, it is open to the parties to request the reimbursement of tribunal fees and reasonable dispute-related expenses in the tribunal decision process on the merits of the dispute, if this becomes necessary.

Shannon Salter, Chair