Court of Queen's Bench of Alberta

Citation: Lupuliak v Condominium Plan No 8211689, 2022 ABQB 65

Date: 20220121
Docket: 2001 08316
Registry: Calgary

Between:

Lillian Lupuliak

Applicant (Cross-Respondent)

- and -

The Owners: Condominium Plan No. 8211689, Steve Gagnon, Jodi Jepps Also Known As Jodi Juniper, Joanne Amey and Lenyx Corp.

Respondents (Cross-Applicants)

Reasons for Decision of the Honourable Mr. Justice Colin C.J. Feasby

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Introduction

[1] To an outsider, disputes between neighbours often appear to be petty and pointless. While aspects of the present dispute are petty, at its core is a difference over a point of principle. The Applicant, Lillian Lupuliak, installed a doorbell on the door of her condominium unit. The doorbell faces a common interior hallway and records audio and video when there is motion detected near the door. Other condominium unit owners objected to the doorbell being in the common space of the condominium building, on the grounds that it was a nuisance and was installed contrary to the condominium by-laws. The Respondents seek, among other things in their cross-application, an injunction compelling the removal of the doorbell.

[2] Ms. Lupuliak counters by arguing that the condominium board's conduct in seeking removal of the doorbell was oppressive. She contends that she had a reasonable expectation, based on the condominium board's non-enforcement of by-laws concerning modifications to condominium unit doors, that she would be able to install and maintain the doorbell. Ms. Lupuliak seeks, among other things, a declaration that the condominium by-laws do not permit the Respondents to remove the doorbell as well as an injunction restraining the Respondents from removing the doorbell.

[3] For the reasons that follow, I find that the condominium board acted reasonably in seeking to have the doorbell removed and has not in any way acted oppressively toward Ms. Lupuliak. Ms. Lupuliak's application is dismissed. I further find that the doorbell was installed contrary to the condominium by-laws and that the condominium board has the authority to require its removal. The Respondents' cross-application is granted.

Facts

Parties

[4] Ms. Lupuliak is an owner and resident of a unit in Riverhill Gardens, a condominium building in Calgary. She has lived in Riverhill Gardens since the building became a condominium in 1998. Currently, Ms. Lupuliak lives in her condominium unit with her partner, Yves Gagnon. In support of her application, Ms. Lupuliak tendered an affidavit and was questioned. Yves Gagnon did not provide any evidence.

[5] Jodi Jepps is an owner of a condominium unit in Riverhill Gardens. Although she no longer lives in the building, she is a longstanding member of the condominium board. Ms. Jepps tendered an affidavit in support of the cross-application, and was questioned.

[6] Joanne Amey is an owner of a condominium unit in Riverhill Gardens and lives across the hall from Ms. Lupuliak. Ms. Amey also tendered an affidavit in support of the cross-application, and was questioned.

[7] The Owners: Condominium Plan No. 8211689 is a corporation (the "Corporation") within the meaning of the *Condominium Property Act*, RSA 2000, c C-22, s 25. The Corporation is governed by a board of directors elected by the owners of the condominium units in Riverhill Gardens (the "Condominium Board").

[8] Steve Gagnon was elected as the President of the Corporation in February of 2020. Steve Gagnon is not related to Yves Gagnon. Steve Gagnon did not provide any evidence.

[9] Lenyx Corp. is the property manager responsible for the day-to-day administration and maintenance of Riverhill Gardens. No evidence was provided by any representative of Lenyx Corp.

Condominium By-Laws

[10] The owners and residents of Riverhill Gardens are governed by the By-Laws of the Corporation (the "By-Laws"). The By-Laws were adopted in 1998.

[11] The parts of the By-Laws relevant to this proceeding provide as follows:

> Article 3(g) [An owner shall] not make any repairs, additions or alterations to the exterior of his unit or the building ... without first obtaining the written consent of the Corporation.
>
> Article 3(h) [An owner shall] use and enjoy the common property in accordance with these by-laws and all rules and regulations prescribed by the Corporation and in such a manner as to not unreasonably interfere with the use and enjoyment thereof by other owners, their families or visitors.
>
> Article 3(i) [An owner shall] not use his unit or permit it to be used in any manner or for any purpose which may be illegal, injurious or that will cause a nuisance or a hazard to any occupant of another unit (whether an owner or not) or the family of such an occupant.

The Doorbell

[12] Sometime in 2019, there was an attempted break-in to Ms. Lupuliak's condominium unit through the exterior patio doors.

[13] As a result of the attempted break-in, in late 2019 Ms. Lupuliak took measures to increase the security of her condominium unit. She installed a camera on the exterior of the building outside of her unit, that captured video and audio from her patio.

[14] Ms. Lupuliak also installed a Ring brand doorbell on the door of her condominium unit, facing the common interior hallway. The doorbell is not a conventional doorbell; it is a so-called smart doorbell. The doorbell is capable of making video recordings (including audio) and is connected to the internet. The doorbell's recording functions are triggered by a motion sensor.

