CITATION: Metropolitan Toronto Condominium Corporation No. 933 v. Lyn
2020 ONSC 3853
COURT FILE NO.: CV-19-614659
DATE: 20200622

SUPERIOR COURT OF JUSTICE – ONTARIO

APPLICATION UNDER sections 119(3), and 134(1) of the *Condominium Act, 1998*

RE: METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 933, Applicant

AND: LILLIAN DOREEN LYN and SASKIA ANYARA KALICHARAN, Respondent

BEFORE: Stinson J.

COUNSEL: *John De Vellis* and *Luis A. Hernandez,* for the Applicant

Marshall Reinhart, for the Respondent Lillian Doreen Lyn

Saskia Anyara Kalicharan, Respondent, in person

HEARD: by written submissions

REASONS FOR DECISION ON COSTS

[1] In my Reasons for Decision released on January 13, 2020 (2020 ONSC 196), I found as a fact that the respondent Saskia Kalicharan (the "Tenant") had repeatedly violated the Noise Bylaw of MTCC 933 ("933"). I therefore made a declaration that, by creating excessive noise, the Tenant breached 933's Rule 1(d). I also made an order requiring the Tenant to comply with the *Condominium Act, 1998*, S.O. 1998, c. 19 (the *"Act")* and the Rules of 933.

[2] In relation to the costs of the proceedings in the Superior Court of Justice, at the time of the hearing the parties agreed that submissions on this topic should await my decision on the main points of the application, and could be made in writing, if required. In my decision released on January 13, 2020, I encouraged the parties to agree on the issue of costs, but they were unable to do so. They have now filed written submissions, leading to these Reasons.

The authority of the court to order a litigant to pay costs

[3] The *Courts of Justice Act*, R.S.O. 1990, c. C.43, s.131(1) states as follows:

> Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of

> the court, and the court may determine by whom and to what extent the costs shall be paid.

[4] This provision gives the judge who decides a case the power to order one litigant in a court proceeding to pay legal costs to another litigant in the proceeding. Ordinarily, a successful litigant seeks and is granted an order for costs against an unsuccessful litigant, unless there is good reason to depart from that principle. Thus in the present case, as the applicant who succeeded in obtaining the compliance order that it sought, 933 has asked for an award of costs against the two responding parties, Lillian Lyn – the Owner of the unit – and the Tenant.

[5] In an ordinary (non-*Condominium Act*) case, an award of costs is made on so-called "partial indemnity" basis, that is, the successful litigant is awarded an amount that serves to indemnify them partially for their own legal bill from their lawyer. In rare and exceptional cases where an unsuccessful litigant has been guilty of egregious behaviour such as fraud, a costs award may be made on a "substantial indemnity" or even a "full indemnity" basis, so that the winning litigant is awarded substantially all of their own lawyer's legal bill or even their full legal bill.

[6] However, in a compliance proceeding commenced under s.134 of the *Condominium Act* such as this one, there is an additional power given to the court in relation to legal costs incurred by a condominium corporation. That power is found in s.134(3) and (5) of the *Act,* which state as follows:

> (3) On an application, the court may ...
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> (a) grant the order applied for;
>
> (b) require the persons named in the order to pay,
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> (i) the damages incurred by the applicant as a result of the acts of non-compliance, and
>
> (ii) the costs incurred by the applicant in obtaining the order; or
>
> (c) grant such other relief as is fair and equitable in the circumstances.
>
> …
>
> (5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

[7] The court's authority to order costs to be paid by unsuccessful parties in condominium compliance proceedings has been considered in numerous decided cases. A leading decision is *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.,* [2005] O.J. No. 1604 (C.A.) *("Skyline*"). In that case, the Court of Appeal stated as follows:

> … s. 134(5) speaks separately to "an award of costs" on the one hand, and "additional actual costs" on the other hand. "An award of costs" refers to the costs that the court orders one litigant to pay to another litigant. "Additional actual costs" can encompass those legal costs owing as between the client and its own lawyer beyond the costs that the court had ordered paid by an opposing party. To the extent that the legal bills owed by [the condominium corporation] to its own lawyers exceeded the costs awarded against [the unit owner], [the condominium corporation] could properly add those amounts to the common expenses of the [the unit owner's] units as long as [the condominium corporation] could demonstrate that those additional legal costs were incurred in obtaining the compliance order.

