

CANADA / JUDGMENT

Kunzler v. The Owners, Strata Plan EPS 1433

2020 BCSC 576

COURT

Supreme Court of British Columbia

DECIDED

16 April 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 576 Kunzler v. The Owners, Strata Plan EPS 1433

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kunzler v. The Owners, Strata Plan EPS 1433,

2020 BCSC 576

Date: 20200416

Docket: S-193371

Registry: Victoria

Between:

Kevin Kunzler, Cheryl Kunzler and Skywater Cannabis Ltd.

Petitioners

And:

The Owners, Strata Plan EPS 1433

Respondent

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Petitioners:

E. Reimer

D. Fogarty

Counsel for the Respondent:

S.M. Smith

Place and Date of Trial/Hearing:

Victoria, B.C.

November 8, 2019

Place and Date of Judgment:

Victoria, B.C.

April 16, 2020

Introduction

- [1] The petitioners, Kevin and Cheryl Kunzler (collectively the "Kunzlers") and Skywater Cannabis Ltd. ("Skywater"), seek orders to remedy alleged unfair treatment by the respondent's passing of bylaws preventing the petitioners' planned construction and operation of a licensed cannabis production facility on Salt Spring Island, B.C.
- [2] The petitioners submit the passing of the new bylaws represents a significantly unfair action by, or decision of, the respondent contrary to s. 164 of the Strata Property Act, S.B.C. 1998, c. 43 ("SPA"):

Preventing or remedying unfair acts

164.(1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair

- (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
 - (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.
- (2) For the purposes of subsection (1), the court may
- (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
 - (b) vary a transaction or resolution, and
 - (c) regulate the conduct of the strata corporation's future affairs.

- [3] The petitioners seek an order that the new bylaws are unenforceable against them pursuant to s. 164(2)(c) or, in the alternative, s. 121(1)(a) of the SPA. They also seek an order under s. 165(b) of the SPA restraining the respondent, its agents and representatives from further conduct that constitutes harassment of, and interference with, the Kunzlers, the business of Skywater and its directors, officers, agents, employees, representatives and invitees, or each of them.

Jurisdiction

- [4] Counsel for both parties consent to this Court hearing the matter, rather than the Civil Resolution Tribunal ("CRT") which would otherwise have jurisdiction.
- [5] Under s. 121 of the Civil Resolution Tribunal Act, S.B.C. 2012, c. 25 ("CRTA"), the CRT has jurisdiction over claims in respect of the SPA concerning the following:
- (a) the interpretation or application of the Strata Property Act or a regulation, bylaw or rule under that Act;
 - (b) ...
 - (c) the use or enjoyment of a strata lot;
 - ...
 - (e) an action or threatened action by a strata corporation, including the council, in relation to an owner or tenant;
 - (f) a decision of a strata corporation, including the council, in relation to an owner or tenant;
 - ...
- [6] Section 16.1(1) of the CRTA provides for the staying or dismissal by the court of certain proceedings that fall within the jurisdiction of the CRT "unless it is not in the interests of justice and fairness for the tribunal to adjudicate the claim": s. 16.1(1)(c). Section 16.3(1) addresses the factors the court may consider in determining whether it is in the interests of justice and fairness that the CRT adjudicate the claim. The parties rely on s. 16.3(1)(a), (c) and (d):
- (a) whether an issue raised by the claim or dispute is of such importance that the claim or dispute would benefit from being adjudicated by that court to establish a precedent;
 - (c) whether an issue raised by the claim or dispute is sufficiently complex to benefit from being adjudicated by that court;
 - (d) whether all of the parties to the claim or dispute agree that the claim or dispute should not be adjudicated by the tribunal;

- [7] The parties rely on *The Owners, Strata Plan VR 855 v. Shawn Oaks Holdings Ltd.*, 2018 BCSC 1162 at para. 56, where the above factors were considered, and the court took jurisdiction. Counsel in that case had argued the matter was a complex dispute and that there would be benefit from a Supreme Court decision on the issues raised.
- [8] The parties also refer to *Downing v. Strata Plan VR2356*, 2019 BCSC 1745 at para. 42, where the court found the CRT should have jurisdiction, not the court because the issues in dispute fell within the expertise of the CRT and turned largely on the individual facts of the case.
- [9] In this case, the issue is complex and may have precedential value, and I recognize the desire of counsel to have the matter argued before the court instead of the CRT process in order to make full oral arguments. As a result, I agree that it is not in the interests of justice and fairness for the CRT to hear the matter, thus this Court will take jurisdiction.

Background

- [10] The respondent Strata Corporation was incorporated under the SPA and was registered upon depositing its bare land strata plan in the Land Title Office on June 13, 2014. The Strata Corporation is a bare land strata consisting of 27 large properties that range from five to 78 acres in size. It is accessible by way of a private road under an easement agreement from a neighbouring strata corporation and from there, access to a public road. Strata Lot 1 (the "Property") is a 16.4-acre property purchased by the Kunzlers in 2017.
- [11] The developer filed a Disclosure Statement with the Superintendent of Real Estate dated November 12, 2014 and amended on August 26, 2015 which included the following statements:
- (a) The Islands Trust is responsible for regulating land use on Salt Spring Island and as such they have established Land Use Bylaw 355;
 - (b) Strata Lots 1 through 21 are wholly within the F1 zone;
 - (c) The permitted uses within the F1 zone include
 - i. Forestry uses related to the production and harvesting of botanical forest products; and
 - ii. Agriculture...
 - (d) In accordance with the zoning noted above the bare land strata lots may be used for commercial or other purposes not ancillary to residential purposes.
- [12] Bylaw No. 355, Salt Spring Island Land Use Bylaw, 1999 (the "Zoning Bylaw"), referred to in the Disclosure Statement, lists agricultural use as one of the "Permitted Uses of Land, Buildings, and Structures" for F1 zones.
- [13] The strata bylaws in force when the Kunzlers purchased the Property were adopted on August 28, 2015 (the "Old Bylaws"). Section 2 states:

2) Use of property

(a) An owner, tenant, occupant or visitor must not use a strata lot or common property in a way that

(i) causes a nuisance or hazard to another person,

(ii) causes unreasonable noise,

(iii) unreasonably interferes with the rights of other persons to use and enjoy the common property,

(iv) is illegal.

(d) An owner, tenant or occupant must ensure that those portions of their strata lot that are within plain view of the Road System or any other strata lot's building site are maintained in a neat and orderly fashion or remain in their natural state.

(e) Unless prohibited by a Land Use Bylaw of the Islands Trust an owner, tenant or occupant of any strata lot with an area less than 8 hectares is restricted to the following land uses for their strata lot:

(i) Single family dwellings

(ii) Accessory buildings

(iii) Seasonal Cottages

(iv) Home based businesses

(v) Agriculture

3) Home Based Businesses

(d) Agriculture under Bylaw 2 e) v) is deemed not to be a Home Based Business under Bylaw 3.

4) Building Scheme

(a) An owner must obtain the written approval of the strata council before making any alteration to the strata lot within 7.5 meters of the Road System...

(b) An owner must obtain the written approval of the strata council before constructing any fence or gate on a strata lot that is within plain view of the Road System...

(c) An owner must obtain the written approval from [sic] the strata council before constructing barns, animal shelters, equipment garages and other structures related to agricultural and/or a home based business on a strata lot that are within the plain view of the Road System or any other strata lot's building site.

- (d) An owner must obtain the written approval of the strata council to store material, equipment, vehicles, trailers or other items if in plain view of the Road System or any other strata lot's building site. If an approval is granted it will only be for a limited time period.
- (e) The strata council must not unreasonably withhold approvals under subsections (a) to (d) above but its decision must be based on retaining the rural elegance of the Road System and what effect the approvals would have on other strata lot owners.

[Emphasis in original.]

