

4-24-2018

An Error of Law and the Credibility of the Civil Resolution Tribunal

Douglas C. Harris

Allard School of Law at the University of British Columbia, harris@allard.ubc.ca

Sophie Marshall

Follow this and additional works at: https://commons.allard.ubc.ca/fac_pubs



Part of the [Administrative Law Commons](#), and the [Property Law and Real Estate Commons](#)

Citation Details

Douglas C Harris & Sophie Marshall, "An Error of Law and the Credibility of the Civil Resolution Tribunal" (24 April 2018) CanLII Connects.

This Response or Comment is brought to you for free and open access by the Faculty Publications at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons. For more information, please contact petrovic@allard.ubc.ca, elim.wong@ubc.ca.

An Error of Law and the Credibility of the Civil Resolution Tribunal

Douglas C. Harris* and Sophie Marshall**

The Civil Resolution Tribunal has made a serious error of law. The error is straightforward and clear. Over a number of decisions, the CRT has attributed words to the British Columbia Court of Appeal that are, instead, the words of the British Columbia Supreme Court. The seriousness of this error is threefold. First, the CRT is citing the BCCA decision as authority for the proposition that the BCCA rejected. Second, in misrepresenting the BCCA decision, the CRT is changing the scope of protection for individual strata property owners from their strata corporations. Finally, the CRT is compounding the error by repeating it. In this comment, we explain the error, outline its seriousness, and consider the implications for the CRT as it works to establish its credibility and expertise in the body of law that creates and governs strata property.

The error of law appears first in [Moore v The Owners, Strata Plan KAS 1878](#).¹ This case involved a dispute over the allocation of parking stalls. The owner claimed that the strata corporation's assignment of parking stalls in the common property was significantly unfair to her, and she relied on the [Civil Resolution Tribunal Act](#) [CRTA], section 48.1(2), which provides the CRT with authority to make an order against a strata corporation "to prevent or remedy a significantly unfair action."² This section, and section 164 of the [Strata Property Act](#) [SPA] on which it is based,³ provide individual strata property owners with protection from, and redress for, the unjust or inequitable decisions and actions of their strata corporation.

To interpret "significantly unfair" the CRT turned to the BCCA decision in [Dollan v Strata Plan BCS 1589](#),⁴ the leading interpretation of "significantly unfair" in the SPA. In doing so, the tribunal member in *Moore* wrote:

26. With reference to the *Dollan v. Strata Plan BCS 1589*, 2012 BCCA 44 (CanLii) case cited by the owner, Garson J.A. developed a new test for analysis under section 164, which I find would apply to an analysis under section 48.1(2) of the Act as follows:

1. Examined objectively, does the evidence support the asserted reasonable expectations of the owner?
2. Does the evidence establish that the reasonable expectation of the owner was violated by action that was significantly unfair?

27. I also note the court's further comments in *Dollan* (my bold emphasis added):

*Professor and Nathan T. Nemetz Chair in Legal History, The University of British Columbia, Peter A. Allard School of Law.

**JD Student, Class of 2018, Peter A. Allard School of Law.

We thank Mary Liston for her comments on an earlier draft.

¹ [Moore v The Owners, Strata Plan KAS 1878](#), 2017 BCCRT 51 [*Moore*].

² [Civil Resolution Tribunal Act](#), SBC 2012, c 25 [CRTA].

³ [Strata Property Act](#), SBC 1998, c 43 [SPA].

⁴ [Dollan v Strata Plan BCS 1589](#), 2012 BCCA 44 [*Dollan*].