[8] In effect, in condominium compliance cases such as the present one, through the application of s.134(5), the courts have awarded the equivalent of full indemnity costs to a successful condominium corporation.

[9] For example, in *Chan v. TSCC No. 1834,* [2011] O.J. No. 90 (Ont. S.C.J.) ("*Chan")* the court found that the unit owner had breached the condominium declaration provisions limiting the use of the units to "single family" occupancy by allowing unrelated tenants to live in one unit, similar in nature to a rooming or boarding house. The court referred with approval to past cases that found that it would not be "fair or equitable for other unit owners to subsidize the costs of such unwarranted conduct making an award of solicitor/client [now substantial/full indemnity] costs appropriate." The condominium corporation had given repeated warnings of the cost consequences of enforcement and those warnings were ignored, leading the court to conclude that "the costs are the consequence of the unit owner's own actions. In these circumstances, the other blameless unit owners should not be made to bear any part of those costs and it is therefore appropriate that the non-compliant unit owner pay the costs on a full recovery basis."

Positions of the parties

933

[10] As provided in s. 134(5) and consistent with the above decisions, 933 seeks an award of the costs of the proceeding as well as its additional actual costs of obtaining the compliance order. It seeks those costs as against both the Owner as well as the Tenant. It asks for an award in the total sum of $33,469.73.

[11] 933 submits that it was entirely successful in the application, in that the court found that it was entitled to the declaration and mandatory order that it sought requiring the Tenant to comply with the *Act* and 933's Rules. It submits that the litigation was unnecessary: the noise complaints commenced in June 2017 and the notice of application was not issued until February 2019, 19 months later. In the interim, both the Tenant and the Owner were warned numerous times about the noise. 933 says it acted reasonably and prior to the first court appearance attempted to have both the Owner and the Tenant consent to the compliance order. The Owner was prepared to, but the Tenant was not. After the first court appearance, 933 contacted the Tenant to attempt to reach a resolution and offered to resolve the matter by way of a consent order without costs. The Tenant still refused to consent and as a result, the matter came back on for hearing on December 3, 2019, ultimately resulting in my decision dated January 13, 2020.

The Owner

[12] The Owner submits that no order as to costs should be made against her. She submits that she acted reasonably in trying to address the noise complaints. She points out that she consented to the order sought as soon as reasonably possible. She further submits that the costs incurred were not a consequence of the Owner's own actions or omissions. In the alternative, the Owner submits that the amount claimed is excessive.

The Tenant

[13] The Tenant opposes any costs order against her, arguing that it would be fair and equitable to order no costs. She submits that she tried to address the concerns of the noise complaints reasonably. She denies that she refused to consent to an order. She points out that she was not made aware of the identity of the complaining neighbour (the "Neighbour") so any efforts made by her to accommodate the problems were futile.

[14] The Tenant further submits that the situation was mismanaged by 933, because no attempt was made to resolve the noise problem by way of a meeting among the parties involved. Because 933 withheld pertinent information and did not inform her who was complaining or explain the nature of the layout of the Neighbour's apartment, the problem turned into a legal situation, when that outcome could have been avoided. On several occasions, management of 933 refused to discuss the situation directly with her, rather than providing information that might have resolved the problem in a straightforward fashion.

[15] In addition, the Tenant seeks an award of costs in her favour for disbursements totaling $1,421.52. This includes a so-called "condo charge" of $1,034.52, which I assume is the amount of costs paid by her at the time the initial noise complaint was addressed.

Analysis

<u>Liability for costs</u>

[16] As I have outlined above, under the *Courts of Justice Act, a* successful litigant ordinarily is granted an order for costs against an unsuccessful litigant unless there is a good reason to depart from that principle. As well, under the *Condominium Act*, a condominium corporation that succeeds in obtaining a compliance order is ordinarily entitled to recover its actual legal costs from the unit owner, over and above the costs it might be awarded under the *Courts of Justice Act*. The question to address, therefore, is whether there are any extenuating circumstances that should relieve either of the respondents from their usual liabilities.