- [14] The petitioner Mr. Kunzler has been pursuing the establishment of a licensed cannabis production business (the "Cannabis Business") since 2014. Before purchasing the Property, he relied on the Zoning Bylaw and the Old Bylaws and concluded a cannabis production business, which was permitted on the Property, provided: (1) he obtain a valid licence under the Access to Cannabis for Medical Purposes Regulations, SOR/2016-230 ("ACMPR") and the Cannabis Act, S.C. 2018, c. 16, once it received Royal Assent; and (2) any production facilities were constructed and operated in a manner that did not offend the nuisance prohibitions in section 2 of the Old Bylaws.
- [15] The Kunzlers entered into the contract of purchase and sale for the Property on May 5, 2017 with a completion date of June 16, 2017. Mr. Kunzler incorporated Skywater on June 14, 2017. The Kunzlers made the purchase with the intention of leasing the Property to Skywater, the proposed licensee and operator of the Cannabis Business. The Property is registered in the names of Kevin William Kunzler and Cheryl Ann Kunzler as joint tenants.
- [16] At the time of purchase, the Zoning Bylaw and the Old Bylaws permitted agricultural use of the Property, with the only impermissible uses being those that would create a nuisance or were illegal. Neither the Zoning Bylaw nor the Old Bylaws specified any type or types of agriculture that would not be permitted. There were no bylaws specifically prohibiting licensed commercial cannabis production.
- [17] Mr. Kunzler continued to plan the construction and licensing of his proposed production facility (the "Facility"), including retaining an architect to design the Facility. On July 24, 2017 Skywater applied to become a licenced producer under the ACMPR and has since begun the process of transitioning that application to an application for the equivalent licences under the Cannabis Act.
- [18] On May 9, 2019, Skywater received a letter from Health Canada regarding its application for a licence under the Cannabis Regulations, SOR/2018-144, indicating that Health Canada had "no critical concerns with the application at this time." However, the application could not be approved until further steps were completed, including construction of the Facility.
- [19] The Capital Regional District ("CRD") has functional jurisdiction on Salt Spring Island and the Southern Gulf Islands to issue Building Permits and oversee building inspections. On May 13, 2019 the CRD provided Mr. Kunzler with a checklist of necessary documents to be provided for a Building Permit application. The checklist erroneously indicated he needed

the express approval of the Strata Council for the Cannabis Business (the "Approval Requirement"). Hence, on May 13, 2019 Mr. Kunzler wrote to the Strata Council providing details of the proposed Cannabis Business and Facility and requested the Strata Council's approval. He later determined such approval was not required. This was the first time the Strata Council were informed of the proposed use of the Property.

- [20] On May 15, 2019, Mr. Kunzler wrote directly to Caitlin Adamson, the new president of the Strata Council, to inform her of his intention to host a meeting at the proposed building site on the Property (the "Site Visit"). Mr. Kunzler later explained to Ms. Adamson that his intention in arranging the Site Visit was to give the Strata Council a chance to see the proposed site and obtain a legal opinion before an upcoming Strata Council meeting on May 29, 2019.
- [21] On May 17, 2019, Skywater applied to the CRD for a Building Permit to begin construction of the Facility.
- [22] On May 21, 2019, Ms. Adamson notified Mr. Kunzler that the Strata Council would not be attending the proposed Site Visit.
- [23] On May 31, 2019, counsel for Skywater and Mr. Kunzler wrote to the CRD regarding the Approval Requirement, stating, inter alia, that the CRD has no authority to enforce an Approval Requirement that empowers the Strata Council to approve or deny a Building Permit issued under the Local Government Act, R.S.B.C. 2015, c. 1. The CRD responded on June 6, 2019 agreeing that the Approval Requirement was not required and that a Building Permit could be issued without Strata Council approval.
- [24] On May 31, 2019 counsel for Skywater and Mr. Kunzler also wrote to the Strata Council and formally requested a hearing under s. 34.1 of the SPA to discuss Mr. Kunzler's proposal.
- [25] On June 5, 2019, Mr. Kunzler and Skywater received zoning approval from Salt Spring Building Inspection and the Salt Spring Island Local Trust Committee. The next day, on June 6, 2019, the CRD provided Mr. Kunzler and Skywater with zoning approval for the Cannabis Business to operate on the Property.
- [26] On June 17, 2019 the Strata Council received a petition signed by several strata owners demanding a Special General Meeting ("SGM") be held to vote on making certain bylaw amendments which would, inter alia, prohibit commercial cannabis production (the "SGM Petition"). Section 43(3) of the SPA required that the Strata Corporation hold the meeting within four weeks after the demand was given to the Strata Corporation.
- [27] On June 18, 2019 the Strata Corporation's counsel responded to the May 31, 2019 letter and requested Mr. Kunzler put his request for a s. 34.1 hearing in abeyance until mid-July 2019 to provide time for the Strata Corporation's counsel to review the issues. Mr. Kunzler agreed to set a date for the hearing of July 17, 2019.

- [28] Immediately after that, on June 23, 2019, the Strata Council sent a notice to all strata owners that an SGM would be held on July 14, 2019 to discuss and vote on the bylaw amendments proposed in the SGM Petition.
- [29] Around this time, some individual strata owners circulated emails amongst other owners expressing concerns and disapproval of the petitioners' Cannabis Business and encouraging owners to attend the SGM and vote in favour of the proposed bylaw amendments. The petitioner describes these emails as fear-mongering.
- [30] As he was uncomfortable attending the meeting personally, Mr. Kunzler appointed his legal counsel as his proxy at the meeting. His counsel Mr. Struthers was to attend with his articulated student Mr. Fogarty to make a presentation on behalf of Mr. Kunzler.
- [31] Mr. Fogarty was not permitted to remain in the meeting to make notes. Mr. Struthers did make his presentation but was limited to five minutes to do so.
- [32] The owners at the SGM voted and passed new bylaws (the "New Bylaws") which expressly prohibit "the commercial production of cannabis plants or cannabis-based products."
- [33] Specifically, Bylaw 2(a) was amended to prohibit any use of a strata lot in a way that:
- (v) is contrary to a purpose for which the strata lot or common property intended as shown expressly or by necessary implication on or by the strata plan,
 - (vi) is subject to physical security requirements, security infrastructure, or security procedures regulated by any government agency that would not otherwise apply to a residential structure,
 - (vii) includes or requires the commercial use or storage of hazardous, dangerous or toxic materials, or
 - (viii) is for the commercial production of cannabis or cannabis-based products.
- [34] Bylaw 3 was deleted in its entirety and replaced with the following:
3. Home Based Businesses and Agricultural Businesses
- (a) Home based businesses and agricultural businesses are permitted subject to strata council approval.
 - (b) A strata lot owner wishing to operate a home based business or agricultural business must first make a written submission to the strata council setting out:
 - (i) the nature of the business;
 - (ii) any business-related activities that will occur on the strata lot and outside the principal residence;
 - (iii) any increased noise or odours that may result from the home based business or agricultural business;

- (iv) any anticipated increase in traffic (such as deliveries and employees);
- (v) any other information to assist the strata council in their decision.
- (c) The strata council must not unreasonably withhold approval, but its decision must be based on retaining the rural elegance of the Road System and what effect the approvals would have on any other strata lot owners.

[35] As a result, the s. 34.1 hearing was not held.

The Nature of a Strata Corporation

- [36] The nature of a strata corporation is relevant to the relief sought by the petitioners. In *Shaw Cablesystems Ltd. v. Concord Pacific Group Inc.*, 2007 BCSC 1711, Leask J. said this:
- [6] Both counsel agree that there are no cases on point and that this is a case of first impression. In analyzing the point of law for decision, I have been assisted by the analysis set forth by the Nova Scotia Court of Appeal in *2475813 Nova Scotia Ltd. v. Rodger*, 2001 NSCA 12 at para. 5:

From a more purely legal perspective, a modern condominium is created pursuant to detailed legislative provisions such as, in Nova Scotia, the Condominium Act. A condominium is, therefore, a creature of statute. But condominium legislation reflects the combination of several legal concepts and relies on, and to a degree incorporates by reference, principles drawn from several different areas of law. The law relating to joint ownership is significant because the owners are tenants in common with respect to the common elements. The law relating individual ownership of real property is, of course, central because the owners of the individual units are, subject to certain limits, entitled to exclusive ownership and use of their units. The law relation to joint ownership is significant because the owners are tenants in common with respect to the common elements. The law relating to easements and covenants is relevant because the unit owners have rights to compliance by the others with the provisions governing a condominium and certain easements are, by statute, appurtenant to each unit. The law relating to corporations is also of importance because the condominium is administered by the condominium corporation in which the unit holders are in a position analogous to shareholders. While the Condominium Act enables and, to a degree, regulates the legal aspects of condominium ownership, it does so against a vast background of general legal principles which will frequently be relevant to the interpretation and application of the Act. As has been said:

In its legal structure, the condominium first combines elements of several concepts ... and then seeks to delineate separate privileges and responsibilities on the one hand from common privileges and responsibilities on the other.

