

## The Case of the Costly Hearing Refusal

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A recent decision of the Civil Resolution Tribunal (CRT) has shown that the failure of a Strata Council to comply with the hearing requirements of the *Strata Property Act* (the SPA) can be costly.<sup>1</sup>

An owner applied to the CRT for \$5,000 in damages because the owner's limited common property patio adjacent to her strata lot was used as the staging area for scaffolding in order for repairs to be carried out to the balconies above her strata lot.

After the strata corporation filed a warranty claim regarding balcony repairs, the warranty company advised the owners in October 2017 that the extent of the damage to the balconies would require a complex scope of work. The warranty company advised the owners to remove personal belongings from their patios and balconies and that the owners of the patio and damaged balconies would not have access to their patios/balconies until the repairs were completed for safety reasons.

In response to her enquiry regarding when the work would start and how long it would take, the owner was advised by the strata manager that the work was being carried out by the warranty company and the warranty company would provide the dates.

Scaffolding was installed on the owner's patio in April 2018, which blocked the owner's ground floor windows. On May 14, the owner wrote to the strata manager asking for an update on how long the work would take

as she was living in the dark and could not use her patio. The strata manager forwarded an email from the warranty company advising that the work would take 4 – 6 months and could not be hastened as the damage was substantial and required the involvement of a structural engineer.

The owner replied to the strata manager saying 4 – 6 months was too long and she didn't understand why she should live with the inconvenience while she was paying her regular strata fees.

The owner also asked for detailed information about the extent of the damage and the plan for resolving it. Subsequently, the owner was advised that the warranty company and contractor were not obligated to provide detailed reports regarding the balcony damage and how they would carry out the work.

The owner emailed again on May 28 requesting a further update and again complained that she was living in the dark and could not use her patio. She wanted to know what the strata was doing to speed up the repairs. The strata manager advised that she would follow up with the warranty company but that it was out of the strata corporation's control, since it was the warranty company that was handling the repair. The owner was subsequently advised that the warranty company advised again that the repairs could not be hastened because they were a very delicate matter.

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<sup>1</sup> *Lozjanin v. The Owners, Strata Plan BCS 3577* 2019 BCCRT 481

On July 16 the owner sent a request for a hearing pursuant to s. 34.1 of the SPA which provides:

- 34.1** (1) By application in writing stating the reason for the request, an owner or tenant may request a hearing at a council meeting.
- (2) If a hearing is requested under subsection (1), the council must hold a council meeting to hear the applicant within 4 weeks after the request.
- (3) If the purpose of the hearing is to seek a decision of the council, the council must give the applicant a written decision within one week after the hearing.

The strata council initially denied the hearing request. The strata manager sent additional information about the repairs and stated that the hearing was not necessary. The strata manager later said that there was no point in holding a hearing as the strata council had no further information to convey. The strata manager then requested that the owner provide further reasons for her request for a hearing. The owner was then advised that she could attend a council meeting on August 8. However, the evidence indicated that the council meeting was on August 28.

In the decision, the CRT stated that the strata council's evidence on the matter of the hearing date was contradictory and the strata council did not provide a confirmation that a meeting was held on August 8. As a result, the CRT concluded that the owner was denied a hearing.

The CRT then considered the test for significant unfairness as follows:

- What is or was the expectation of the affected owner or tenant?
- Was the expectation on the part of the owner or tenant objectively reasonable?
- If so, was that expectation violated by an action that was significantly unfair?

The CRT noted that the right to a hearing is mandatory pursuant to s. 34.1 of SPA and that as a result, the owner had a reasonable expectation that the strata council would grant her a hearing before August 16.

The CRT concluded that, in not meeting that expectation, the strata council acted in a manner that was significantly unfair. The CRT noted that it was unclear that a hearing would have changed the timeline or outcome of the balcony repairs. However, the CRT also acknowledged that the owner and her husband had repeatedly raised concerns about the lack of communication about the repairs. The CRT also considered that there had been large and visible scaffolding and mesh blocking the owner's window.

The CRT concluded that the strata council's denial of a hearing was unreasonable and a clear violation of s. 34.1 of SPA and that it was significantly unfair. The CRT held that the owner was entitled to a remedy for significant unfairness and that it was reasonable for the owner to be compensated in the amount of \$1,000.

Although, the owner had sought damages of \$5,000 due to the loss of use and enjoyment of her patio, and personal injury, there is no indication in the decision that the owner specifically sought damages for the failure of the strata council to hold a hearing. The CRT dismissed the claim for damages for loss of use and enjoyment and personal injury as neither claim was proven. Nonetheless, the CRT was willing to award damages for significant unfairness regarding the failure of the strata council to hold a hearing.

The fact that the CRT was willing to award damages because the strata council failed to hold a hearing is significant and emphasizes the need for strata councils to strictly comply with such provisions of the SPA.

Section 34.1 provides that a hearing is held at a council meeting. Although some strata councils believe that a hearing is something different than a council meeting, in fact, the hearing is simply a council meeting agenda item. It may be that the strata council holds the council meeting only for the one agenda item, namely the hearing, or it could be that the hearing is one of many items that the strata council must address at that meeting. When presented with a request for a hearing, the strata council may already have a strata council meeting scheduled, at which the hearing can be added as an agenda item. If no hearing is scheduled within the next four weeks following receipt of the hearing request one must be scheduled.

In order for the strata council meeting to proceed, a quorum of council members must be present. Additionally minutes of the meeting must be taken. Following the strata council meeting, if the owner requested a decision, the decision must be provided in writing within one week of the date of the hearing. To ensure that the decision is communicated within the time frame, strata council members should make their decision immediately following the meeting. The minutes of the meeting can then include the decision.

The amount of information contained in the minutes regarding the purpose of the hearing will depend on the nature of the hearing. Strata council members should be careful not to include personal information in the minutes. For example, the minutes relating to a hearing regarding a request for an exemption from a rental bylaw on the basis of hardship, or to hearing regarding permission for an exemption from a bylaw due to a disability will contain very little information, whereas the minutes relating to a hearing requesting permission for an alteration to common property would likely contain more information. If a strata council is unsure

about how much information should be disclosed, it may want to seek legal advice.

If an owner is provided with a strata council meeting date but is unable to attend, the strata council should ensure that the notification of the hearing date and the owner's response is recorded in writing, usually by email, in the event it becomes necessary for the strata council to prove that a strata council meeting date for the hearing was offered within the time period specified by the SPA.

At this time, it is not known whether other CRT decisions will follow *Lozjanin* and award damages as a result of the strata council's failure to hold a hearing. However, strata councils can avoid such a possibility by strictly complying with the Act.