[17] In view of the opposing positions described above, it is worthwhile reviewing the history of the actions taken by the parties. The following is a brief summary:

July 31, 2017 – first record of a complaint from Neighbour.

August 31, 2017 – letter from 933 to Owner advising about Tenant listening to very loud music after 11:00 PM on a regular basis. Despite 933's knowledge of Owner's address for service, this not sent to Owner but instead to the unit's address, where it came to the attention of Tenant. Owner unaware of complaint.

September, October and November 2017 – further complaints from Neighbour to 933 about noise from Tenant's unit.

November 9, 2017 – letter from 933 about noise from Tenant's unit. Received by Tenant but not by Owner.

November 17, 2017 – registered letter from 933's counsel sent to Owner at her proper address and copied to Tenant. This is first notice to Owner about any noise complaints. It lists 8 occasions on which excessive noise was caused by Tenant and recites that "[t]his is your final warning." It demands payment of 933's legal costs, which are paid by Owner and Tenant.

November 2017 – following receipt of November 17, 2017 letter, Owner's representative speaks to Manager of 933 and to Tenant to learn about and address noise issues and their amelioration. Owner hears nothing further from 933 for over 7 months.

June 27, 2018 – Neighbour again complains in writing to 933 about noise from Tenant's unit.

June 28, 2018 – letter from 933 to Owner reporting additional noise complaints and advising that Owner terminate Tenant's lease.

June/July 2018 – Owner's representative contacts Tenant to discuss latest letter from 933 and to suggest Tenant move out since they didn't know who was making the complaints but they appeared to be continuing. Tenant responds that she is looking to buy a residence and will move out then and, in the meantime, will be diligent in keeping the noise down. Nothing further heard from 933 until November 28, 2018.

July 6, 2018 – Tenant writes to management of 933 to express her view that the complaining Neighbour (who has not been identified to her) was being unreasonable and that 933 was not conducting a fair investigation or taking steps to intervene to resolve the situation. When no response is received, Tenant speaks to management of 933, but the discussion is unproductive.

October and November 2018 – Neighbour again complains to 933 about noise from Tenant's unit.

November 28, 2018 – letter from 933 to Owner regarding additional noise complaints, requesting that Owner terminate lease and have Tenant move out within 30 days. Also requests Owner to inform Tenant not to communicate with management of 933.

Late November/early December 2018 – Owner's representative contacts Tenant to discuss further noise complaints and to request her to move within 30 days. Tenant responds she cannot meet that timeline over the Christmas holidays. Owner's representative also seeks legal advice regarding possible proceedings before the Landlord and Tenant Board to terminate tenancy but is advised that application will likely not succeed.

December 2, 2018 – Tenant writes to management of 933 to address latest noise complaint, explaining her position, expressing the view that the complaints are unwarranted and asking "to be heard on this matter." Instead of responding to Tenant, 933 requests Owner to instruct Tenant not to communicate with it, on the basis that all communications should be through Owner, except in emergencies.

December 27, 2018 – 933 informs Owner that Neighbour has moved from unit. Owner's representative forwards letter to her legal counsel.

January 8, 2019 - Owner's legal counsel writes to 933 advising that no steps will be taken to terminate the Tenant's tenancy because the complaining Neighbour has moved out and without her evidence such an application would fail.

January 9, 2019 – 933 writes back explaining that the Neighbour had only moved out temporarily and reminding counsel that January 12, 2019 (three days later) is the date 933 has requested the tenancy be terminated.

January 9, 2019 to March 18, 2019 - No further direct contact between parties.

February 19, 2019 – Notice of Application is issued, returnable April 12, 2019. It is not served until affidavits are sworn. In due course, it is supported by affidavits sworn by Neighbour (sworn March 18, 2019) and a representative of 933 (sworn March 19, 2019).

March 18, 2019 – 933 notifies Owner of further noise complaints from Neighbour.

March 25, 2019 - counsel for 933 asks counsel for Owner if he will accept service of the application materials. Upon receipt of materials, Owner and her counsel (and Tenant) learn for the first time the identity and unit number of the complaining Neighbour.

April 1, 2019 - Owner consents to a partial order only. Her counsel advises she will not consent to a declaration that the Owner breached the *Act* or the Governing Documents as she denies that she has breached any of these and is therefore not willing to consent to such a declaration.