There is no doubt that in making a decision the Strata Corporation must give consideration of the consequences of that decision. However, in my view, **if the decision is made in good faith and on reasonable grounds, there is little room for a finding of significant unfairness merely because the decision adversely affects some owners to the benefit of others. ...**⁵

The error lies in attributing “the court’s further comments” to *Dollan*. Garson JA does reproduce this passage in her reasons for decision in *Dollan*,⁶ but draws it from the BCSC decision in [Peace v Strata Plan VIS 2165](#).⁷ In fact, the passage lies at the heart of the judgment in *Peace* that courts should review the processes and procedures of strata corporation decision-making for significant unfairness, but that there is “little room” to review the consequences of those decisions. The full paragraph from the decision in *Peace* is as follows:

[55] I have already referred to the wording of section 164 of the SPA. I repeat that the focus of that section is on the conduct of the Strata Corporation and not on the consequences of the conduct. **There is no doubt that in making a decision the Strata Corporation must give consideration of the consequences of that decision. However, in my view, if the decision is made in good faith and on reasonable grounds, there is little room for a finding of significant unfairness merely because the decision adversely affects some owners to the benefit of others.** This must be particularly so when the consequence complained of is one which is mandated by the SPA itself.⁸

The seriousness of the error lies, first, in the fact that Garson JA specifically and explicitly rejected the limited scope for judicial review that the BCSC adopted in *Peace*. Instead, Garson JA held that courts should not limit themselves to reviewing processes and procedures, but must also consider the unfairness of outcomes. In her reasons for decision, Garson JA put it this way:

[24] Section 164 is remedial. It addresses that, despite using a fair process and holding a democratic vote, the outcome of majoritarian decision-making processes may yield results that are significantly unfair to the interests of minority owners. Section 164 provides a remedy to an owner who has been treated significantly unfairly by co-owners or the strata council that represents them. The view that significantly unfair decisions reached through a fair process are insulated from judicial intervention would rob the section of any meaningful purpose. I agree with what Masuhara J. said in *Gentis* that the outcome of the vote is one factor to be considered in determining if the impugned action is unfair. **I do not agree with the suggestion in *Pearce* [sic] that provided the process is fair and democratic, a court should defer to the decision of the strata council or corporation.**⁹

⁵ *Moore*, *supra* note 1 at paras 26-27 (footnote omitted; emphasis in original).

⁶ *Dollan*, *supra* note 4 at para 21.

⁷ [Peace v Strata Plan VIS 2165](#), 2009 BCSC 1791 [*Peace*].

⁸ *Ibid* at para 55 (emphasis added to indicate the sentences reproduced in *Moore*).

⁹ *Dollan*, *supra* note 4 at para 24 (emphasis added).

The justices who joined Garson JA in *Dollan*—Hall JA (concurring with Garson JA in the result) and Smith JA (in dissent)—suggested greater deference to the democratic decision-making of strata corporations in their reasons for decision, and thus less attention to the unfairness of outcomes, but both indicated that courts were not limited to a review of processes and procedures.¹⁰ As a result, although the appellate justices in *Dollan* did not speak with one voice, it is clear that *Dollan* is not authority for the principle that good-faith decision-making on reasonable grounds will insulate a strata corporation against claims of significant unfairness. If anything, *Dollan* is the standard-bearer for its opposite: courts must be attentive to processes and to outcomes when reviewing the decisions of strata corporations for significant unfairness to one or more strata property owners.

The CRT's inadvertent misrepresentation of the BCSC decision in *Peace* as the BCCA's statement of the law in *Dollan* is not a trivial error. As Garson JA suggests, the purpose of section 164 is to provide strata property owners with remedies where "majoritarian decision-making processes" create significant unfairness.¹¹ In appearing to narrow the scope of its review of strata corporation decision-making to processes, the CRT is limiting the access of strata property owners to the statutory remedies, contrary to the direction from the BCCA.