[15] The software program associated with the doorbell automatically saves video captured by the doorbell for 60-days. Video files may be tagged by a user to be saved indefinitely and may be exported from the doorbell software by the user.

[16] Ms. Lupuliak did not obtain permission from the Condominium Board to install either the patio camera or the doorbell.

[17] No complaints have been lodged to the Condominium Board about the patio camera and no action has been taken by the Condominium Board in respect of the patio camera.

Doorbell Controversy

[18] The doorbell and, in particular, its video function, made Ms. Amey uncomfortable. The motion sensor was triggered when people entered and left Ms. Amey's condominium unit and video and audio of herself and her guests was captured. She felt that this was an invasion of her privacy.

[19] Ms. Amey expressed her concern about the doorbell to the Condominium Board in an email dated January 7, 2020.

[20] She also expressed her displeasure with the doorbell by saluting it with her middle finger. Ms. Amey's salute was captured on video by the doorbell and Ms. Lupuliak posted it to her Facebook page with a hashtag identifying Ms. Amey's employer.

[21] The doorbell and its video capability were discussed by the Condominium Board and by owners of units present at the Corporation's Annual General Meeting on February 27, 2020 (the "AGM"). The meeting minutes reflect that "[t]he owners were unanimous is [*sic*] expressing their discomfort at being surveilled in this manner." At the AGM, Yves Gagnon was asked to remove the doorbell.

[22] The day after the AGM, Yves Gagnon sent an email to Lenyx Corp. advising that the doorbell would not be removed.

[23] In early March of 2020, Steve Gagnon wrote to Ms. Lupuliak and Yves Gagnon, on behalf of the Corporation, again requesting that the doorbell be removed. Steve Gagnon explained that the installation of the doorbell was not in compliance with the By-Laws because no prior permission had been obtained from the Corporation. Lenyx Corp. sent a similar email to Ms. Lupuliak in early March of 2020.

[24] In or around April of 2020, during the first wave of the COVID-19 pandemic, Ms. Lupuliak used the video footage captured by the doorbell to report Ms. Amey to Alberta Health Services for not complying with the public health orders in place at that time. This report caused Alberta Health Services to make inquiries of Ms. Amey. Ms. Amey denies that she breached any of the public health measures in place at the time.

[25] At some point during the first half of 2020, Ms. Lupuliak submitted videos recorded by the doorbell as part of complaints to the Calgary Police Service about Ms. Amey, Steve Gagnon and others. She also submitted the footage as part of a complaint to the Privacy Commissioner about the Condominium Board. There is no indication that the police complaints or the complaint to the Alberta Privacy Commissioner resulted in any action.

[26] On June 2, 2020, counsel for the Corporation wrote to Ms. Lupuliak demanding removal of the doorbell.

[27] Ms. Lupuliak's counsel responded with a letter on June 10, 2020, denying that the doorbell violated any By-Laws and asserting that the Corporation was selectively enforcing its By-Laws and bullying Ms. Lupuliak.

[28] On June 17, 2020, Steve Gagnon sent a communication to all Riverhill Gardens unit owners notifying them of By-Law article 3(g) which precludes modifications to condominium units. Steve Gagnon, in this communication, acknowledged that "a number of modifications to the unit doors have been made over the years by Owners." He conceded that some of these modifications may have been approved informally and that documented approvals may have since been lost. Accordingly, he requested that "all owners (as applicable) submit an approval request, accompanied by a photo if possible, of the modifications made to their doors." He went on to say, "[w]e expect to provide approval for most long-standing modifications, for example peep-holes, silver finish lock sets, key pad entry, etc. Any recording devices that intrude on the privacy of residents such as spy cameras or security cameras will not be approved." He set a deadline of June 30, 2020, for requests to be made.

[29] Ms. Lupuliak did not apply for approval of the doorbell.

[30] On July 6, 2020, Lenyx Corp. wrote to Ms. Lupuliak demanding removal of the doorbell before 4:00pm on July 10, 2020.

[31] Ms. Lupuliak commenced this proceeding by way of an Originating Application on July 9, 2020.

[32] On July 10, 2020, counsel for Ms. Lupuliak appeared before Justice A.D. Macleod and obtained an injunction restraining the Corporation from removing the doorbell pending the final determination of this action.

Law & Analysis

Improper Evidence

[33] Ms. Lupuliak objects to two categories of evidence relied upon by the Respondents. The first category is improper affidavit evidence. The second category is evidence that is appended to counsel's submissions but which was not previously adduced in an affidavit or during the questioning process.

[34] Ms. Lupuliak alleges that Ms. Amey and Ms. Jepps' affidavits contain impermissible hearsay, argument, opinions, and bad character evidence. She submits that the offending sections of the affidavits must be struck out pursuant to Rule 3.68(4)(a) of the *Alberta Rules of Court*, Alta Reg 124/2010 (the "*Rules*"). Alternatively, she requests that the offending parts of the affidavits be given no weight.