...

- [10] ... Owning a strata lot and sharing ownership of the common property in a condominium development is a new system of owning property and has required the development of new mechanisms and procedures. Living in a strata development combines many previously developed legal relationships. It is also something new. It may resemble living in a small community in earlier times. The council meeting of a strata corporation, while similar in some respects to a corporate annual general meeting, also resembles the town hall meeting of a small community. Stratas are small communities, with all the benefits and the potential problems that go with living in close collaboration with former strangers. In the circumstances, I believe the court should be slow to find absolute rights in individual owners that cannot be modified by the considered view of the majority of owners, controlled by judicial supervision where appropriate.
- [37] In *The Owners, Strata Plan VR2122 v. Wake*, 2017 BCSC 2386, Loo J. observed:
- [77] A strata operates as a democratic society in which each owner has many of the rights associated with sole ownership of real property, but in which, having regard to their co-ownership with the others, some of those rights are subordinated to the will of the majority. An equitable balance must exist between the independence of the individual owners and the interdependence of them all in a co-operative community: 2475813 Nova Scotia Ltd. v. Rodgers, 2001 NSCA 12.
- [38] In *Getzlaf v. The Owners, Strata Plan VR 159*, 2015 BCSC 452, Abrioux J. (as he then was) at para. 35 noted certain principles which arise in the context of a strata corporation and alleged significantly unfair conduct:
- a strata corporation, in carrying out its mandate, must consider and act in the best interests of all the owners. It must endeavor to accomplish the greatest good for the greatest number. See *Gentis v. Strata Plan VR 368*, 2003 BCSC 120 at para. 24;
 - "significantly unfair" encompasses at the very least oppressive conduct and unfairly prejudicial conduct or resolutions. "Oppressive conduct" has been interpreted to mean conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith. "Unfairly prejudicial conduct" has been interpreted to mean conduct that is unjust and inequitable. See *Gentis* at para. 27;
 - strata corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Consequently, the modifying term "significantly" indicates that the court should only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness. *Gentis* at para. 28; see also *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126 at para. 27; and

it is no justification for an owner to say that he was unaware or had forgotten that prior permission was required before he could erect a fence on common property. A strata corporation's demand that such a fence be removed does not amount to oppressive conduct. A petitioner who seeks what is essentially injunctive relief should come to court with "clean hands". See *Barnes v. Strata Corp.* NW 3160, [1997] B.C.J. No. 1081, 1997 CanLII 1021 (S.C.) at paras. 6, 10-11.

Position of Petitioners

- [39] The petitioners argue the events that occurred after their plans were known to the Strata Corporation reveal a concerted effort of other strata owners and the Strata Council to specifically target their planned Cannabis Business. They submit this was unfair because, prior to the passing of the New Bylaws on July 14, 2019, they were in compliance with the Zoning Bylaw and the Old Bylaws.
- [40] The petitioners submit that the passing of the New Bylaws was "significantly unfair" to them under s. 164 of the SPA. They rely on *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, where the Court of Appeal addressed the test for significant unfairness. The petitioners submit the test must consider their reasonable expectations and, in addition, that significant unfairness encompasses oppressive and unfairly prejudicial conduct or resolutions.
- [41] They further argue the restraint on the Cannabis Business is an unreasonable restraint on trade, hence it contravenes s. 121(1)(a) of the SPA.
- [42] They seek a declaration that the New Bylaws represent a significantly unfair action, an order that they are unenforceable against the petitioners and a restraining order preventing the respondent, its agents and representatives, from further conduct that constitutes harassment of, and interference with, their Cannabis Business.

Position of Respondent

- [43] The respondent raises a number of issues and characterizes the issues differently than the petitioners, noting the unique nature of a strata corporation and that the challenged bylaws do not rise to the level of significant unfairness.
- [44] The respondent submits what is at issue here is not whether or not the production of cannabis creates problems. Rather, it is about whether the owners want to take the risks that can arise from its production. The respondent submits it is not unreasonable for owners to have concerns respecting the commercial production of cannabis, an activity unlike any other use of a strata lot by any of the other strata lot owners. They submit that owners within a strata corporation are entitled to as much freedom as possible to shape the community in which they live.

[45] The respondent further submits that s. 164 of the SPA only permits owners and tenants to seek relief and that Skywater is simply an "occupant" as there is no lease between it and the Property owners, hence Skywater has no standing as a tenant.

[46] The respondent also argues the test for significant unfairness does not include consideration of the petitioners' reasonable expectations as raised in Dollan.

Issues

[47] The issues then are:

- (i) Does Skywater have standing?
- (ii) What is the test to apply for significant unfairness and does it include consideration of the petitioners' reasonable expectations per Dollan?
- (iii) Were the Kunzlers' expectations reasonable?
- (iv) Were Skywater's expectations reasonable?
- (v) Was Mr. Kunzler treated in a significantly unfair manner with respect to the SGM?
- (vi) Was the passage of the New Bylaws significantly unfair?
- (vii) Do the New Bylaws constitute a restraint of trade and violate s. 121 of the SPA?
- (viii) Should there be a remedy under s. 165(b) of the SPA?

Standing of Skywater

[48] I turn first to the standing of Skywater to bring this petition.

[49] The SPA refers to three classes of persons who will inhabit and interact with a strata corporation: owners, tenants and occupants. In this instance the "owners" are the Kunzlers registered as joint tenants on the title to the Property. A "tenant" is defined in s. 1(1) of the SPA as "a person who rents all or part of a strata lot, and includes a subtenant ..." An "occupant" is defined as "a person, other than an owner or tenant, who occupies a strata lot."

[50] Section 164 of the SPA permits only owners and tenants to apply for relief. If the respondent is correct that Skywater is neither an owner nor a tenant and is only an occupant, then it has no standing under s. 164 and cannot seek the relief sought.

[51] There is no issue that Skywater is not an owner.

[52] What is in issue is whether the relationship between the Kunzlers and Skywater is a tenancy or merely a license arrangement, or whether there is any agreement at all.

- [53] While both a tenancy and a licence permit the right to use a strata lot, they have very different rights and obligations: *HighStreet Accommodations Ltd. v. The Owners, Strata Plan BCS2478*, 2017 BCSC 1039, aff'd 2019 BCCA 64; *The Owners, Strata Plan VR2213 v. Duncan & Owen*, 2010 BCPC 123. *HighStreet* and *Duncan & Owen* were followed in *Semmler v. The Owners, Strata Plan NES3039*, 2018 BCSC 2064, where Baker J. stated:
- [45] These two cases establish the following principles, which I agree with:
- a) A person may occupy a strata lot under a tenancy agreement or a license agreement.
 - b) A tenant is a person who rents all or part of a strata lot and who, through that arrangement, receives an interest in the property including exclusive possession of the premises.
 - c) An occupant is a person other than an owner or tenant who occupies a strata lot.
 - d) A licensee is an occupant but not a tenant.
 - e) Provisions of the *Strata Property Act* which relate to tenants and tenancies do not apply to licencees.
- [54] The mere making of periodic payments from a person to the strata lot owner does not create a tenancy. There must be some formal arrangement for payment. In *Jay v. The Owners Strata Plan NW 3353*, 2019 BCCA 102, the Court of Appeal, in upholding a ruling a tenancy did not exist, said this:
- [40] The question of whether Mr. Jay was a tenant is a question of mixed fact and law, on which the judge at first instance is entitled to deference. It is clear that more than mere occupancy of a unit is required in order for a person to be a tenant under the Act, even if that person is a family member of the owner. The statute recognizes different rights and obligations for "owners", "tenants" and "occupants" of a strata lot. It defines "tenant" as a person who "rents" the strata lot. There must, then, be some formal arrangement for payment. It seems to me that the judge made no reversible error on the evidence before her in finding that such an arrangement was not in place.
- [55] In *Duncan & Owen* the court addresses the distinction between an agreement creating a lease or a licence:
- [36] In *Maxwell v. Brown* (1982), 35 O.R. (2d) 770 (Ont. Co. Ct.), the occupant of a rooming house was evicted in a manner that contravened the requirements of the *Landlord and Tenant Act*. The initial question was whether the *Landlord and Tenant Act* applied, or whether the relationship was that of licensor-licensee.
- [37] At paragraph 7, the court cited the following passage from *Halsbury, Laws of England*, 4th Ed. Vol. 27:

"General principles for determining whether agreement creates lease or licence. In determining whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties. The

parties to an agreement cannot, however, turn a lease into a licence merely by stating that the document is deemed to be a licence or describing it as such. The parties' relationship is determined by law on a consideration of all relevant provisions of the agreement; and an agreement labelled by the parties to it as a "licence" will still be held to create a tenancy if the substance of the agreement conflicts with that label. Similarly, the use of operative words ("let", "lessor" etc.) which are appropriate to a lease will not prevent the agreement from conferring only a licence if from the whole document it appears that it was intended merely to confer a licence. Primarily the court is concerned to see whether the parties to the agreement intend to create an arrangement personal in its nature or not, so that the assignability of the grantee's interest, the nature of the land and the grantor's capacity to grant a lease will all be relevant considerations in assessing what is the nature of the interest created by the transaction. In the absence of any formal document the parties' intention must be inferred from the circumstances and the parties' conduct.