April 12, 2019 – initial hearing before Stinson J. Matter is not concluded and is therefore adjourned to a new date. Parties are encouraged to seek a resolution, failing which a new date to complete argument must be scheduled and a proper Compendium of material must be filed.

April 12, 2019 to September 24, 2019 – counsel for 933 unsuccessfully attempts to secure agreement of Tenant to consent to a declaratory order that she has breached the *Act* and 933's Declaration and noise bylaw and offers to forego any claim for costs. Parties cannot agree on terms.

December 3, 2019 – further appearance in court to make final submissions.

January 13, 2020 – Stinson J. releases decision finding that Tenant has breached 933's Noise Bylaw.

Liability of the Tenant

[18] I will deal first with the question of the Tenant's liability to pay costs. As I have explained above, the court's authority to make an order for the payment of costs in a condominium compliance case is twofold. First, under the *Courts of Justice Act,* and second, under the *Condominium Act*, ss.134(3) and (5). Specifically, s.134(3)(b)(ii) of the *Condominium Act* gives the court to order responding parties to pay the costs incurred by an applicant condominium corporation in obtaining a compliance order. As well, s. 134(3)(c) empowers the court to "grant such other relief as is fair and equitable in the circumstances." In addition, s.134(5) empowers the court to direct that "any additional actual costs to the corporation in obtaining the order" be added to the common expenses for the unit. As the case law cited above indicates, these "additional actual costs" can encompass legal costs owing as between the client and its own lawyer, beyond the costs that the court has ordered paid by an opposing party.

[19] I do note that s.134(5) contemplates that these "additional actual costs" are to be added to the common expenses for the unit. In that sense, therefore, s.134(5) does not expressly address the question of the potential liability of a tenant or occupant (as opposed to an owner) being ordered to pay such costs. That said, it seems to me to be unfair and inequitable that, where a tenant is the underlying cause of the problem that gave rise to the proceeding in which the compliance order was sought, the owner alone should bear responsibility for these additional costs. I would therefore interpret the power given to the court under s.134(3)(c) to "grant such other relief as is fair and

equitable in the circumstances" to encompass the power to order a tenant or occupant to pay such “additional actual costs" where it is fair and equitable to do so.

[20] Turning to the specific facts of this case, for the reasons that follow, I conclude that it is appropriate to order the Tenant to pay costs under the *Courts of Justice Act* and as well "additional actual costs" under s.134(5) of the *Condominium Act*:

1. The Tenant was clearly an unsuccessful party in the litigation. In my decision released January 13, 2020, I found that the Tenant had breached the Noise Bylaw of 933 and I ordered her henceforth to comply with the *Condominium Act* and the Rules of 933. Thus, 933 was successful in obtaining the relief against the Tenant that it sought.

2. The basis for my finding that the Tenant was in breach of the Noise Bylaw was my finding that she created excessive noise at various times of the night when most occupants would expect to be sleeping or engaged in relatively quiet activities.

3. In my decision I found as a fact that, on repeated occasions, complaints of excessive noise from the Tenant's unit were investigated by representatives of 933 and found to be substantiated.

4. I accepted the Neighbour’s evidence that her log accurately recorded at least 25 separate noise problems between July 2017 and March 2019. This reflects the severity and seriousness of the disturbance caused by the Tenant.

5. In addition to the multiple late night attendances by the concierge at the Tenant's door to address noise complaints, on three separate occasions the Tenant received written communications from 933 providing formal notice of her non-compliance with the condominium Noise Bylaw by making excessive noise. There can be no doubt that the Tenant was aware of the problems she was creating. Although the noise issues abated from time to time following the formal notices, they resumed and continued into early 2019, shortly before the commencement of the proceedings. Indeed, subsequent to the initial hearing on April 12, 2019, additional noise issues arose in August and September 2019.

6. Additionally, subsequent to the initial hearing on April 12, 2019, the tenant was provided the option of consenting to the relief sought by 933 on the basis that it would forego any order as to costs. Despite ample opportunity to consider and accept that proposal, the Tenant refused, which resulted in the matter returning to court in December 2019 which in turn lead to my decision of January 13, 2020.