[35] Applications to strike evidence from affidavits are typically not a good use of the Court's time. In most cases, the Court is capable of sifting the wheat from the chaff and ignoring improper evidence. Spending time focussing on improper evidence often distracts from the substance of the matter before the Court and directs the Court's attention to the improper evidence. Counsel should reserve such applications for situations where the impugned affidavit evidence is material and where its admission would be genuinely prejudicial.

[36] Most of the instances of alleged improper affidavit evidence raised by Ms. Lupuliak concern descriptions or characterizations of the evidence that may be interpreted as incorporating elements of opinion or argument. Put simply, counsel is mainly objecting to the use of adjectives and adverbs. For the most part, the impugned evidence is proper evidence and is not struck. I place no weight on the judgments embedded in the descriptive language in the affidavits and have formed my own views of the conduct and communications described therein.

[37] Ms. Lupuliak objects to paragraphs 11 and 16 of Ms. Amey's affidavit. Paragraph 11 details Ms. Amey's "interpretation" of Ms. Lupuliak's actions. Her description of Ms. Lupuliak's actions is not an interpretation in the sense of an opinion on evidence; rather, she is saying that Ms. Lupuliak's actions communicate a message to her and make her feel a certain way. Paragraph 16 expresses the view that the doorbell camera enables Ms. Lupuliak to harass Ms. Amey and others. The paragraph is awkwardly stated and contains a characterization of Ms. Lupuliak's behaviour, but the point of the paragraph is to say that the camera facilitates what Ms. Amey considers to be harassment. Neither of these paragraphs cross the line into being inappropriate evidence and, therefore, neither are struck.

[38] Paragraph 14 of Ms. Amey's affidavit is objected to on the grounds that it characterizes Ms. Lupuliak's behaviour as "harassing and intimidating" and offers an opinion on the ultimate

issue before the Court. The reality is that a description of behaviour as "harassing and intimidating" is just another way of Ms. Amey saying that she feels harassed and intimidated. Further, there is nothing in the paragraph that constitutes an opinion on the ultimate issue. Paragraph 14 is not struck.

[39] Paragraph 12 of Ms. Jepps' affidavit expresses a belief that Ms. Lupuliak's activity is an unreasonable interference with the privacy rights of the other residents of the condominium complex. Paragraph 14 asserts that Ms. Lupuliak did not have the written consent of the Condominium Board as required, to install the doorbell. Paragraph 20 expresses the view that an email attached to Ms. Lupuliak's affidavit was falsified and this view is supported by attaching, as an exhibit, the version of the email that Ms. Jepps received. Paragraphs 24 and 25 express Ms. Jepps' concern that Ms. Lupuliak will continue to use the doorbell in a way that is injurious to the residents of the condominium complex. All of this evidence falls within the permissible scope of things that may be said by a witness; none of the above paragraphs will be struck from the record. To the extent that this evidence expresses opinions, I give the opinions no weight.

[40] Ms. Lupuliak further submits that paragraphs 16 and 21 as well as Exhibit J of Ms. Jepps' affidavit contain irrelevant evidence and should be struck. Both paragraph 16 and 21 address the ongoing back and forth between the parties on the issue of the doorbell. The evidence is relevant. I also note that Exhibit J, referred to in paragraph 21, is part of Ms. Lupuliak's allegations of improper conduct. Ms. Lupuliak cannot ask for Exhibit J to be struck and seek to rely upon it at the same time.

[41] Ms. Lupuliak also objects to paragraph 19 of Ms. Jepps' affidavit. Paragraph 19 discusses an email sent by Ms. Lupuliak to Steve Gagnon. The email reads as follows:

> Subject: Asshole
>
> You will pay dearly you SOB
>
> I promise on my Father's grave.
>
> Lillian

[42] Ms. Jepps, in paragraph 19 of her affidavit, characterizes the content of the email as "abusive, improper, and threatening." Counsel for the Respondents submits that Ms. Jepps' characterization of the email is merely descriptive and that witnesses should be able to describe their perception of things, within reason. Counsel for Ms. Lupuliak contends that Ms. Jepps is offering an impermissible opinion about the content of the email. Witnesses should be granted some leeway in their description of evidence, but counsel who are often the drafters of affidavits, should be mindful to avoid advocacy. While the characterization of the email by Ms. Jepps alone would not result in the striking of the evidence, the email also raises the question of hearsay. The email is attached to, and described in, Ms. Jepps' affidavit, but the email was sent by Ms. Lupuliak to Steve Gagnon. Ms. Jepps is not an appropriate person to authenticate or speak to the email because she is neither the sender nor the recipient of the email and her evidence was sworn in her personal capacity and not as a representative of the Corporation. Accordingly, paragraph 19 of Ms. Jepps' affidavit is struck; the email shall remain in evidence, however, as it was subsequently authenticated by Ms. Lupuliak during her questioning and marked as an exhibit without any objection from her counsel.