...

Creation of licence. A licence is normally created where a person is granted the right to use premises without becoming entitled to exclusive possession of them, or the circumstances and conduct of the parties show that all that was intended was that the grantee should be granted a personal privilege with no interest in the land. If the agreement is merely for the use of the property in a certain way and on certain terms while the property remains in the owner's possession and control, the agreement will operate as a license, even though the agreement may employ words appropriate to a lease."

[38] In *Marchant v. Charters* (1977), 3 All ER 918, the court said that "the true test was the nature and quality of the occupation: whether it was intended that the occupier should have a stake in the room or whether he only had permission for himself to occupy the room personally, whether under a contract or not".

[39] In the result, in the *Maxwell* case, the court concluded that the Landlord and Tenant Act did not apply.

[40] In *Canadian Pacific Hotels Ltd. v. Hodges* (1978), 23 O.R. (2d) 577 (Ont. Co. Ct.), the Plaintiff sought to recover approximately \$13,000.00 in unpaid rent respecting the use of various rooms at the Royal York Hotel. The Defendant, Hodges, had resided in various hotel rooms for 15 years. The ability of the hotel to recover so much back rent depended upon the application of the Landlord and Tenant Act. At paragraph 24, the court stated:

"It is relatively easy to state the principles. In determining whether an agreement between the parties constitutes a relationship of landlord and tenant or only that of licensor and licensee, the major consideration is the intention of the parties. If there is no formal agreement, in writing or otherwise, this intention must be gathered from all of the facts and circumstances and the conduct of the parties. The fact that the agreement grants a right of exclusive possession is, while important, by no manner or means conclusive."

- [56] Justice Baker in *Semmler* held, "[t]he courts look to the intention of the parties to determine whether there was an intention to create an interest in the land. If the parties intended to create an interest in the land, a tenancy is created. If not, the arrangement is a license" (at para. 38).
- [57] There is no written lease between the owners - the Kunzlers - and Skywater. Mr. Kunzler describes the arrangement as an "informal lease," something not recognized in law. Ms. Kunzler described the arrangement as a verbal lease until a written one could be prepared and that such is in the process of preparation. No rent has been or is being paid as none is charged or to be paid until the Facility is fully constructed and the Cannabis Business is operational.
- [58] The relationship is even less formalized than in the *Jay* case. No payments have been made and Skywater does not occupy or use the premises as the premises and the Facility that is the subject matter of the proposed tenancy does not yet exist.
- [59] The petitioners submit the existence of a lease arises as a matter of intention to be determined from the facts and circumstances and conduct of the parties where there is no formal agreement. They argue there is a tenancy because the owners clearly intended to give Skywater exclusive use and occupation of the Property. The Kunzlers intended Skywater to be created and intended then to lease the premises to it. There is evidence of attempts by the Kunzlers to secure a lease precedent and create a more formalized agreement.
- [60] In *Clare's Cove Marina Ltd. v. Salmon Arm (City)*, 2013 BCSC 553, Barrow J. discussed the difference between a lease and an agreement to grant a lease:
- [108] The plaintiffs point out that the law distinguishes between a lease and an agreement to grant a lease. The former creates an interest in land; the latter is simply a contract. In situations involving leases that, for one reason or another, the parties have not reduced to a formal written document, the issue is often cast as being whether the parties were merely negotiating with a view to reaching a contract, or whether they reached a binding contract that they planned to later reduce to writing. This issue was succinctly described by Lysyk J. in *Deshugh Estates Ltd. v. Robin's Foods Inc.* (1998), 19 R.P.R. (3d) 40 (B.C.S.C.) at paras. 19 to 21 where he wrote:
- [19] Where, as here, execution of a formal lease document is contemplated but not effected, there are two possible conclusions. Either there is a concluded agreement to lease as evidenced by the correspondence between the parties and the execution of a formal lease would simply reflect this agreement or, alternatively, the execution of the formal lease is a condition precedent to the existence of an agreement to lease ...
- [20] The distinction between these alternative analyses is described in the following frequently quoted passage from the judgment of Parker J. in *Von Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284 at pp.288-9:

It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.

[61] The law does not recognize an "agreement to agree": *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 330. Justice Adair in *Indotan Inc. v. Invincible Resources Corp.*, 2009 BCSC 1482, discusses the law regarding such agreements:

[54] an agreement between two parties to enter into an agreement by which some critical part of the contract matter is left to be determined is no contract at all. A concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties: see *May & Butcher Ltd. v. R.* (1929), [1934] 2 K.B. 17 (U.K. H.L.), at 20-21.

[55] Moreover, as Professor Fridman writes in *The Law of Contract in Canada*, 5th ed. (Scarborough: Thomson Carswell, 2006), at pp. 21-22:

For the most part, where terms are missing or have not been finalized, or there is some ambiguity about the precise meaning of what the parties appear to have agreed to, the general tenor of the decisions is against any possibility of completing the parties' work for them and creating a valid contract out of the vague contractual intent that may be evidenced by their language or conduct.

[62] As Voith J. noted in *Concord Pacific Acquisition Inc. v. Oei*, 2019 BCSC 1190:

[339] Absent agreement on the essential terms of a contract, no contract can exist. Though a court will make "every effort" to find meaning in a contract, it is not open to a court to create a contract for the parties. This has been so for a long time: *Kelly v. Watson* (1921), 61 S.C.R. 482 (S.C.C.) at 490; *Murphy v. McSorley*, [1929] S.C.R. 542 (S.C.C.) at 546. It remains true today: *Langley* at para. 40.

[63] What constitutes an "essential" term in an agreement will depend on both the nature of the agreement and the circumstances of the case: *Concord Pacific* at para. 341. For a valid agreement of lease, there are at least four essential terms:

- (1) the identification of the lessor and the lessee;
- (2) the premises to be leased;
- (3) the commencement and duration of the term; and
- (4) the rent or other consideration to be paid.

See *Chen v. Xiao*, 2019 BCSC 2036 at para. 85, and *Clare's Cove Marina* at para. 11.

[64] In this case, there is no evidence of an agreement to any terms such as rental rate, responsibility for taxes, or the term of the lease. At best there is an intention to create a landlord/tenant relationship; however, such generalized intention without any further evidence of agreement as to essential terms does not establish a contract or tenancy.

[65] I conclude Skywater is not a tenant. At best it may be a licensee, although even that is doubtful and not an issue that I need resolve for the purpose of determining standing in this matter. Skywater is the applicant for a cannabis production license from Health Canada. It will be the holder of the license and the operator of the proposed Cannabis Business. However, as it lacks standing, its reasonable expectations and the impact of the New Bylaws on it are not before the court. It cannot seek relief under s. 164 of the SPA.

[66] In other words, Skywater cannot complain about the New Bylaws or the Strata Corporation's passing thereof. The Kunzlers do have standing as owners of the Property given their future intention to be landlords and receive rent from the proposed Facility.

