

CANADA / JUDGMENT

The Owners, Strata Plan BCS 435 v. Wong

2020 BCSC 1972

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Supreme Court of British Columbia

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2020 BCSC 1972 The Owners, Strata Plan BCS 435 v. Wong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

The Owners, Strata Plan BCS 435 v. Wong,

2020 BCSC 1972

Date: 20201214

Docket: S202873

Registry: Vancouver

In the Matter Concerning the Judicial Review Procedure Act, R.S.B.C. 1996, c. 24;

The Civil Resolution Tribunal Act, S.B.C. 2011, c. 25;

The Personal Information Protection Act, S.B.C. 2003, c. 63; and

The Strata Property Act, S.B.C. 1998, c. 43

Between:

The Owners, Strata Plan BCS 435

Petitioner

And

Peter Wong and Linda Wong

Respondents

Before: The Honourable Justice Lindsay M. Lyster

On judicial review from: A decision of the Civil Resolution Tribunal, dated

January 14, 2020 (Wong v. The Owners, Strata Plan BCS 435, 2020 BCCRT 53).

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

July 27 and 28, 2020

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December 14, 2020

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Introduction

- [1] This decision is in respect of a petition for judicial review of a decision of the Civil Resolution Tribunal (the "CRT"), indexed as *Wong v. The Owners, Strata Plan BCS 435*, 2020 BCCRT 53 (the "Decision").
- [2] The respondents, Peter and Linda Wong (the "Wongs"), challenged a bylaw of the strata in which they live that required all overnight guests of a resident to complete a Temporary Resident Information Form (the "TRIF"). The Wongs were fined when their guests refused to allow their photo identification to be photocopied, as required by the TRIF. They filed a claim with the CRT, in which they alleged that the bylaw was not enforceable because it contravenes the Personal Information Protection Act, S.B.C. 2003, c. 63 [PIPA].
- [3] The CRT upheld the Wongs' claim, and ordered the strata corporation, The Owners, Strata Plan BCS 435 (the "Strata"), which is the petitioner in this matter, to refrain from enforcing the bylaw. The Strata applies to this Court to set aside the CRT's Decision.
- [4] This judicial review arises in the context of the interplay of four statutes: PIPA, the Civil Resolution Tribunal Act, S.B.C. 2012, c. 25 [CRTA], the Strata Property Act, S.B.C. 1998, c. 43 [SPA], and the Administrative Tribunals Act, S.B.C. 2004, c. 45 [ATA].
- [5] At the heart of the dispute between the parties is the interpretation of the sections of the CRTA that provide that the CRT is considered to have specialized expertise in relation to strata property claims, and the determination of the standard of review of decisions in respect of which the CRT has specialized expertise. Also central to this case is the relationship between the CRT's jurisdiction and that of the Information and Privacy Commissioner ("IPC") in applying PIPA to complaints of breaches of privacy in the strata context.
- [6] This is the first judicial review to be conducted pursuant to amendments to the CRTA, which came into effect on January 1, 2019, that prescribe the standard of review for CRT decisions and apply the provisions of the ATA to judicial review some of its decisions, including the Decision under review: Civil Resolution Tribunal Amendment Act, 2018, S.B.C. 2018, c. 17, ss. 2(e), 25, 32; B.C. Reg. 232/2018.
- [7] In its written submissions, the Strata opposed the CRT being granted standing on this judicial review. The Strata did not pursue this position at the hearing. The CRT properly confined its submissions to its processes and jurisdiction, and the standard of review applicable to the Decision.

Background Facts

- [8] The factual background to this judicial review is relatively straightforward. As set out in the Decision, the Strata consists of 129 strata lots in a high rise condominium building in Vancouver. Most of the lots are accessed via a lobby and elevator. The Strata employs a 24/7 concierge in the lobby. The Strata's key fob system only permits users to access their own floor, and records each time a fob is used, to whom it is assigned, and the floor accessed. The Strata has a number of security cameras, and recordings are saved for two months.
- [9] The Wongs own and reside in a strata lot in the tower, and have done so since 2003.
- [10] At its annual general meeting ("AGM") on October 22, 2014, the Strata first passed a bylaw that required all guests staying for more than a week to "register and complete the Waterford Temporary Occupant Form". That bylaw was replaced at the October 28, 2015 AGM with a new bylaw, which required any guest staying for more than three days to complete a TRIF.
- [11] The bylaw in place at the time of the events in issue in this case was passed at the AGM held on October 24, 2018. As set out at para. 16 of the Decision, the bylaw provides:

Not prohibited, is the right of residents to have guests in their homes. For the purposes of this bylaw guests are defined as family, friends or acquaintances of the resident without paying rent or consideration in any form whatsoever, and the residents receive no benefit whatsoever except the benefit of their company.

A "Temporary Resident Information Form" must be completed by all overnight guest(s) of a resident.