[43] Paragraph 22 of Ms. Jepps' affidavit relays a story about how Ms. Lupuliak's cat escaped from her condominium unit and was retrieved by Yves Gagnon from another condominium unit

without the resident's permission. Paragraph 22 refers to Exhibit K which is an email from another resident of the condominium complex, relaying a more detailed version of the incident. The anecdote is irrelevant to the matters before me and was clearly intended to show Ms. Lupuliak in a bad light. The evidence is hearsay, unnecessary, and prejudicial. Accordingly, paragraph 22 and Exhibit K are struck.

[44] The Respondents' written submissions contain three documents relevant to this proceeding that were not adduced as evidence in any of the affidavits nor in any of the questionings conducted in this proceeding. Counsel for Ms. Lupuliak, in oral argument, withdrew his objection to the use of one of the documents, the Condominium Plan, which had been obtained from the Registrar at the Land Titles Office.

[45] The two remaining documents are not properly adduced as evidence and cannot be considered by the Court. Our Court of Appeal has observed that "[i]t is trite law that the submissions of counsel are not evidence": ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2021 ABCA 16, leave to appeal dismissed 2021 SCCA No 79, at para 196.

[46] The three documents were undoubtedly presented as appendices to counsel's written submissions because the Consent Order granted by Justice S.L. Kachur on September 29, 2021, provided, among other things, that "no further evidence shall be filed in this Action ... without leave of this Honourable Court."

[47] If the Respondents wished to refer to the new documents appended to their written brief, they should have been presented by way of an affidavit and leave to file the affidavit should have been sought from the Court. Leave was not sought; the two documents appended to the Respondents' written brief to which the objection is maintained are struck as are the portions of the written brief referring to those documents.

Adverse Inference

[48] Ms. Lupuliak submits that an adverse inference should be drawn against the Respondents because Steve Gagnon failed to give evidence. Steve Gagnon is the President of the Corporation and an author of some of the important documents in this case. Ms. Lupuliak contends that she was unfairly denied an opportunity to cross-examine him. She submits that the failure of Steve Gagnon to give evidence naturally gives rise to an inference that his evidence would have contradicted that of the other witnesses for the Respondents and supported the view that the Corporation acted oppressively toward her.

[49] The factors to be considered when deciding whether to draw an adverse inference were discussed in ***Stikeman Elliott LLP v 2083878 Alberta Ltd,*** 2019 ABCA 274 at para 87 and are as follows:

(a) whether there is a legitimate explanation for the failure to call the witness;

(b) whether the witness has material evidence to provide;

(c) whether the witness is the only person or the best person who can provide the evidence; and

(d) whether the witness is within the "exclusive control" of the party, and is not "equally available to both parties".

[50] Steve Gagnon undoubtedly would have had material evidence to provide, would have been the best person to provide that evidence, and no explanation was provided by the Respondents for their failure to call him as a witness. Steve Gagnon, being an adverse party, was not equally available to both parties. Despite this, it is not correct to say that Ms. Lupuliak was denied the opportunity to obtain Steve Gagnon's evidence. Rule 3.13(2) of the *Rules* permits a party to a proceeding commenced by Originating Application, to obtain evidence, in the form of questioning, from a person who has not sworn an affidavit in the proceeding. Rule 3.13(4) provides that Rule 6.20, among others, applies to questioning under Rule 3.13. Rule 6.20(2) permits such questioning to be in the form of cross-examination, when the person being examined is adverse in interest. Accordingly, had Ms. Lupuliak wished, she could have cross-examined Steve Gagnon.

[51] An adverse inference must be reasonable; it is not a licence to write fiction. An adverse inference should only be drawn when it is a reasonable inference to draw in light of the totality of the evidence before the Court. All of the evidence in this case suggests that Steve Gagnon's evidence would be consistent with the evidence of Ms. Jepps and Ms. Amey. Ms. Lupuliak has not pointed to any gap in the evidentiary record that could plausibly be filled by an adverse inference drawn from Steve Gagnon's failure to testify. Instead, she seeks to have the Respondents' failure to adduce Steve Gagnon's evidence give rise to an inference that they "acted improperly towards Ms. Lupuliak" which, in effect, would decide the whole case. That is not a reasonable inference to draw in light of the facts as a whole. Accordingly, I exercise my discretion to decline to draw the requested adverse inference.

[52] Counsel are inevitably tasked with deciding how to run their case efficiently. For whatever reason, counsel for the Respondents chose to put in evidence about the Condominium Board's actions only through Ms. Jepps and did not offer evidence from Steve Gagnon. Counsel for Ms. Lupuliak made a similar choice in not adducing evidence from Yves Gagnon who was very much involved in the relevant events and communications. Counsel should be commended for making decisions necessary to present their case most efficiently, as that is in the financial interests of their clients and it saves valuable Court time. The decision to present a case efficiently to the Court should not be penalized through the device of an adverse inference where the safety valve represented by Rule 6.20 is available to permit the evidence of a witness adverse in interest to be obtained.