Significant Unfairness: The Test to be Applied

[67] The petitioners submit the New Bylaws are significantly unfair to them, specifically to the Kunzlers as owners and proposed landlords and Skywater as the proposed tenant. They rely on *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, and refer to the "reasonable expectations" test. They submit the Court of Appeal articulated the test for what is considered "significantly unfair" under s. 164 of the SPA as follows:

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

[68] While such a test was articulated in *Dollan*, it is not a mandatory test to be applied under s. 164. In *Dollan*, Garson J.A. adopted the test at para. 30. While Hall J.A. concurred in the result, he did not expressly adopt the test. Justice D. Smith dissented and at para. 54 specifically declined to adopt the test. This has subsequently been recognized by the Court of Appeal in *Radcliffe v. The Owners, Strata Plan KAS1436*, 2015 BCCA 448, where Savage J.A. stated for the Court:

[39] The scope of s. 164 of the Act has been considered by this Court, most recently in *Dollan v. The Owners, Strata Plan BCS 1569*, 2012 BCCA 44. In *Dollan*, in considering the meaning of "significantly unfair", Garson J.A. endorsed the description in *Reid v. The Owners, Strata Plan LMS 2503*, 2001 BCSC 1578, that something more than "mere prejudice" or "trifling unfairness" was required to invoke the section.

- [40] Garson J.A. applied a two-part test borrowed from corporate oppression jurisprudence that considered (1) does the evidence objectively support the reasonable expectations of the strata unit owner seeking redress, and (2) does the evidence establish that the reasonable expectations of the strata unit owner was violated by action that was significantly unfair.
- [41] Without endorsing the two-part test, Hall J.A., found that conduct "unduly burdensome" fell within the purview of the statute as "significantly unfair". Smith J.A., was disinclined to adopt the two-part test, which she noted was developed in a very different factual and legal commercial context. She opined that the plain and ordinary meaning of the term "significantly unfair" might be less complex than the test which appears to have evolved.
- [42] Although the members of the division differed in whether it would adopt the two-part test, I do not see anything in the language used in Dollan, the earlier decisions, or the language of the statute that would preclude a court from directing a strata corporation to reimburse an owner for expenses incurred or in doing something that would have the consequential effect of requiring the reimbursement of expenses, provided the actions complained of are shown to be significantly unfair.
- [69] To similar effect, see *Sherwood v. The Owners, Strata Plan VIS 1549*, 2018 BCSC 890 at paras. 265-266 and *King Day Holdings Ltd. v. The Owners, Strata Plan LMS3851 (Re)*, 2018 BCSC 1772 at para. 62.
- [70] In *Sherwood*, Gray J. described the circumstances in Dollan as demonstrating the limits on the deference due to a strata council:
- [259] [Dollan] demonstrates the limits on the deference due in B.C. In Dollan, the marketing materials relied upon by the owners of a strata lot described the units as having 'vision glass' for the window in question, but the affected units were completed with spandrel opaque glass. The spandrel opaque type of glass impairs the view out the window. The spandrel glass deprived the affected owners of a view of False Creek and prevented them from having a view into other units in the strata corporation. Those other units had vision glass, and as a result, they had a view of the affected owners' unit.
- [260] The affected owners applied to the strata corporation for permission to install vision glass. The strata corporation considered that the request engaged s. 71 of the SPA, and the request was presented to the owners at an SGM. The resolution did not pass: 19 voted in favour and 54 voted against, and 45 of the owners voted by proxy.
- [261] The affected owners challenged the vote as being significantly unfair. Both the B.C. Supreme Court chambers judge and the Court of Appeal agreed that the vote denying permission to the affected owners to install vision glass was significantly unfair.

- [71] Justice Hall in *Dollan* noted that "courts should be very hesitant in interfering with the decisions of a Strata Council. That is the form of government utilized by strata lot owners to govern their affairs and, assuming a fair process (of which there is no issue here), courts should, in my view, adopt an attitude of considerable deference to such decisions" (at para. 43) but concluded that case was a "rare instance where a court can legitimately second guess the views of a strata council" (at para. 46).
- [72] *Dollan* was not a case where a bylaw was passed but rather a case of a strata council exercising its discretionary authority. While a reasonable expectations test may make sense in the latter circumstance, it is problematic if sought to be applied to a fundamental decision of the owners such as the passage of bylaws. Although, see *Semmler* at para. 58 where the reasonable expectations test was applied to the passage of a bylaw. This is because the reasonable expectations test would mean that the bylaws cannot be changed to change the permitted uses from what they were when a strata lot was acquired if the purchaser's expectations were not consistent with a change. In effect, each owner would have a de facto veto over bylaw changes simply by claiming that their reasonable expectations have been violated and then seek an exemption from the effect(s) of the new bylaw. This would rob s. 128 of the SPA, which governs the bylaw amendment procedure, of its efficacy. It would also undermine strata owner's right to make democratic decisions such as the passage of bylaws.
- [73] The application of a reasonable expectations test could result in situations where a bylaw is not struck down but rather an order is made that it not apply to a particular owner, creating a patchwork of bylaw application. This would effectively create a grandfathering regime. The legislation permits grandfathering only with respect to three situations, namely, restrictions on pets, age and the rental of strata lots: ss. 123 and 143. There is no general grandfathering provision in the SPA. Had such been intended, the legislature would presumably have included it and not the limited situations permitted.
- [74] I conclude that the application of the reasonable expectations test as described in *Dollan* is not appropriate in this instance and decline to apply it. As a result, the appropriate test is solely whether the passage of the New Bylaws falls within the definition of significant unfairness as described in *Reid v. Strata Plan LMS2503*, 2003 BCCA 126. This does not leave the petitioners without a remedy as a bylaw that is significantly unfair to an owner can be challenged on that basis under s. 164.
- [75] In the event my conclusion on the reasonable expectations test is incorrect, I turn to its application in this instance.

Application of Reasonable Expectations Test

- [76] In *Potter v. Vancouver East Cooperative Housing Association*, 2019 BCSC 871, Marzari J. noted that expectations of an owner must be objectively reasonable and not based on subjective expectations. They must be realistic, objective and contextual in the situation in which they arise:

What are Reasonable Expectations?

[95] The first issue in any oppression case is to determine whether the petitioners' expectations for conduct by the corporation (or in this case by the housing cooperative) are reasonable. Before reviewing the specific expectations of the petitioners in this case, it is helpful to review what defines reasonable expectations more generally, with a focus on the case law and principles most applicable to the not-for-profit cooperative context.

[96] In BCE, the Supreme Court emphasized a contextual approach, taking into account the particular relationships at issue and noting that "there may be conflicting claims and expectations." At paragraph 64 the Court explained:

[64] The oppression remedy recognizes that a corporation is an entity that encompasses and affects various individuals and groups, some of whose interests may conflict with others. Directors or other corporate actors may make corporate decisions or seek to resolve conflicts in a way that abusively or unfairly maximizes a particular group's interest at the expense of other stakeholders. The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly. Fair treatment -- the central theme running through the oppression jurisprudence -- is most fundamentally what stakeholders are entitled to "reasonably expect".

[Emphasis added.]

[97] The principles to be drawn from BCE and other cases were recently summarized in *Radford v. MacMillan*, 2017 BCSC 1168, aff'd in 2018 BCCA 335, as follows:

[119] Reasonable expectations are assessed by what is "objective and contextual", rather than only according to the stakeholder's own expectations. The expectations must be realistic. Expectations may evolve over time and not be static. The overarching considerations guiding the reasonable expectations analysis were best summarized by the Court in BCE as follows:

[120] The Court in BCE compiled a non-exhaustive list of factors that may be looked to in determining the existence of reasonable expectations: general commercial practice, the nature of the corporation, the relationship that exists between the parties, past practice, self-protection steps the petitioner could have taken, any representations and agreements and the fair resolution of conflicting interests between corporate stakeholders (BCE at para. 72).

[121] Evidence of expectation may take many forms depending on the facts of a case (BCE at para. 70). The determinations as to an expectation and its reasonableness are questions of fact.

[Emphasis added.]

- [98] In the context of this case and housing cooperatives more generally, the purpose and nature of the Co-op is a significant factor, as is the relationship between the parties, past practices of the Co-op, and representations to and agreements with various members.

Were Skywater's Expectations Reasonable?

- [77] Aside from the issue of standing, Skywater was not incorporated until June 14, 2017, it did not exist when the Kunzlers entered into the contract of purchase and sale for the Property on May 5, 2017, hence it had no expectations regarding the use of the Property when it was purchased by the Kunzlers.