- [12] The bylaw does not specify what information will be collected on the TRIF. As set out in para. 17 of the Decision, until 2019, the TRIF collected the following information:
- a. The visitor's name,
 - b. The suite number the visitor is visiting,
 - c. Whether the visitor is a "tenant" (defined as "a person paying rent for the temporary use of a strata unit or portion of a strata unit") or a "guest" (defined as a "person who has been invited by an owner or a tenant to visit"),
 - d. The duration of the visitor's stay,
 - e. The visitor's telephone number and email address,
 - f. The key fob that the visitor is using during their stay,
 - g. Whether the visitor will access any shared facilities,
 - h. The make and license plate of the visitor's car, and the parking stall they will use during their stay, and

- i. The visitor's emergency contact name and telephone number.
- [13] In addition, the visitor had to sign the TRIF and provide a copy of their photo identification.
- [14] The TRIF was amended in September 2019. Thereafter, it required the name and signature of the strata resident, but not an emergency contact. It allowed frequent visitors to fill out the TRIF just once. The requirement to provide a copy of the guest's photo identification remained. The tribunal member found that the Strata could retain a guest's personal information for as long as it wanted and that there was no policy for destroying the TRIFs.
- [15] Between May and July 2018, the Strata sent the Wongs three notices of infraction for breaches of the bylaw. The Wongs did not deny that their guests failed to complete the TRIF or provide photo identification. They objected to the validity of the bylaw. The Strata fined them \$50 for the first infraction, \$100 for the second and \$200 for the third. In October 2019, the Wongs paid \$350 in trust for the disputed fines.
- [16] The Wongs filed their application for dispute resolution with the CRT on June 29, 2019. Ms. Wong represented the respondents and the Strata's president represented the petitioners before the CRT. The tribunal member decided the dispute on the basis of the written evidence and submissions provided.

Statutory Structure

- [17] There are a number of statutes that are relevant to this judicial review. I will begin with the CRTA, which is the constituent statute for the CRT. Section 2(2) of the CRTA sets out the CRT's mandate, as follows:
- (2) The mandate of the tribunal is to provide dispute resolution services in relation to matters that are within its authority, in a manner that
 - (a) is accessible, speedy, economical, informal and flexible,
 - (b) applies principles of law and fairness, and recognizes any relationships between parties to a dispute that will likely continue after the tribunal proceeding is concluded,
 - (c) uses electronic communication tools to facilitate resolution of disputes brought to the tribunal, and
 - (d) accommodates, so far as the tribunal considers reasonably practicable, the diversity of circumstances of the persons using the services of the tribunal.
- [18] In ensuring that that mandate is fulfilled, section 18 of the CRTA provides:

Nature of tribunal proceeding

18 A tribunal proceeding is to be conducted with as little formality and technicality and with as much speed as permitted by the requirements of this Act, the rules and a proper consideration of the issues in the dispute.

- [19] The CRT has jurisdiction to decide a number of different kinds of disputes, as provided in Part 10 of the CRTA. Currently, those are small claims disputes under \$5,000, certain motor vehicle claims, certain cooperative association and societies claims and certain strata property claims. In issue in this case is its jurisdiction over strata property matters, which is established in Division 4 of Part 10 of the CRTA.
- [20] Section 121 sets out the types of strata claims over which the CRT has jurisdiction. Key to this case is s. 121(1)(a), which grants the CRT jurisdiction over a claim concerning "the interpretation or application of the Strata Property Act or a regulation, bylaw or rule under that Act", and s. 121(1)(d), which grants jurisdiction over "money owing, including money owing as a fine, under the Strata Property Act or a regulation, bylaw or rule under that Act".
- [21] Section 121(2) of the CRTA states that "[f]or the purposes of this Act, the tribunal is considered to have specialized expertise in respect of claims within the jurisdiction of the tribunal under this Division". Section 1 defines "specialized expertise" to mean "the expertise that the tribunal is considered to have in respect of certain claims, under section 116". Section 1(4) also refers to "specialized expertise", stating:
- (4) For the purposes of this Act, the tribunal is to be considered to have specialized expertise in respect of a claim if the claim is in a claim category in respect of which the applicable Division of Part 10 provides that the tribunal is to be considered to have specialized expertise.
- [22] Section 116, in turn provides:

Specialized expertise of tribunal

- 116 (1) If, under section 1 (4), the tribunal is to be considered to have specialized expertise in respect of a claim category, or a class of claims in a claim category, the tribunal is to be considered to have specialized expertise to inquire into, hear and determine all those matters and questions of fact, law and discretion arising under this Act or required to be determined by the tribunal under this Act, and to make any order permitted by this Act to be made, in respect of the claim category or the class of claims in the claim category.
- (2) A decision of the tribunal made in a claim in respect of which the tribunal is to be considered to have specialized expertise is final and binding on the parties, except the decision may be judicially reviewed in accordance with section 56.7 (1) (b) [standard of review].
- [23] The concept of statutorily defined "specialized expertise" found in the CRTA is unique in administrative law statutes in British Columbia, and is central to the question of the standard of review of this Decision.

[24] The CRT's jurisdiction over some disputes, including those arising under the SPA, is not exclusive. In determining whether it has jurisdiction over a given claim, and, if so, whether to exercise it, the CRT must look first to the CRTA, s. 10(1), which provides that it must refuse to resolve a claim that is outside of its jurisdiction. Section 11 addresses the CRT's discretion whether to resolve a claim that is within jurisdiction, in the following terms:

General authority for tribunal to refuse to resolve claim or dispute

11 (1) The tribunal may refuse to resolve a claim or a dispute within its jurisdiction if it considers that any of the following apply:

- (a) the claim or the dispute
 - (i) would be more appropriate for another legally binding process or dispute resolution process, or
 - (ii) has been resolved through a legally binding process or other dispute resolution process;
 - (b) the request for resolution does not disclose a reasonable claim or is an abuse of process;
 - (c) issues in the claim or the dispute are too complex for the dispute resolution process of the tribunal or otherwise impractical for the tribunal to case manage or resolve;
 - (d) resolving the claim or the dispute may involve a constitutional question or the application of the Human Rights Code;
 - (e) the tribunal is satisfied that it has been established, on the basis of satisfactory evidence, that the claim or the dispute is beyond the jurisdiction of the tribunal.
- (2) The tribunal may exercise authority under this section
- (a) at the time of considering a request for tribunal resolution, or
 - (b) in the case of a request that has been accepted, at any time before the tribunal makes the final decision resolving the dispute.
- (3) If the tribunal refuses to resolve a dispute under this section, it must notify the person making the request or the parties, as applicable, of the refusal and the reason for the refusal.
- (4) If the tribunal refuses to resolve a dispute under this section after the tribunal proceeding respecting the dispute has started, section 15 [restrictions in relation to court and other proceedings -- when tribunal proceeding starts] no longer applies in relation to the claims that were to be resolved by the tribunal proceeding.

[25] Part 5.1 was added to the CRTA by the Civil Resolution Tribunal Amendment Act, 2018, s. 25. It sets out the standard of review applicable to CRT decisions, by reference to the ATA. Sections 56.6, 56.7(1) and 56.7(3) came into force on January 1, 2019: B.C. Reg. 232/2018. Section 56.7(2) came into force on April 1, 2019: B.C. Reg. 233/2018. Section 56.7 reads:

Standard of review

56.7 (1) The tribunal must be considered to be an expert tribunal, and section 58 (2) and (3) [standard of review with privative clause] of the Administrative Tribunals Act applies, in relation to an application for judicial review of a final decision of the tribunal in

- (a) a claim within the exclusive jurisdiction of the tribunal, or
- (b) a claim in respect of which the tribunal is to be considered to have specialized expertise.
- (2) Subsection (1) does not apply to an application for judicial review of a final decision of the tribunal that relates to liability in an accident claim described in section 133 (1) (c) [claims within jurisdiction of tribunal for accident claims] of this Act.
- (3) Section 59 [standard of review without privative clause] of the Administrative Tribunals Act applies to an application for judicial review of a final decision of the tribunal in a claim other than a claim to which subsection (1) of this section applies.

[26] This takes us to s. 58 of the ATA, which reads:

Standard of review with privative clause

58 (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

- (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
 - (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
 - (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
 - (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
- (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
 - (a) is exercised arbitrarily or in bad faith,
 - (b) is exercised for an improper purpose,
 - (c) is based entirely or predominantly on irrelevant factors, or
 - (d) fails to take statutory requirements into account.

- [27] As will be seen, the interpretation of s. 56.7 of the CRTA, taken together with s. 58 of the ATA, is the at crux of the parties' dispute about the standard of review applicable to the Decision under review.
- [28] I turn to the relevant provisions of the SPA. It will be recalled that s. 121(1)(a) of the CRTA grants the CRT jurisdiction over a claim concerning the interpretation or application of the SPA or a bylaw under the SPA. Part 7 of the SPA deals with strata bylaws. Section 121(1)(a) of the SPA 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,

- [29] In this case, it was pursuant to s. 121(1)(a) of the SPA's reference to "any other enactment" that the CRT applied PIPA in the Decision. Specifically, it found that the collection of personal information in the TRIF, including photo identification, was contrary to s. 11 of PIPA, which provides:

Limitations on collection of personal information

11 Subject to this Act, an organization may collect personal information only for purposes that a reasonable person would consider appropriate in the circumstances and that

- (a) fulfill the purposes that the organization discloses under section 10 (1), or
- (b) are otherwise permitted under this Act.

Decision under Review

- [30] In the Decision, issued January 14, 2020, the tribunal member began by reviewing the parties' arguments. The Wongs argued that the bylaw was unenforceable under s. 121(1)(a) of the SPA because it contravened PIPA. They also argued the bylaw was invalid under s. 119 of the SPA and that it was too vague to be enforceable. In the alternative, they argued that, if the bylaw was valid, they should not have been fined due to the trivial nature of the breaches. They asked to have the bylaw declared unenforceable and the fines cancelled.
- [31] In response, the Strata argued that the bylaw complied with the SPA. They also argued that the CRT did not have jurisdiction over PIPA and therefore could not make the order sought by the Wongs.
- [32] After setting out some of the relevant provisions of the CRTA and the factual background summarized above at paras. 8-16 the tribunal member began the analysis by considering whether the CRT has jurisdiction to determine whether the bylaw contravenes PIPA. The Strata relied upon *Dhanji et al v. The Owners, Strata Plan LMS 2472*, 2019 BCCRT 1194 [Dhanji], in support of their argument that the CRT did not have jurisdiction to do so. In

Dhanji, the applicants sought orders stopping their strata from monitoring key fob use and licence plates. The CRT in that case found that only the IPC had jurisdiction to make those orders. The tribunal member in the Decision under review agreed with the reasoning in Dhanji, but distinguished it on the basis of the nature of the orders sought in the two cases. He held that the IPC has exclusive jurisdiction under s. 52(3) of PIPA to order an organization to stop collecting information and to destroy personal information in its possession, but does not have jurisdiction to make orders about the enforceability of a strata bylaw or to reverse fines, which is what the Wongs sought: the Decision at para. 29.