Alleged Improper Conduct by the Condominium Board

[53] Ms. Lupuliak asserts that the Respondents engaged in "improper conduct" as defined in the *Condominium Property Act*. Specifically, Ms. Lupuliak cites s. 67(1) which provides, in part, that improper conduct means:

> (iii) the exercise of the powers of the board in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interest of an interested party,
>
> (iii.1) the conduct of an owner that is oppressive or unfairly prejudicial to the corporation, a member of the board or another owner.

[54] Ms. Lupuliak makes two distinct allegations of improper conduct by the Respondents. Specifically, that they:

> (a) disregarded Ms. Lupuliak's objectively reasonable expectations in respect of the Door; and

(b) disclosed personal information collected by the Corporation about Ms. Lupuliak without her consent.

Reasonable Expectations

[55] A purpose of the oppression remedy, in the corporate context, is to protect objectively assessed reasonable expectations of corporate stakeholders: ***BCE Inc v 1976 Debentureholders***, 2008 SCC 69 at para 61. Similarly, a purpose of s. 67 of the *Condominium Property Act*, is to protect objectively assessed reasonable expectations of stakeholders in a condominium corporation: ***Leeson v Condominium Plan No 9925923,*** 2014 ABQB 20 at para 16.

[56] Ms. Lupuliak contends that a condominium board cannot change a policy to retroactively prohibit actions by an owner, where that owner has relied on reasonable expectations created by the prior conduct of the condominium board. Ms. Lupuliak asserts that the principle against retroactivity is a general principle derived from the rule of law and operates in these circumstances akin to estoppel. In the alternative, Ms. Lupuliak argues that the Condominium Board effectively granted a waiver and is no longer entitled to insist on strict compliance with the By-Laws.

[57] Ms. Lupuliak submits that her circumstances are similar to the facts in ***Condominium Plan No 762 1302 v Stebbing,*** 2015 ABQB 219 **("*Stebbing*").** In that case, it was held that the failure of a condominium board to enforce a no pets by-law for two years in respect of a resident with a cat in her condominium unit, gave rise to an objectively reasonable expectation that the by-law would not be enforced. Accordingly, the condominium board's later order to remove the cat was found to constitute improper conduct.

[58] Despite its superficial resemblance, ***Stebbing*** is distinguishable from the present case. The condominium unit owner in ***Stebbing*** purchased her unit in reliance on an objectively reasonable belief that her cat was permitted by the condominium board to reside in her unit. The Court allowed the condominium board to enforce its no pets policy subject to Ms. Stebbing being permitted to live with her cat for the remainder of its life. Ms. Lupuliak, in contrast, did not rely on non-enforcement of By-Laws when acquiring her unit, nor is the removal of a doorbell with video capability analogous to a requirement for someone to do away with a companion animal.

[59] The parties agree on the key evidence in this matter. The Condominium Board never enforced its By-Law preventing modifications to the exterior of condominium units. In particular, it allowed decorations on doors and allowed for physical modifications to doors such as the drilling of holes to install peepholes. The relevant question in the present case is: based on the evidence before me, what was Ms. Lupuliak's objectively reasonable expectation?

[60] Ms. Lupuliak submits that she had an objectively reasonable expectation that she could attach the doorbell to the door of her unit that faced the common interior hallway. She points to the fact that various security modifications – the installation of peepholes and keypads for keyless entry – have implicitly been permitted by the Condominium Board's non-enforcement of the By-Laws. She further asserts that a former President of the Condominium Board told her that no approval was required for the installation of security devices.

[61] The fact that the Condominium Board has exercised its discretion not to enforce its By-Laws in respect of some modifications to the exteriors of condominium units, does not mean that all such modifications are permitted and protected by the concept of reasonable expectations. For example, it would be absurd to suggest that non-enforcement of the By-Law in respect of

small decorations would give rise to a reasonable expectation that a large and obtrusive decoration could be installed. Similarly, it is absurd to suggest that non-enforcement of the By-Laws in respect of peepholes implies permission for all manner of security devices to be installed.

[62] I find that Ms. Lupuliak had an objectively reasonable expectation that she could decorate her door – with a wreath, for example – or that she could install a security device in the nature of a peephole or key pad entry without the permission of the Condominium Board. The installation of a doorbell with video recording capability is different. No one at Riverhill Gardens had previously installed a video device capable of recording activity in a common hallway of the condominium building. Ms. Lupuliak had no objectively reasonable expectation that she could install a doorbell with video recording capability without permission of the Condominium Board, in accordance with the By-Laws.

[63] Ms. Lupuliak's submission that the Condominium Board is estopped from enforcing its By-Laws or has waived strict compliance with the By-Laws is without merit. The essence of the doctrines of both estoppel and waiver is that "a party should not be allowed to go back on a choice when it would be unfair to the other party to do so": ***Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co***, [1994] 2 SCR 490 at para 18. As the foregoing discussion of reasonable expectations demonstrates, there was nothing unfair about the Condominium Board enforcing its By-Laws in respect of the doorbell.