Were the Kunzlers' Expectations Reasonable?

- [78] The Kunzlers submit that their reasonable expectations when purchasing the Property were that they would be able to operate the Cannabis Business on the Property in accordance with the Zoning Bylaw and the Old Bylaws. They submit as well that the real estate agent involved with their purchase of the Property confirmed their proposed use was permitted. They also submit that a website advertising the Property and other strata lots within the Strata Corporation noted its private nature and agricultural potential. The respondent argues, and I accept, that this website is not operated by the Strata Corporation, but rather by a realtor acting in her sole discretion without any input from the Strata Corporation. The Kunzlers submit these reasonable expectations were violated by the passing of the New Bylaws.

- [79] The effect of the Kunzlers' position is their expectations limit the right of the strata owners to pass bylaws inconsistent with the Kunzlers' expectations. Section 128 of the SPA sets out the procedures applicable to bylaw amendments:

128.(1) Subject to section 197, amendments to bylaws must be approved at an annual or special general meeting,

- (a) in the case of a strata plan composed entirely of residential strata lots, by a resolution passed by a 3/4 vote,
 - (b) in the case of a strata plan composed entirely of nonresidential strata lots, by a resolution passed by a 3/4 vote or as otherwise provided in the bylaws, or
 - (c) in the case of a strata plan composed of both residential and nonresidential strata lots, by both a resolution passed by a 3/4 vote of the residential strata lots and a resolution passed by a 3/4 vote of the nonresidential strata lots, or as otherwise provided in the bylaws for the nonresidential strata lots.
- (2) If an amendment to a bylaw is approved, an Amendment to Bylaws that sets out that amendment and is in the prescribed form must be filed in the land title office and, until that filing, the amendment has no effect.

- (4) The strata corporation must inform owners and tenants of any amendment to the bylaws as soon as feasible after the amendment is approved.
- [80] A three-quarter majority of the strata owners have the authority to make bylaw amendments. It is not reasonable for the Kunzlers to think their expectations at the time of purchase of their strata lot bind the other owners and that their expectations would be grandfathered and exempt from any amendment, particularly given the lack of any such grandfathering provision in the legislation.
- [81] The respondent refers to *The Owners, Strata Plan LMS 4498 v. Mac Phee-Manning et al*, 2019 BCCRT 463, where the Tribunal noted that strata owners have a reasonable expectation that bylaws will not change unless agreed upon by the three-quarters majority required under the SPA (at paras. 54-55), the corollary to this being that strata owners can reasonably expect that bylaws can and will change if three-quarters of owners agree to such.
- [82] In addition, it is submitted by the respondent that the nature of the specific Strata Corporation in this case cannot be ignored. Mr. Kunzler deposes that he "understood that the Strata Corporation encouraged agriculture on the Property and within the strata corporation." However, the nature of agriculture anticipated under the bylaws is arguably of a more traditional nature such as a hobby farm given the restrictions on the strata lot uses for single family dwellings, seasonal cottages and home-based businesses. Although I note such use was limited to areas less than eight hectares and the Kunzlers' exceeds eight hectares. There is no evidence that any other property in the strata is being used for a purpose remotely similar to that proposed by the petitioners, something presumably readily apparent to them. It is clear on the evidence that the strata in practice is not an industrial or commercial strata corporation and has a significant residential and rural component to it.
- [83] The petitioners however submit the actual use does not dictate or change the intended use. In *East Barriere Resort Limited v. The Owners, Strata Plan KAS1819*, 2017 BCCA 183, the petitioner sought declarations that certain strata lots were not "residential" as defined in the SPA. The respondent strata corporation took the position that the strata consisted only of residential strata lots with the intended use being primarily that of a residence.
- [84] The trial judge found that the actual use of the lots as residential pre-empted the original intentions of the developer in the Disclosure Statement that it was a resort operated by the strata corporation where the buildings on the strata lots were intended to be "rentable units and to be used for vacation and recreational purposes and not as a principal residence unless permitted by zoning." The Court of Appeal overturned this and held that the "design" and "intention" of the strata was determined by the Disclosure Statement and zoning at its inception, not by subsequent actual usage:

- [46] To rely solely on actual use over time would be to give the words "designed or intended" no meaning. In my view, "design" and "intention" must be determined by the documents prepared and filed at and around the inception of the development. Otherwise, there would be uncertainty concerning the proper voting procedures, filing requirements, and the applicability of numerous other provisions in the SPA that rely on the definition of "residential strata lot" ...
- [85] While that principle is not in dispute, the actual use does have relevance to the reasonable expectations issue in the sense that the petitioners' awareness of actual use would be relevant to the reasonableness of their expectations, particularly that changes to the bylaws might occur.
- [86] The Kunzlers, while not addressing the point, should have expected opposition to their plan to grow cannabis on a commercial scale. It raises a question as to why they chose not to raise their proposed Cannabis Business with the strata before purchasing the Property, instead relying on the bylaws not changing. There is no evidence the respondent said or did anything to create an expectation that the bylaws would not change in the future.
- [87] For these reasons, I find the Kunzlers' expectations were not reasonable.

Application of Significant Unfairness Test

- [88] Justice Adair in *Omnicare Pharmacy Ltd. v. The Owners, Strata Plan LMS 2854*, 2017 BCSC 256, summarized the meaning of "significantly unfair" under s. 164:
- [147] The term "significantly unfair" in s. 164 encompasses conduct that is oppressive or unfairly prejudicial. "Oppressive conduct" has been interpreted to mean conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith. "Unfairly prejudicial" conduct has been interpreted to mean conduct that is unjust and inequitable. See *Reid v. The Owners, Strata Plan LMS 2503*, 2001 BCSC 1578 ("Reid"), at paras. 11-13; *aff'd* 2003 BCCA 126 ("Reid Appeal").
- [89] To be significantly unfair, the impugned conduct must result in "something more than mere prejudice or trifling unfairness": *Reid* at para. 27.
- [90] In assessing whether the impugned conduct was significantly unfair, the court must consider both the decision-making process and the outcome. As discussed in *Dollan*:
- [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 that provided the process is fair and democratic, a court should defer to the decision of the strata council or corporation.

- [91] Section 164 of the SPA is concerned with actions of the strata corporation, including the strata council, not the actions of individual owners. In *Peace v. The Owners, Strata Plan VIS 2165*, 2009 BCSC 1791, Sewell J. explained:
- [44] It is important to recognize that section 164 gives the Supreme Court the power to intervene only if there has been a significantly unfair action, threatened action or decision of the Strata Corporation in relation to an owner. In my view this means that for the section to apply some action or decision of the Strata Corporation must be the source of the unfairness complained of.
- [92] With these principles in mind, I will first consider the conduct of the SGM before turning to the passage of the New Bylaws.

Was Mr. Kunzler treated in a significantly unfair manner with respect to the Special General Meeting?

- [93] As noted, Mr. Kunzler emailed the Strata Council on May 13, 2019 seeking approval of the Cannabis Business and Facility. Two days later he advised the Strata Council of his plans to hold the Site Visit at the Property. When advised the Strata Council could not attend, he threatened legal action if he did not have approval by month end. When the Strata Council asked him for further information about the Cannabis Business, he responded by asking for the name of the Strata Corporation's lawyer, an action the Strata Corporation criticizes. In fairness, however, the information demanded by the Strata Corporation was lengthy, onerous and beyond the scope of matters a strata should concern itself with.
- [94] Mr. Kunzler states that beginning in June of 2019, certain strata owners and members of the Strata Council began targeting him and the Cannabis Business by:
- (a) setting a date for a special general meeting ("SGM") to amend the Strata Bylaws to prohibit the Cannabis Business;
 - (b) circulating emotionally-manipulative and fear-mongering emails to Strata Council and all strata owners, copying Mr. Kunzler, containing misleading information regarding the Cannabis Business and the need to target and prevent its operations;
 - (c) performing and circulating to Strata Council and all strata owners, including Mr. Kunzler, land title searches of the Property in an effort to build arguments against the Cannabis Business, and searches of Ms. Kunzler's professional profile; and
 - (d) filing complaints about Mr. Kunzler with the CRD.
- [95] Following the SGM Petition, the SGM was held on July 14, 2019 in accordance with s. 43 of the SPA. None of the owners who signed the SGM Petition were members of the 2018-2019 Strata Council. It was around this time that some individual strata owners circulated emails

to other owners expressing concerns about the Cannabis Business and encouraging owners to attend the SGM and vote in favour of the New Bylaws. As noted above, the SGM was scheduled immediately after Mr. Kunzler had agreed to put his request for a s. 34.1 hearing in abeyance at the request of the Strata Corporation's legal counsel.