- [33] The tribunal member referred to s. 11 of the CRTA, and found that the IPC would not be a more appropriate forum for the present dispute, because it could only address one of the Wongs' claims. Under s. 52 of PIPA, the IPC could order the Strata to stop collecting information, which would arguably have the same effect as declaring the bylaw unenforceable, but it could not make any order about the outstanding fines: the Decision at para. 33.
- [34] The tribunal member then turned to considering whether the bylaw contravenes PIPA. He found that a reasonable person would not consider photocopying each guest's photo identification to be appropriate. Presuming that the purpose of doing so is to compare the identification to the information put on the TRIF, he found there was no explanation why this goal would not be equally met by the concierge inspecting the photo identification: the Decision at para. 47.
- [35] He found that the personal information collected on the TRIF was sensitive. In this regard, he relied on the fact that the Strata can collect information about who visits each resident overnight, for how long, and how often. This, he noted, is not only the guest's personal information, but also the resident's: the Decision at para. 48.
- [36] Having found that the information collected is sensitive, the tribunal member balanced the sensitivity of the information collected against the Strata's reasons for collecting it. The Strata put forward two reasons: enforcing its prohibition against short-term rentals and ensuring the safety and security of the strata and owners. The tribunal member found that it was unnecessary to collect the personal information of short-term renters to enforce the Strata's prohibition. He found that "an honest short-term renter" would provide the concierge with sufficient information to permit enforcement of the short-term rental bylaw, and that there was no additional benefit to the collection and retention of their personal information: the Decision at para. 50. He found that the Strata failed to provide any evidence to support that it had a problem with fraud, and that a "dishonest short-term renter" could easily avoid disclosing their status to the concierge, such that the TRIF would not be an effective way to deter or catch them. He also found that the Strata failed to provide any evidence that it had tried other, less intrusive, means of enforcing its bylaws: the Decision at paras. 51, 52.

- [37] With respect to safety and security, the tribunal member found that most of the Strata's arguments were based on assumptions or hypotheticals. He referred to an alleged brothel, which was the only safety or security issue identified by the Strata, but noted that it was solved without the TRIF: the Decision at para. 53.
- [38] In the result, the tribunal member found that a reasonable person would not consider the collection of personal information in the TRIF, including photo identification, to be appropriate. In light of this conclusion under s. 11 of PIPA, it was unnecessary for the tribunal member to consider the Wongs' alternative arguments: the Decision at paras. 54, 55.
- [39] In terms of remedy, the tribunal member referred to s. 121(1)(a) of the SPA, which provides that a bylaw is unenforceable only to the extent it contravenes another enactment. He found that the only part of the bylaw that contravenes s. 11 of PIPA is the requirement that overnight guests complete the TRIF, including the requirement for photo identification, and accordingly found only that part of the bylaw to be unenforceable: the Decision at para. 56.
- [40] The CRT does not have jurisdiction to grant declaratory orders. The tribunal member did not consider an order that part of the bylaw is unenforceable to be in substance a declaratory order. Section 123(1)(b) of the CRTA authorizes the CRT to order a person to refrain from doing something, and he found that ordering that the bylaw is unenforceable is no different from ordering the Strata to refrain from enforcing it: the Decision at para. 57.
- [41] At para. 61 of the Decision, the tribunal member summarized his conclusions this way:

Finally, this decision should not be taken as authority that the strata, or any other strata corporation, could never pass a PIPA-compliant bylaw that includes collecting the personal information of overnight guests or short-term renters. This decision rests on the specific facts before me, including the lack of evidence that the strata had tried less privacy intrusive strategies to achieve its goals, the lack of evidence that the TRIF is effective at achieving its purposes, and the apparently indefinite retention of the records at issue.

Standard of Review

Interpretation of the CRTA and ATA

- [42] The Strata argues that the standard of review applicable to the Decision is correctness. The Wongs and the CRT argue it is patent unreasonableness. The difference between them arises due a difference in interpretation of s. 56.7 of the CRTA and s. 58 of the ATA. All parties acknowledge that the legislative interpretation question in issue is a difficult one, arising from the interplay between the two provisions and problems with the drafting of s. 56.7.
- [43] Section 56.7(1) provides, in relevant part:

Standard of review

56.7 (1) The tribunal must be considered to be an expert tribunal, and section 58(2) and (3) of the Administrative Tribunals Act applies, in relation to an application for judicial review of a final decision of the tribunal in

- (a) a claim within the exclusive jurisdiction of the tribunal, or
- (b) a claim in respect of which the tribunal is considered to have specialized expertise.

[44] Section 58 of the ATA provides:

Standard of review with privative clause

58 (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

- (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
 - (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
 - (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
 - (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
- (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if
 - (a) is exercised arbitrarily or in bad faith,
 - (b) is exercised for an improper purpose,
 - (c) is based entirely or predominantly on irrelevant factors, or
 - (d) fails to take statutory requirements into account.

[45] The difficulty, as submitted by the Strata, arises because s. 58(2) of the ATA, on its face, only applies to matters over which the CRT has exclusive jurisdiction. The CRT does not have exclusive jurisdiction over this dispute. It has specialized jurisdiction, as that term is defined and used in the CRTA. The Strata submits:

Therefore, even though s. 56.7 of the CRTA directs us to s. 58 of the ATA, a strata matter is not encompassed by s. 58 of the ATA because the CRT lacks exclusive jurisdiction over it.