[64] Ms. Lupuliak also complains that the Condominium Board's process for deciding that her doorbell had to be removed was biased and unfair. Specifically, the Condominium Board's process in June of 2020 requring applications for existing door modifications is submitted to be unfair because it was expressly stated that applications for "recording devices that intrude on the privacy of residents such as spy cameras or security cameras will not be approved." Regardless of the process undertaken by the Condominium Board in June of 2020, it is clear that the decision to enforce the By-Laws to require removal of Ms. Lupuliak's doorbell was made months earlier at the AGM.

Personal Information

[65] Ms. Lupuliak's allegation that the Corporation disclosed personal information without her consent is rooted in the *Personal Information Protection Act*, SA 2003, c P-6.5 ("*PIPA*"). *PIPA* ss. 1(1)(i) and 4 provide that the legislation applies to corporations.

[66] Ms. Lupuliak alleges three separate instances of disclosure of her personal information by the Corporation that breached *PIPA*:

(1) An email dated March 3, 2020, written by Steve Gagnon, but sent out by Lenyx Corp., advising of the results of the Condominium Board election at the AGM and advising condominium owners at Riverhill Gardens of the discussion that occurred at the AGM, read as follows:

> "[t]he Board has just been advised that there is an unauthorized surveillance system installed on the door of Unit #4. It has a view of the hallway and is capable of recording audio. The owners have been posting some of their recordings on the internet and sending recordings to various people by email. I am required to advise you that you will almost certainly be recorded, in video and

audio, should you pass within range of this system. If you wish to avoid being recorded, you may wish to avoid the eastern end of the first floor hallway.

...The owners of Unit #4 have been advised that this surveillance is not acceptable and possibly illegal.... I will advise once the system has been removed.";

(2) An email dated December 4, 2020, written by Steve Gagnon, but sent out by Lenyx Corp. to all Riverhill Gardens unit owners. The email provided information about these proceedings. The part of the email objected to by Ms. Lupuliak as violating *PIPA* is as follows:

"You will recall that at the last AGM, we asked Yves Gagnon, resident in Unit #4, to remove the peephole recording device that had been installed without permission, in violation of the bylaws. After several further requests by the Board, the owner of #4 refused to comply."; and

(3) A letter from Steve Gagnon attached to a letter from Lenyx Corp. dated December 18, 2020, to all Riverhill Gardens unit owners. The letter explained that the Corporation was making a cash call on the unit owners to pay for the cost of these legal proceedings. The legal proceedings were described as "a lawsuit brought against us by Lillian Lupuliak, unit #4."

[67] The Respondents submit that the first alleged breach of *PIPA* is not a breach for two reasons. First, no personal information of Ms. Lupuliak is disclosed. The email only refers to "[t]he owners of Unit #4" – no name is used. Second, the Corporation had a duty to inform unit owners of the location of the recording device and the device was affixed to the door of Unit #4.

[68] The law is clear that "[i]nformation that relates to an object or property does not become information "about" an individual, just because some individual may own or use that property": ***Leon's Furniture Ltd v Alberta (Information & Privacy Commissioner,*** 2011 ABCA 94, leave to appeal dismissed [2011] SCCA No 260, at para 48**.** Accordingly, the first alleged breach of *PIPA* is not a breach and is not improper conduct.

[69] The Respondents take the position that the second and third alleged breaches of *PIPA* are not breaches because *PIPA* s. 20(m) provides that "[a]n organization may disclose personal information about an individual without the consent of the individual but only if.... the disclosure of the information is reasonable for the purposes of an investigation or legal proceeding."

[70] Ms. Lupuliak cites a decision of the Alberta Privacy Commissioner, ***Real Estate Council of Alberta (Re)***, 2011 CanLII 96641 (AB OIPC), that considered s. 4(3)(k) of *PIPA*, not s. 20(m). Notably, s. 4(3)(k) exempts, from falling under *PIPA*, personal information in a court file whereas s. 20(m) deals with circumstances where, notwithstanding that *PIPA* applies, personal information may be disclosed without consent. The Alberta Privacy Commissioner in ***Real Estate Council of Alberta (Re)*** concluded that "in order for information to fall under section 4(3)(k), it would have to be directly taken or copied from a court file": para 15. Counsel for Ms. Lupuliak urges that s. 20(m) should be interpreted narrowly to be consistent with s. 4(3)(k).

[71] Ms. Lupuliak contends that s. 20(m) of *PIPA* should be read narrowly because the *Interpretation Act*, RSA 2000, c I-8, s 10, states that "[a]n enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best

ensures the attainment of its objects."[1] Given that *PIPA*'s object is to protect private information, it is submitted that the exception to non-disclosure, in s. 20(m), should be read as applying only to information on the court record or information obtained directly from the court record. Whatever interpretive force is exerted by the *Interpretation Act* in the present case, is balanced by the *Alberta Bill of Rights*, RSA 2000, c A-14, which requires that statutes be "construed and applied" so as not to "abridge" freedom of speech: s. 2. In the face of conflicting statutory direction on the interpretive approach to be used, I find that s. 20(m) of *PIPA* is to be given its plain and fair meaning.