- [96] Mr. Kunzler's counsel, Mr. Struthers and his articulated student Mr. Fogarty, attended the SGM on behalf of Mr. Kunzler. Mr. Kunzler deposes, based on information from his counsel, that Mr. Fogarty's presence at the SGM to take notes was denied and he was asked to leave the meeting and that initially the Strata Council denied Mr. Struthers' request to make a presentation, although they did eventually permit such.
- [97] When the SGM was called to order, the owners passed a motion limiting each owner's speaking time to five minutes for preliminary discussion and two minutes for each resolution. Mr. Struthers used his allotted time to make his presentation.
- [98] That motion was brought by Michael Wolf, the apparent leader of the opposition to the Cannabis Business and was made in response to Mr. Struthers wanting to make the presentation. It was clearly meant to limit Mr. Struthers' ability to make a full presentation. While he was allotted the same amount of time as other owners, in reality five minutes was not enough time for anyone to make a reasonable presentation that could have swayed other owners, many of whom attended the meeting with the goal of getting the New Bylaws passed.
- [99] The petitioners argue these events evidence unfair treatment by the Strata Corporation and the Strata Council.
- [100] The respondent acknowledges the SGM got off to a "rocky start" but that it did proceed and the presentation was made but did not sway the owners. The respondent submits the fact the presentation did not change the owners' minds does not make the result - the New Bylaws being passed - significantly unfair.
- [101] In *Macdonald v. The Owners, EPS 522*, 2019 BCSC 876, Young J. considered whether the petitioner had been treated significantly unfairly by members of the Strata Council. In one instance, the petitioner attempted to raise concerns at an Annual General Meeting ("AGM"). The Chair of the AGM repeatedly interrupted and ignored the petitioner when he attempted to speak, which Young J. found was "rude, dismissive, and hostile" and denied the petitioner the right to participate in the meeting (at para. 143), constituting significantly unfair conduct under s. 164 (at para. 148). At another AGM, the petitioner attempted to read s. 128 of the SPA as he had questions to raise, but was stopped by the Chair. He was then allowed to read a synopsis of s. 128. Justice Young concluded there was nothing unfair about this conduct (at para. 146).

- [102] Justice Young noted that, "[a]n owner addressing Council on an issue concerning the Strata Corporation has a reasonable expectation that he or she will be heard, treated with respect, and that his or her concern will be considered by the Council" (at para. 138) and "[t]he petitioner has the right to raise concerns at meetings. His numerous objections may be frustrating for Council but he should be treated with respect and given the same rights to speak that other owners are given" (at para. 148).
- [103] In the present case, the treatment of Mr. Kunzler through his counsel at the SGM was consistent with the test described in *Macdonald*. Despite some initial resistance, Mr. Struthers was permitted to make his presentation advocating for Mr. Kunzler and the Cannabis Business. While his time to do so was limited, he was allotted the same amount of time to speak as the other owners.
- [104] The scheduling of the SGM, coming almost immediately after Mr. Kunzler put his request for a s. 34.1 hearing in abeyance at the request of the Strata Corporation's counsel, does raise some concerns about fairness. However, the Strata Council acted as required by the SPA to schedule the SGM after receiving the SGM Petition. The s. 34.1 hearing was never held, as the passage of the New Bylaws at the SGM rendered it unnecessary. The owners, who brought the SGM Petition, clearly moved quickly to pass the New Bylaws once they became aware of Mr. Kunzler's intentions, but they were within their rights as owners to do so.
- [105] I am satisfied that the conduct of the meeting and its scheduling were not significantly unfair.

Was the passage of the New Bylaws significantly unfair?

- [106] As noted earlier, the petitioners submit the New Bylaws are significantly unfair to them because they purchased the Property in reliance on the Old Bylaws permitting agricultural use and commercial activity. After the purchase, they incorporated Skywater and hired an architect to design a Facility they believed would not be visible from the road or cause issues with light, noise, or odour. They obtained the requisite CRD building permit and were in the process of applying for the necessary cannabis production licence through Health Canada.
- [107] The respondent submits the passage of the New Bylaws does not meet the significant unfairness test. They argue that in a democratic institution, such as a strata corporation, decisions of the majority will on occasion be unfair to a minority owner or owners. They note a bylaw may well restrict the rights of one owner while benefiting another. Such an imbalance in itself does not mean the decision of the strata is unfair.

[108] The petitioners' argument is premised on the fact they purchased the Property with a specific purpose in mind, a purpose later prohibited by the passage of the New Bylaws. While a strata corporation is different from a municipality in its private nature and governance, some assistance is to be found in municipal non-confirming use authorities regarding the retroactive effect of bylaws on properties already put to a particular use, particularly with respect to the concept of fairness and its application in this case.

[109] Section 528 of the Local Government Act, R.S.B.C. 2015, c. 1, provides statutory protection for non-conforming uses of land, buildings, or other structures, including those under construction at the time of the adoption of a land use regulation bylaw:

528.(1) Subject to this section, if, at the time a land use regulation bylaw is adopted,

- (a) land, or a building or other structure, to which that bylaw applies is lawfully used, and
- (b) the use does not conform to the bylaw,

the use may be continued as a non-conforming use.

(2) If a non-conforming use authorized under subsection (1) is discontinued for a continuous period of 6 months, any subsequent use of the land, building or other structure becomes subject to the land use regulation bylaw.

(4) A building or other structure that is lawfully under construction at the time of the adoption of a land use regulation bylaw is deemed, for the purpose of this section,

- (a) to be a building or other structure existing at that time, and
- (b) to be then in use for its intended purpose as determined from the building permit authorizing its construction.

[110] In *Cowichan Valley (Regional District) v. Yole*, [1988] B.C.J. No. 2448 (C.A.), the defendants started building a stable for horses without a building permit. The next year the district passed a new zoning bylaw which prohibited keeping livestock. After that the defendants brought horses onto their property. The plaintiff district brought an action against the defendants seeking an order restraining them from bringing horses onto their property. At issue was whether the use of the land for a stable to keep horses was protected by the non-conforming use exemption. The Court of Appeal said this:

[16] I turn now to the second ground of appeal. It is that dedication to a use by building a stable is not an actual use for the keeping of livestock, and so a lawful non-conforming use was not in effect when the by-law change occurred.

[17] We have been referred by the respondent to three cases from Ontario which support the view that commitment to a use is equivalent to a use for the purpose of the lawful non-conforming use provision of the Ontario Planning Act, R.S.O. 1970, c. 349 [Citations omitted]

[18] Of these cases, *Richmond Hill v. Miller Paving* is closest to the point in this appeal. In that case, the use in question was the production of asphalt. The lands had been committed to that use by the building of a plant and no other use was in effect, but no asphalt had been produced. It was decided that the land had been in prior use as an asphalt plant even though there had been no production. Mr. Justice Saunders says at p. 148 [D.L.R.]:

that any doubt as to prior use should be resolved in favour of the owner.

[19] I agree with that proposition and would apply it in this case.

[111] As a result, a "commitment to use" is equivalent to "use" for the purposes of the non-conforming use exemption: see also *British Columbia Custom Car Assn. v. Mission (District)*, [1990] B.C.J. No. 2968 (S.C.). However, a commitment to use requires more than just a mere intention to use the lands for a particular purpose: *Corporation of the District of Maple Ridge v. Board of Variance of the District of Maple Ridge* (1996), 28 B.C.L.R. (3d) 65 at para. 35.

[112] In *Linton v. Comox-Strathcona (Regional District)*, [1991] B.C.J. No. 3778 (S.C.), the petitioners were the owners and potential developers of a 223-acre parcel of land, acquired in 1989, which they intended to develop into a golf course. Since 1986, the land had been zoned to permit golf courses. The petitioners invested \$130,000 in designs and feasibility studies on top of other expenditures of time and money exploring the proposed development. The petitioners had applied for approval by the Agricultural Land Commission who had informed them it had no objection to the project, subject to certain conditions, though that application process was never completed. In 1990, the municipality enacted a bylaw eliminating golf courses from the land use permitted by the zoning, with an exception for existing golf courses. The petitioners sought to rely on non-conforming use to allow the development to proceed despite the bylaw prohibiting such.