- a) The legislative text does not express the rule that the Legislature intended to enact.
- b) It appears that s. 56.7 as drafted leads to a result that cannot have been intended.

[46] The Strata goes on to argue that it is not for the court to ascribe an intention to the Legislature where that result is not clear. It submits that neither s. 58 nor s. 59 of the ATA apply, and that recourse must therefore be had to the common law to determine the applicable standard of review. Relying on *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov], the Strata submits that the presumption of reasonableness is rebutted here by there being a question regarding the jurisdictional boundary between the CRT and the IPC, with the result that correctness applies.

[47] The Wongs and the CRT candidly acknowledge the discord between s. 58(2) of the ATA and s. 56.7 of the CRTA. The following passage from the CRT's written submission encapsulates both its and the Wongs' position on this issue:

The plain wording of section 58(2)(a) of the ATA requires a tribunal to have exclusive jurisdiction over a matter for the patent unreasonableness standard of review to apply to findings of fact, law or exercises of discretion. The CRT does not have exclusive jurisdiction over strata property disputes. However, the CRT maintains that the patent unreasonableness standard must apply to findings of fact, law or exercises of discretion in strata property matters in order to give effect to the intent of the standard of review provisions in the CRTA, and to avoid an otherwise absurd outcome.

[48] They rely on Driedger's "modern principle" of statutory interpretation, which was affirmed by the Court in *Vavilov* at para. 118 as entailing that:

[118] Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker.

[49] They also rely on s. 8 of the Interpretation Act, R.S.B.C. 1996, c. 238, which provides that "[e]very enactment must be construed as being remedial, and must be given such fair, large and liberal interpretation as best ensures the attainment of its objects."

[50] Ultimately, the CRT and the Wongs argue that "specialized jurisdiction", which the CRT is granted pursuant to the CRTA, must be read to have the same meaning as "exclusive jurisdiction" for the purposes of determining the standard of review under s. 58 of the ATA.

[51] I am unable to give effect to the submissions of the CRT and the Wongs on this issue. I accept that the Legislature likely intended for decisions of the CRT dealing with strata matters to be subject to a deferential standard of review. But it would do violence to the language actually chosen by the Legislature to read "exclusive jurisdiction" in s. 58(2)(a) of the ATA as including the novel term "specialized jurisdiction".

- [52] The CRT acknowledges in its submissions that it is asking the court to interpret the ATA in a manner not in keeping with its plain meaning. Relying on Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014) at s. 7.22, it submits that such a "strained interpretation" is permissible in order to prevent an absurdity. The passage relied upon by the CRT goes on to state that "[h]owever, the meaning adopted must be one the words of the text can reasonably bear": Sullivan at s. 7.26.
- [53] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 27 [Rizzo Shoes], the Supreme Court of Canada stated that "an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment".
- [54] As the CRT noted in its submissions, if s. 58(2)(a) does not apply, the only other available subsection of the ATA is s. 58(2)(c). Under s. 58(2)(c), the CRT would be subject to a correctness standard, which would give no deference to the CRT on questions of fact, law or the exercise of discretion.
- [55] I agree that that is an anomalous result. But I do not accept that it is absurd, in the sense discussed by the Court in *Rizzo Shoes*. The interpretation urged upon the Court by the CRT is, by contrast, not one that the words of the statute can reasonably bear.
- [56] Significantly, the CRTA itself includes a definition of "exclusive jurisdiction" in s. 1: "exclusive jurisdiction' means the jurisdiction of the tribunal in respect of certain claims, under section 115". Section 115 addresses those claims over which the CRT has exclusive jurisdiction. Had the Legislature intended that exclusive jurisdiction be read to include specialized expertise, it was open to it to make that clear within the CRTA. It did not do so. Exclusive jurisdiction is a term of art with clear meaning. Exclusive means exclusive. It cannot be read, in the absence of explicit legislative language to that effect, to include specialized but non-exclusive jurisdiction.
- [57] The Strata argues that as a consequence of these interpretative difficulties, neither s. 58 nor s. 59 of the ATA applies, with the result that recourse must be had to the common law to determine the standard of review. I do not accept that submission. Section 56.7 of the CRTA clearly states that ss. 58(2) and (3) of the ATA apply. The fact that the application of ss. 58(2) and (3) creates interpretative difficulties does not render it inapplicable.
- [58] The decision of the Court of Appeal in *Lavender Co-Operative Housing Association v. Ford*, 2011 BCCA 114 at para. 57 [Lavender] makes clear that if s. 58 or s. 59 of the ATA applies to a given tribunal, then the applicable section represents a "complete code of the possible standards or review." Only if neither section applies is recourse to be had to the common law.

[59] Further, in *Robertson v. British Columbia (Teachers Act, Commissioner)*, 2014 BCCA 331 at paras. 47, 48, the Court of Appeal, building upon *Lavender*, held that difficulty in applying the ATA does not render it inapplicable. The court wrote:

[47] There are no gaps in s. 58 of the ATA and there is no need to resort to the common law standard of review analysis.

[48] Read through the lens of "a complete code", it becomes clear that the task of a reviewing court is to first determine if s. 58 or s. 59 is intended to apply and then rely on the principles of statutory interpretation to characterize the questions the court is tasked with deciding. It simply does not seem to me to be open to a court to conclude that though the legislature intended for the ATA to apply, the difficulty in doing so precludes the court from following through on the legislature's direction.