[72] I reject the interpretation urged by Ms. Lupuliak because s. 20(m) is worded differently than s. 4(3)(k). Specifically, s. 20(m) contains no reference to a court file and instead refers more generally to information that is "for the purposes of ... a legal proceeding." The fair construction of s. 20(m), therefore, is that it permits the disclosure of personal information to those people who have a legitimate interest in knowing the information, for the purposes of legal proceedings. Under this interpretation, clients may provide such information to lawyers. The category of people, to whom information may properly be disclosed, must extend in the corporate context to shareholders, and in this case condominium unit owners, who may be called upon to fund a corporation's legal expenses.

[73] If my interpretation of *PIPA* s. 20(m) is incorrect, I find that by commencing legal proceedings against the Corporation, Ms. Lupuliak consented to the disclosure of her personal information relevant to the legal proceedings. *PIPA* s. 8(2) provides that "an individual is deemed to consent to the ... disclosure of personal information about the individual ... for a particular purpose if (a) the individual ... voluntarily provides the information to the organization for that purpose....". In the present case, Ms. Lupuliak commenced legal proceedings against the Corporation and delivered to it the pleadings and evidence. This was a voluntary act and the personal information in the pleadings and evidence was provided to the Corporation for the purpose of the legal proceedings. In accordance with s. 8(2) of *PIPA*, the Corporation's second and third impugned communications with the condominium unit owners was for the express purpose of the legal proceedings.

[74] There has been no breach of *PIPA* and there has been no improper conduct in respect of the disclosure of Ms. Lupuliak's personal information.

Improper Conduct of Ms. Lupuliak

[75] Non-compliance by condominium owners with the By-Laws of a condominium corporation is improper conduct according to *Condominium Property Act* s. 67(1)(a)(i). The relevant question in the present case is whether Ms. Lupuliak contravened any of the By-Laws by installing the doorbell.

[76] During oral argument, significant time was devoted to whether the exterior of the door, to which the doorbell was attached, is part of Ms. Lupuliak's condominium unit or part of the building's common property. *Condominium Property Act* s. 9(2)(b) provides that all doors "located on exterior walls of the unit are part of the common property unless otherwise stipulated in the condominium plan." The legislation uses the words "exterior walls of the unit" not

[1] This interpretive approach was adopted by the Alberta Privacy Commissioner in *Alberta Teachers' Association (Re)*, 2008 CanLII 88803 (AB OIPC) at para 20.

"exterior of the building"; Ms. Lupuliak's door to the common interior hallway is common property.

[77] By-Law article 3(g) provides that "[an owner shall] not make any repairs, additions or alterations to the exterior of his unit or the building ... without first obtaining the written consent of the Corporation." [emphasis added]. Article 3(g) applies to both the unit and the building, so whether the door is part of the unit or the building, the By-Law applies to modifications to the door.

[78] By-law article 3(h) states that "[an owner shall] use and enjoy the common property in accordance with these by-laws and all rules and regulations prescribed by the Corporation and in such a manner as to not unreasonably interfere with the use and enjoyment thereof by other owners, their families or visitors." Article 3(h) directly applies, as the doorbell affects the use and enjoyment of the common property.

[79] By-law article 3(i) provides that "[an owner shall] not use his unit ... for any purpose which may be illegal, injurious or that will cause a nuisance or a hazard to any occupant of another unit (whether an owner or not) or the family of such an occupant." Article 3(i) applies because despite being affixed to the exterior of the door, the doorbell is controlled from inside Ms. Lupuliak's condominium unit and, as such, constitutes a use of her unit.

[80] Ms. Lupuliak disputes that By-Law article 3(h) has been contravened because, in her view, the doorbell does not affect the use and enjoyment of the common property. Similarly, she disputes that article 3(i) has been breached because, in her estimation, the doorbell does not constitute a nuisance. Ms. Lupuliak's positions on articles 3(h) and (i) will be discussed together as the concept of use and enjoyment is connected to the tort of private nuisance.

[81] Ms. Lupuliak submits that "use and enjoyment" are terms of legal art. She argues that together they refer to the ability of residents of Riverhill Gardens to use the common property for its intended use. She further takes the position that the doorbell does not affect the use of the common hallway for its intended use – ingress and egress from the condominium units adjoining the common hallway. Ms. Lupuliak rejects the idea that "enjoyment" refers to the subjective experience of those using the common hallway in the presence of the doorbell knowing that they are being recorded.