Finally, the CRT is compounding the seriousness of the error by repeating it. Since the decision in *Moore*, tribunal members have reproduced the same passage from *Peace*, with the same attribution to *Dollan*, in six subsequent decisions.¹² In five of the seven decisions, the CRT determined that the actions or decisions of the strata corporations were not significantly unfair to the applicant-owners. The CRT's error of law in these decisions provides the strata property owners with a clear ground for appeal to the BCSC.¹³

Creating grounds for appeal in a growing list of cases is cause for concern, but the error and its repetition should also cause the CRT to reflect on the manner in which it uses judicial precedent and its earlier decisions as it endeavors to build expertise and establish credibility in strata property law. In this regard, the decisions of the CRT do not create binding precedent.¹⁴ Tribunal members are not required to follow earlier decisions. However, even if prior decisions are not binding, consistency in decision-making is an important value. The parties appearing at the CRT have a

¹⁰ *Ibid* at paras 43-44, 64.

¹¹ *Ibid* at para 24.

¹² [Wilchek v The Owners, Strata Plan VR 55](#), 2017 BCCRT 67 at para 65; [Pritchard v The Owners, Strata Plan VIS3743](#), 2017 BCCRT 69 at para 37; [A.P. v The Owners, Strata Plan ABC](#), 2017 BCCRT 94 at para 42; [D.W. v The Owners, Strata Plan BCS XXX](#), 2017 BCCRT 107 at para 57; [Allard v The Owners, Strata Plan VIS 962](#), 2017 BCCRT 111 at para 101; [Maslek et al v. The Owners, Strata Plan LMS 2778](#), 2018 BCCRT 106 at para 20. The tribunal member who authored *Moore*, *supra* note 1, also authored the four subsequent decisions.

¹³ *CRTA*, *supra* note 2 s 56.5 provides for the appeal of final CRT decisions to the BCSC.

¹⁴ This principle of administrative law applies generally to administrative tribunals, not just the CRT.

reasonable expectation that, when it comes to the final decision-making stage in the CRT's process, the tribunal will approach and resolve their disputes as it has approached and resolved similar disputes in the past. As a result, tribunal members should be consulting earlier CRT decisions in considering their decisions. But in consulting earlier decisions, tribunal members need to be cautious about relying on them and on their interpretations of court decisions in particular. When citing important principles from the courts, tribunal members should turn to the court decisions themselves. In this instance, the CRT appears to have repeated its error because tribunal members turned to the CRT decision in *Moore* and to its representation of the BCCA decision in *Dollan* rather than to the BCCA decision itself.

Errors of law will occur in administrative tribunal decisions. It may be that they are more likely to occur in the early years of an administrative tribunal while it develops its expertise. It may also be that the particular design of the CRT, with its "shift in emphasis away from the needs of people who provide justice processes [including lawyers] towards the people who use them,"¹⁵ means that errors of law will occur more frequently. However, we recognize that the design of the CRT reflected conscious and deliberate choices to enhance access to effective and efficient strata property dispute resolution. Our purpose in this comment is not to argue that the CRT should reorient its processes away from the needs of those who have disputes to be resolved.

Nevertheless, we do suggest that this error of law and its repetition have implications for the CRT and its credibility as a body charged, among other things, with interpreting and applying strata property law. While the CRT establishes itself as an administrative tribunal with expertise in strata property law, tribunal members should be conscious that they are building a foundation on which strata property dispute resolution will rest. This foundation-building occurs in the careful authoring of individual decisions, but it may also require collective and collaborative work among tribunal members to establish the practices of interpretation that will guide their decision-making. It may also require drawing from the expertise of the legal profession in strata property law, perhaps in ways that involve lawyers in roles beyond that of advocates in an adversarial setting. Whatever the methods, the success of the CRT will turn on its capacity to provide access to effective and efficient dispute resolution, and on its accurate interpretation and clear application of the body of rules, based primarily in statute and case law, that creates and governs strata property. In fact, the former will depend, at least in part, on the latter. It is with accessibility and credibility that the CRT will best fulfill its promise of improving the lives of people who reside or work within the legal architecture of strata property.

¹⁵ Shannon Salter and Darin Thompson, "Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunal" (2016-17) 3 McGill J Disp Resol 113 at 125.