[Emphasis added.]

[60] In *Vavilov*, the Court explained, at para. 121, the role of an administrative decision maker in interpreting a statute:

[121] The administrative decisions maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior - albeit plausible - merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

[Emphasis added.]

[61] What the Court said there with respect to administrative decision makers applies with equal force to the courts. The interpretation that the CRT and the Wongs ask this Court to give to these provisions would be to reverse-engineer a desired outcome. I conclude that, despite the difficulty in doing so, I am required to apply s. 58(2)(c) of the ATA, and apply a correctness standard to the CRT's Decision.

Standard of Review under *Vavilov*

[62] I have not yet considered the Strata's argument that the common law as set out in *Vavilov* applies, and in particular, that the presumption of reasonableness is rebutted here due to there being a question of the jurisdictional boundary between two or more administrative bodies. For the reasons I have already given, I do not accept that the common law applies to the determination of the appropriate standard of review in this case. If it did, I would not find that a correctness test should apply due to the necessity of resolving the jurisdictional boundary between the CRT and IPC.

- [63] The Strata argues that the CRT and IPC "collide in jurisdiction", and that there is an operational conflict between them, pulling the parties in two incompatible directions. It submits that this is the kind of situation that the Supreme Court referred to at paras. 63 and 64 of Vavilov, where the rule of law requires courts to intervene and apply a correctness test.
- [64] In addition to Vavilov, the Strata relies on the pre-Vavilov decision of the Court of Appeal in Viterra Inc. v. Grain Workers' Union, Local 333, 2018 BCCA 455 [Viterra], in which the court held at para. 38 that a correctness standard should be applied in determining whether inspectors authorized under the Canada Labour Code, R.S.C. 1985, c. L-2, had exclusive jurisdiction to decide complaints about hours of work, or whether labour arbitrators also have jurisdiction to hear such complaints through the grievance process. The court held that this was an issue "regarding jurisdictional lines between two or more competing specialized tribunals", to be reviewed on a correctness standard.
- [65] The present case can be distinguished from Viterra. In contrast to Viterra, in which it was argued that the labour inspectors had exclusive jurisdiction, the CRT and the IPC clearly have concurrent jurisdiction over the application of PIPA to this bylaw. Ultimately, the Court is not being asked to find that the IPC has exclusive jurisdiction to apply PIPA in this context; rather, it is being asked to find that the CRT ought not to have exercised its jurisdiction. The CRT's jurisdiction to apply PIPA is clear as a result of s. 121(1)(a) of the SPA, which enables the CRT to hold a bylaw unenforceable to the extent that it contravenes the SPA "or any other enactment or law".
- [66] In Vavilov, the Court observed that administrative decisions are rarely contested on the basis of jurisdictional boundaries between two administrative tribunals. It stated that "[w]here they are, however, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another": Vavilov at para. 64. In the present case, the CRT has not interpreted the scope of its authority in a manner incompatible with the jurisdiction of the IPC. The tribunal member recognized the IPC has jurisdiction, considered whether it should refuse to decide the dispute to permit the IPC to do so, and deferred to the IPC's specialized expertise in interpreting PIPA. There is no true operational conflict, and thus no basis for invoking this exception to reasonableness review.
- [67] Section 11 of the CRTA is designed to assist the CRT in deciding whether to exercise its jurisdiction in circumstances where another body also has jurisdiction. In the present case, the tribunal member considered s. 11, and determined that the IPC was not a more appropriate forum to decide this dispute. These provisions, and the tribunal member's decision to exercise the CRT's jurisdiction, do not give rise to the kind of operational conflict between different bodies' jurisdictions which would be necessary, if Vavilov applied, to rebut the presumption of reasonableness review.

[68] Nonetheless, while I get there by the different route described above, I agree with the Strata that I must apply a correctness test to the Decision, as a result of s. 58(2)(c) of the ATA. I have come to this conclusion because I do not think it is this Court's role, in an application for judicial review, to effectively rewrite the statute to overcome the interpretative difficulties caused by faulty legislative drafting. The solution to the interpretative problems discussed in this decision lies, not with the judiciary, but with the Legislature.

Is the Decision Correct?

Did the Tribunal Member err in Exercising Jurisdiction?

[69] I must now decide whether the Decision under review was correct. In Vavilov, the Supreme Court stated the following about the application of the correctness standard:

[54] When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or substitute its own view: Dunsmuir, at para. 50. While it should take the administrative decision maker's reasoning into account - and indeed, it may find that reasoning persuasive and adopt it - the reviewing court is ultimately empowered to come to its own conclusions on the question.

[70] The Strata argues the Decision was incorrect. While the Strata's submissions occasionally refer to the IPC having exclusive jurisdiction over privacy matters, or that the CRT exceeded its jurisdiction in resolving this dispute, the crux of its position is that the CRT erred in deciding to exercise its jurisdiction, rather than deferring to the IPC. It argues that the CRT has only restricted or "peripheral" authority to interpret and apply PIPA under s. 121(1)(a) of the CRTA. The Strata submits that the CRT erred in considering the contents of the TRIF, rather than the bylaw that mandated it. Further, the Strata relies upon the democratic nature of strata governance, its argument on this point being encapsulated in the following passage from its written submissions:

By passing the Bylaw, the homeowners, including the Respondents, had voted to enhance building security by choosing to abdicate an unspecified level of anonymity on the TRIF. The democratic government of the strata community should not be overridden by the court except where absolutely necessary.