[82] The tort of nuisance is defined as "a substantial and unreasonable interference with the use and enjoyment of land": A Linden, *Canadian Tort Law*, 11th ed (Toronto: LexisNexis, 2018) at 528. This Court, in ***Telus Communications Inc v TWU,*** 2005 ABQB 719, affirmed 2006 ABCA 397, at para 43**,** citing A Linden, *Canadian Tort Law*, 7th ed, (Markham: Butterworths, 2001) at 525, explained that the tort of private nuisance "can involve material injury to property or be less tangible and result in discomfort or inconvenience." Accordingly, it is clear that the term "use and enjoyment" refers to both the use of property and the experience of using the property.

[83] What constitutes an "unreasonable" interference with the use and enjoyment of property was considered in ***Friedel v Vavrek***, 2012 ABQB 703 at para 17 ("***Friedel***"), citing A Linden and B Feldthusen, *Canadian Tort Law*, 9th ed (Lexis Nexis 2011) at 578. Specifically, an unreasonable interference is one that "would not be tolerated by the ordinary occupier": ***Friedel*** at para 17.

[84] Ms. Amey's discomfort using the common hallway knowing that she and her guests will be captured on video entering and leaving her condominium unit is a normal feeling that a reasonable person would have in the same circumstances. In short, the surveillance would not be tolerated by the ordinary occupier. This is consistent with findings in other cases that security cameras that capture activity on another person's property may constitute a tortious nuisance: see, for example, ***Suzuki v. Munroe***, 2009 BCSC 1403 at para 118; ***Wasserman v Hall***, 2009 BCSC 1318 at para 85; ***Saelman v Hill***, [2004] OJ No 2122 at para 41; ***Lipiec v Borsa***, [1996] OJ No 3819 at paras 16-18. Regardless of whether the tort of nuisance is made out on the present facts, Ms. Lupuliak's actions impaired the use and enjoyment of common property by residents of Riverhill Gardens and contravened the By-Laws.

[85] Ms. Lupuliak's conduct in using the video footage captured by the doorbell to bolster her complaints about the Respondents to the Calgary Police Service, Alberta Health Services, and the Alberta Privacy Commissioner, along with her posting video footage from the doorbell on social media, was improper. The weaponizing of the doorbell in this fashion validates all of the concerns expressed by the Respondents and is not conducive to peaceful co-existence in the context of a condominium complex such as Riverhill Gardens.

Remedy

[86] Section 67(2) of the *Condominium Property Act* provides various remedies for improper conduct. Subsequent to such a finding, the Court may do one or more of the following:

> (a) direct that an investigator be appointed to review the improper conduct and report to the Court;
>
> (b) direct that the person carrying on the improper conduct cease carrying on the improper conduct;
>
> (c) give directions as to how matters are to be carried out so that the improper conduct will not reoccur or continue;
>
> (d) if the applicant suffered loss due to the improper conduct, award compensation to the applicant in respect of that loss;
>
> (e) award costs;
>
> (f) give any other directions or make any other order that the Court considers appropriate in the circumstances.

[87] The parties both sought, amongst other relief, mandatory orders. There is agreement that a remedy in the nature of an injunction is appropriate where there is a finding of improper conduct under the *Condominium Property Act*.

[88] The interlocutory injunction of Justice A.D. Macleod is set aside. The Court hereby directs Ms. Lupuliak to remove the doorbell forthwith and prohibits her from operating any surveillance device that captures video or audio of the common areas of Riverhill Gardens. This direction does not apply to the external camera that captures video of Ms. Lupuliak's patio. The Court further orders that Ms. Lupuliak is restrained from sending threatening communications or engaging in abusive conduct towards the Condominium Board and its members.

Costs

[89] Our Court of Appeal in ***Maverick Equities Inc v Condominium Plan No 942 2336,*** 2008 ABCA 221 at para 15, awarded solicitor and client costs on the basis that it was provided for in the applicable by-laws. Article 43 of the By-Laws provides that the Corporation shall recover its costs on a solicitor and his own client basis. Accordingly, the Corporation is awarded its costs on a solicitor and his own client basis.

Conclusion

[90] Living in a multi-unit condominium complex requires tolerance and sometimes the compromise of deeply-held views and principles. As Bruce Ziff has explained, "[p]articipation in condominium projects necessarily involves a surrender of some degree of proprietary independence. An owner is at the mercy of the rules enacted through the internal decision-making process": Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Carswell, 2010) at 366. At the same time, however, it is important that condominium governance be responsive to legitimate concerns of individual unit owners. In the present case, the better course for Ms. Lupuliak after the attempted break-in at her unit would have been to petition the Condominium Board for increased security measures for the building, including in its common areas. Had she raised this concern, the Condominium Board should have taken her suggestion seriously. For instance, a security system with video, operated by the property manager and paid for by the Corporation, would not have raised the same privacy concerns and would have cost much less for everyone involved, both emotionally and monetarily, than this litigation.

Heard on the 18th day of January, 2022.
Dated at the City of Calgary, Alberta this 21st day of January, 2022.

Colin C.J. Feasby
J.C.Q.B.A.

Appearances:

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