[113] Justice Hutchinson referred to *Campbell River (District) v. Driemel* (1979), 10 B.C.L.R. 209 (S.C.) at pp. 213-214, to determine when a party becomes entitled to the benefit of a non-conforming use exemption:

... It is impractical to talk of this or that stage of building as being the precise time at which a structure begins its existence as such. As a matter of common sense the construction of a building commences with the preparation of the ground for its eventual erection, and as soon as the filling or excavation of the soil commences construction has started. If at any stage it is feasible to stop the work and with no, or trifling, expense restore the premises to their original state, then and only then can it be said that whatever was planned is not under construction.

[114] Justice Hutchinson concluded that the preparatory steps taken by the petitioners did not amount to "use of the land" such to constitute non-conforming use:

[14] In this case there has been no use of the land (as opposed to promotional ideas) that is only consistent with the petitioners' expressed intentions to create a golf course. Plans have been drawn, designers retained, investors approached and the regulatory authorities consulted;

but the crucial step of moving from a concept to an unequivocal commitment of the lands to the use of a golf course has not been taken. The land is in the same condition it was in after the clearing was completed, and when the property was listed for sale; that was before the petitioners turned their attention to developing the land as a golf course. Since then, the land has not been altered in any way to further those plans. I find, in these circumstances, the land was not being lawfully used as a golf course at the time By-law 1275 was passed.

- [15] In coming to this conclusion I have kept in mind the principle expressed by Lambert J.A. in *Cowichan Valley (Regional District) v. Yole et al*, supra, that any doubt as to prior use of land should be resolved in favour of the owner.
- [115] In *Sunshine Coast (Regional District) v. Bailey*, [1995] B.C.J. No. 2350 (S.C.), Lysyk J. noted the concept of fairness which underlies the statutory non-conforming use exemption:
- [31] Presumably, it is the concept of fairness that supplies the underlying rationale for the statutory non-conforming use exemption, for its liberal interpretation by the courts through development of the "commitment to use" doctrine, and for the accompanying proposition that any doubt as to prior use ought to be resolved in favour of the owner. To prohibit completion of a land development project to which there has been an unequivocal commitment, including significant physical alteration to the site, savours of unfairness because it is tantamount to giving the zoning bylaw retroactive effect, to the prejudice of the owner.
- [116] Thus, the principle of non-conforming use provides a useful analogy for assessing whether the actions of a strata corporation are significantly unfair in the context of a bylaw amendment which prohibits an owner's desired use of a strata property. However, I note the concept of "fairness" in the context of a strata corporation is different than in the municipal context, given the powers afforded to strata owners under the SPA to shape their community as they see fit, coupled with the high bar for significant unfairness set out in *Reid*.
- [117] In this case, the petitioners had taken initial preparatory steps to establish the Cannabis Business on the Property, including hiring an architect to help design the Facility and obtaining a CRD building permit. However, they have not started construction of the Facility. While they have applied for the necessary licence through Health Canada, they have not yet obtained such approval. By analogy to the above authorities, I am satisfied there has been no actual use nor commitment to use the Property for the Cannabis Business.

[118] Ms. Kunzler deposes she expected to receive rental income for the Property from Skywater, however, there is no evidence that the Property could not be rented to someone else for some other purpose. The New Bylaws have not robbed the petitioners of other reasonable uses or value of the Property. The fact that a proposed or intended use has been curtailed does not rise to an injustice. The nature of strata corporations is such that limitations on use will often restrict a particular owner's desired use.

[119] The New Bylaws were not bylaws created by or proposed by the Strata Council, but rather the strata owners who brought the SGM petition. Despite the various complaints and allegations of the petitioners relating to the behaviour of other strata owners, it has not been shown that their motivation was anything other than maintaining a specific type of strata community, one which did not involve a commercial cannabis growth operation. The will of the majority outweighed the desires of the petitioners.

[120] The petitioners have not established that the actions of the Strata Corporation or Strata Council were sufficiently oppressive or unfairly prejudicial to satisfy the test for significant fairness as articulated in Reid. Accordingly, I find that the passage of the New Bylaws was not significantly unfair.

Do the New Bylaws Violate Section 121 of the SPA?

[121] The petitioners submit the New Bylaws impose restrictions on their freedom to conduct the Cannabis Business, constituting an unlawful restraint on trade and rendering the New Bylaws unenforceable under s. 121(1)(a) of the SPA which provides:

Unenforceable bylaws

121.(1) A bylaw is not enforceable to the extent that it

(a) contravenes this Act, the regulations, the Human Rights Code or any other enactment or law,

[122] They submit that at common law any unreasonable restriction(s) on the freedom to conduct business is unenforceable as a restraint on trade: J. G. Collins Insurance Agencies Ltd. v. Elsley Estate, [1978] 2 S.C.R. 916. They further submit in this matter the test for an acceptable or enforceable restraint on trade is whether there are legitimate reasons for the restraint and whether the restraint is reasonable: Kok v. Strata Plan LMS 463, [1999] B.C.J. No. 921 at para. 34 and The Owners, Strata Plan LMS 1590 v. Yip, 2018 BCSC 2185 at para. 79 citing Kok.

[123] In Kok, a strata owner argued that bylaws which limited the uses of strata lots in a shopping mall were an unlawful restraint on trade. Rejecting that argument, the Court stated:

[34] In my view, Parker Place is more similar to a leased shopping centre than to businesses on a street. However, the distinction which the Plaintiffs endeavour to make misses the point. There is nothing to stop the owners of properties on a street from agreeing to restrictive covenants which regulate the use to which they put their properties. The fact that this rarely

occurs does not mean that it is an unlawful restraint of trade when it does occur. The relevant considerations are whether there are legitimate reasons for the restraint and whether the restraint is reasonable. The Plaintiffs have not demonstrated that the purpose of the Use Bylaw is illegitimate or that the restraint created by the Use Bylaw is unreasonable.

- [124] The petitioners submit there are no legitimate reasons for the restraint on the Cannabis Business nor is the restraint reasonable. They argue the restraint was due to "persistent fear mongering" by certain strata owners and their "unsubstantiated assumptions about the effects of the Cannabis Business on neighbouring properties." They note that even if such were valid concerns, the nuisance provisions in the Old Bylaws would provide a remedy. They further submit that the SGM being held and the New Bylaws being voted upon prior to a hearing being held denied Mr. Kunzler the opportunity to address any concerns the Strata Council may have had.
- [125] The respondent submits the passage of the New Bylaws was both reasonable and objective. They note the concerns owners raised respecting the proposed Cannabis Business, including the Facility becoming a target for break-ins and thefts, the impact of the Facility on adjacent lots and their shared environment and the cumulative effect of commercial operations within the Strata Corporation. The respondent argues the rigorous nature of the cannabis production licensing process supports the reasonableness of such concerns.
- [126] The petitioners' argument is based on the assumption that the majority of strata owners voted in favour of the New Bylaws because of the conduct the petitioners complain of. That is not established.
- [127] The owners' concerns were not just limited to cannabis production. They were concerned about the general nature of the Strata Corporation and the type of community they wished to maintain. This is reflected in the New Bylaws which go beyond prohibiting the commercial production of cannabis, indicating the owners' concerns were broader and related to other business activities as well.
- [128] I find that there were legitimate reasons for the restraint and that the restraint was reasonable. The New Bylaws are not unenforceable under s. 121.

Relief Sought Under Section 165(b) of the SPA

- [129] The petitioners also seek an order pursuant to s. 165(b) of the SPA which provides:

Other court remedies

165. On application of an owner, tenant, mortgagee of a strata lot or interested person, the Supreme Court may do one or more of the following:
- (b) order the strata corporation to stop contravening this Act, the regulations, the bylaws or the rules;

[130] Given the finding that the New Bylaws are not significantly unfair and are not unenforceable under s. 121, the issue of an order under s. 165(b) does not arise.

[131] The petition is dismissed with costs to the respondent.

"The Honourable Mr. Justice Punnett"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/05/2020BCSC0576.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/kunzler-v-the-owners-strata-plan-eps-1433-2020>

Prepared on 26 October 2026 · Esheria