- a) The CRT determined that the reasons for passing the Bylaw were invalid.
- b) It is not for the law, except where it is "absolutely necessary" to tell owners how they should live in their own homes.

[71] The Wongs' primary position was that the Decision was not patently unreasonable. But in the alternative, they argued that the Decision was correct. They argue that it was appropriate for the CRT to exercise its jurisdiction with respect to this dispute, and that s. 121(1)(a) of the SPA gave it full jurisdiction to apply PIPA. They submit that the CRT correctly applied PIPA. The CRT, quite properly, took no position with respect to the merits of the Decision.

- [72] I begin my analysis of the merits of the Decision by considering the statutory basis for the CRT having and exercising jurisdiction over this dispute. While there is some inevitable overlap with my earlier discussion of the standard of review, it is important to engage in this analysis, in part because of the ambiguity in the Strata's submissions with respect to whether they were arguing that the CRT truly lacked jurisdiction to apply PIPA to the bylaw.
- [73] In my view, it is clear that the CRT had jurisdiction to apply PIPA to this dispute, and did not err in its decision to exercise that jurisdiction.
- [74] As discussed above, s. 121(1)(a) of the CRTA grants the CRT jurisdiction over "the interpretation or application of the Strata Property Act or a regulation, bylaw or rule under that Act", and s. 121(1)(d) grants it jurisdiction over "money owing, including money owing as a fine, under the Strata Property Act or a regulation, bylaw or rule under that Act". In their application for dispute resolution, the Wongs challenged the bylaw that mandates the TRIF, and the fines imposed upon them due to their guests refusing to fill out the TRIF and provide the required photo identification. The CRT, and indeed this is not disputed by the Strata, had the jurisdiction to apply the SPA to this dispute.
- [75] Section 121(1)(a) of the SPA provides that a bylaw is not enforceable, to the extent it contravenes the SPA or "any other enactment or law". PIPA is another enactment or law. Therefore, the CRT had jurisdiction to apply PIPA to determine if the bylaw is unenforceable to the extent it is inconsistent with it.
- [76] I reject the Strata's argument that the CRT's jurisdiction to apply PIPA was somehow limited or restricted by virtue of the fact the IPC is empowered to adjudicate disputes under PIPA. The Legislature has clearly decided that the IPC does not have exclusive jurisdiction to apply PIPA. Many other bodies, including not only the CRT but also labour arbitrators and the Labour Relations Board, have concurrent jurisdiction to apply PIPA to matters arising within their statutory authority: *Otis Canada*, 2012 BCIPC No. 11.
- [77] The Strata raises the spectre of the CRT having jurisdiction to "interpret a limitless number of statutes under" s. 121(1)(a) of the SPA. I agree with the Wongs that that is the Legislature's intention, and that the CRT has the authority to consider whether a bylaw passed by a strata is unenforceable to the extent it is inconsistent with any enactment or law. There is no basis for reading down the CRT's jurisdiction to consider other enactments or laws under s. 121(1)(a) of the SPA.
- [78] The CRTA has within it tools to enable tribunal members to consider whether it is appropriate to exercise their jurisdiction in any given case. Under s. 11 of the CRTA, the CRT may refuse to resolve a claim or a dispute within its jurisdiction if it considers that the claim or dispute would be more appropriate for another legally binding process or has been resolved through a legally binding process or dispute resolution process.

- [79] In the present case, the tribunal member considered s. 11, and found that the IPC would not be a more appropriate forum because it could address only one of the Wongs' claims. The IPC could order the Strata to stop collecting and using personal information, but it could not make any order relating to the fines.
- [80] The Strata argues that CRT's jurisdiction to interpret statutes other than the SPA or the Human Rights Code, R.S.B.C. 1996, c. 210, both of which are specifically enumerated in s. 121(1)(a), is peripheral, and that this requires it to defer to other tribunals that have primary jurisdiction to interpret such statutes. I do not agree with this submission. The CRT has the same jurisdiction to apply any other law as it has to apply the SPA or Human Rights Code, and that is to find a bylaw unenforceable to the extent it is inconsistent with them. It is not required to defer to other tribunals in considering disputes relating to their enabling statutes, although that is certainly a factor the CRT would be entitled to take into account in deciding whether to exercise its jurisdiction under s. 11.
- [81] The decision by a tribunal member whether to refuse to resolve a dispute under s. 11 is a discretionary one, to which it is inherently difficult to apply the correctness test I have concluded I must apply to this Decision. I find that the tribunal member correctly instructed themselves with respect to the applicable law, and that their determination that the IPC was not a more appropriate forum was correct.
- [82] I will address here the arguments made by the Strata with respect to a complaint having been filed by the Wongs' granddaughter to the IPC on November 21, 2019. The Strata raises the concern that this complaint gives rise to the possibility of inconsistent results. The fact that a complaint was filed with the IPC does not appear to have been evidence before the tribunal member. Regardless, the fact that a complaint has been filed with the IPC about similar subject matter does not render the tribunal member's decision not to refuse to decide this dispute incorrect. I am told that the IPC has deferred consideration of that complaint, pending this matter. It will be for the IPC to decide what to do with that complaint in light of the CRT's decision, and this Court's decision on judicial review.

Did the Tribunal Member err in Concluding the Bylaw Contravenes PIPA?

- [83] I turn to a consideration of the substance of the Decision, and whether the tribunal member correctly applied PIPA to this dispute. The relevant section is s. 11, which provides that "an organization may collect personal information only for purposes a reasonable person would consider appropriate in the circumstances". The tribunal member discussed three IPC decisions that have considered whether a reasonable person would consider the collection of personal information appropriate within the meaning of s. 11: *K.E. Gostlin Enterprises Ltd., Re*, 2005 CanLII 18156 (BC IPC); *Cruz Ventures Ltd. (Wild Coyote Club) (Re)*, 2009 CanLII 38705 (BC IPC); and *Shoal Point Strata Council (Re)*, 2009 CanLII 67292 (BC IPC). The tribunal member noted that, while IPC decisions were not binding on him, he found them highly persuasive because of the IPC's specialized expertise in the interpretation of PIPA.

[84] The tribunal member then correctly set out the legal test:

45. Taken the above decisions together, I find that the legal test to be applied is as follows: The strata can only collect and use personal information if a reasonable person would consider it appropriate in the circumstances. A reasonable person expects that the strata would collect as little personal information as possible to achieve its stated goals considering the sensitivity of the personal information. A reasonable person also considers how effective the system requiring the collection of personal information is in achieving its goals. Finally, a reasonable person considers how the organization handles and disposes of the personal information it collects.

[85] In finding that a reasonable person would not consider the collection of the personal information on the TRIF, including photo identification, to be appropriate in the circumstances, the tribunal member referred to the following factors:

- a) A copy of a person's driver's licence or passport is highly sensitive information;
- b) Copying a guest's photo identification is not necessary to meet the Strata's goal of comparing it to the information included on the TRIF, as the concierge could simply inspect the photo identification;
- c) The Strata's privacy policy allows it to retain completed TRIFs indefinitely, thereby accumulating data about who visits each resident overnight, for how long and how often. This is not only the visitor's personal information, but also the resident's;
- d) Collecting this sensitive information is unnecessary with respect to short-term renters--an honest short-term renter will verbally give the concierge the information they require to enforce the bylaw on short-term rentals, and the TRIF is not an effective way to catch or deter a dishonest short-term renter who would not do so;
- e) The Strata provided no evidence about whether it had tried other, less intrusive methods of enforcing its bylaws; and
- f) Most of the Strata's arguments with respect to safety and security were based on assumptions and hypotheticals, not evidence.

[86] The Strata sought to introduce additional information, which was not before the CRT, by means of an affidavit sworn by John Chan, the president of the Strata. The CRT and the Wongs are correct in their submissions that the evidence contained in Mr. Chan's affidavit is inadmissible on judicial review. Judicial review is based on the record that was before the tribunal, and only in exceptional circumstances can evidence outside the record be admitted: *C.S. v. British Columbia (Human Rights Tribunal)*, 2017 BCSC 1268 at para. 69. As the Court of Appeal stated in *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at para. 40, "[c]ourts must be vigilant, however, not to accept affidavits that simply seek to shore up weaknesses in the record, or serve to provide a revisionist version of the tribunal's decision." The fresh evidence contained in Mr. Chan's

affidavit does not fall within any of the exceptional circumstances in which a party on judicial review can supplement the tribunal's record. It seeks merely to shore up weaknesses in the record, and is not properly admissible on judicial review.

- [87] The Strata submits that the CRT gave insufficient weight to the fact that the bylaw was enacted by the Strata, pursuant to the democratic governance model mandated under the SPA. In my view, the fact that the bylaw was enacted by the Strata does not displace or modify the objective reasonable person test required under s. 11 of PIPA. As the Wongs submit, the Strata's democratic function is logically constrained by the provisions of s. 121(1) (a) of the SPA, which prevent a strata from enacting bylaws that contravene any enactment or law.
- [88] The Strata argues that the CRT erred in applying PIPA to the TRIF and its requirement for photo identification, rather than the bylaw itself. It argues that it is not the bylaw that requires the collection of personal information, but the TRIF, and that therefore, the bylaw does not contravene PIPA.
- [89] I do not agree with this submission. The bylaw provides, in relevant part, "[a] 'Temporary Resident Information Form' must be completed by an overnight guest(s) of a resident". The TRIF sets out the information that must be provided, including a copy of a guest's photo identification.
- [90] The bylaw is the legal authority for the Strata collecting the personal information required on the TRIF. It would be strange indeed if a strata could evade legal review of the personal information it collects by the subterfuge of enacting a vague bylaw mandating that guests complete a form, and then collecting whatever information it pleases on that form. As the Wongs submit, a bylaw that mandates the completion of a form cannot legally authorize a form that contravenes PIPA.
- [91] In my view, in the Decision the tribunal member identified and applied the correct legal test, considered and appropriately weighed the relevant factors, and correctly concluded that the bylaw contravenes s. 11 of PIPA, and is, to the extent of the contravention, unenforceable.

Conclusion

- [92] I have determined that the standard of review applicable to the CRT's Decision is correctness. Applying a correctness standard, I have concluded that the Decision is correct.
- [93] I therefore dismiss the Strata's application for judicial review. The Wongs are entitled to their costs under the normal rule. The CRT's role on this judicial review proceeding was appropriate and consistent with the accepted bounds of an administrative tribunal's participation in such a proceeding. There will be no order for costs for or against the CRT.

"Lyster J."

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