[21] I am, of course, alert to the Tenant's submissions that she tried to address the concerns of the noise complaints reasonably and that the situation was mismanaged by 933 because no attempt was made to resolve the noise problems by way of a meeting

among the parties involved. Those facts do not detract from the underlying reality that the Tenant continued to breach the Noise Bylaw and to disturb her neighbour. To the extent those facts may be a factor that I should consider in my relation to awarding costs, they relate to the issue of the amount of costs that should be awarded and not whether liability for costs should be imposed.

[22] I note that the Tenant requested a costs award in her favour. Since she was unsuccessful in the proceedings, I see no basis to grant that relief.

Liability of the Owner

[23] I turn next to the liability of the Owner for costs. The same legal framework applies here. The factual circumstances involving the Owner, however, are significantly different than those involving the Tenant. In essence, the Owner argues that she is not at fault, because she acted reasonably in trying to address the noise complaints and she consented to the order sought as soon as reasonably possible.

[24] The Owner correctly points out that she was unaware of complaints of noise at the unit – first reported to 933 in July 2017 – until November 17, 2017. Management of 933 never informed the Owner about the issue on an ongoing basis and failed to provide any notice of the earlier noise complaints to the Owner, despite having her address for service. When she received the written complaint in November 2017, the Owner promptly contacted the Tenant to discuss the matter and make suggestions to reduce the noise.

[25] The Owner next heard from 933 about noise issues in late June 2018, over seven months later. She had no knowledge of any ongoing problems, despite the fact that the Neighbour continued to experience them in December 2017 and in February, May and June 2018. When the Owner heard from 933 in June 2018, she again contacted the Tenant and urged her to move out. In response, the Tenant advised that she was looking to buy a residence in the near future and would move then. In the meantime, the Tenant assured the Owner that she would be diligent in keeping the noise down.

[26] Despite ongoing complaints from the Neighbour in October and November 2018, 933 next advised the Owner regarding a further noise complaint in November 2018. On this occasion, acting with the benefit of legal advice, the Owner requested the Tenant to move out, and sought information from 933 to assess whether there was evidence to support an application to terminate the tenancy. 933 did not supply the Owner with recordings and did not even identify the complaining neighbour so there was no witness for purposes of a Landlord and Tenant Board application to terminate the tenancy. 933 also erroneously informed the Owner that the Neighbour was moving out of her unit and then renewed its demand that the Owner evict the Tenant.

[27] Ultimately, when this application was commenced, the Owner did not oppose the relief sought as regards the Tenant and merely took the position that no relief or costs should be awarded as against her.

[28] This is a case quite unlike *Chan* or *Skyline*, in which the unit owners flagrantly breached the condominium corporations' rules. In this case, 933 did not properly communicate to the Owner regarding the complaints of the Neighbour. On two occasions, it failed to send her any notice at all, despite being aware of her address for service. When 933 demanded the Owner take steps to evict the Tenant, it imposed arbitrary and unreasonable deadlines and failed to provide information that would have facilitated the Owner taking steps to end the tenancy if appropriate.

[29] 933 allows unit owners to lease their units – indeed the units occupied by both the Tenant and the Neighbour are owned by individuals who have chosen to do so. It is understandable that 933 (and all condominium corporations) should be able to look to the unit owners for ultimate compliance with the corporation's Rules and Declaration, whether the breach is by a unit owner or a tenant. This principle is codified in s.119(2) of the *Condominium Act.* That said, where (as here) a compliance order is sought and the corporation seeks complete indemnity for its costs, it would be neither fair nor equitable to overlook the circumstances that lead to the proceeding when deciding the question of costs.

[30] Diamond J. considered this issue in *Toronto Standard Condominium Corporation No. 2032 v. Boudair,* et al., 2016 ONSC 509 where he wrote (at para. 23) as follows:

> Pursuant to section 119(2) of the *Act*, every owner must take "all reasonable steps" to ensure that an occupier of that owner's unit comply with the Act and the applicant's declarations, by-laws or rules. The term "reasonable steps" is not defined. In *Carleton Condominium Corporation No. 555 v. Legace* 2004 CanLII 26137 (S.C.J.), Justice Aitken observed [at para.20] as follows:
>
> > The *Condominium Act, 1998* does not establish the strict liability of unit owners for all infractions of tenants, even if they have had no notice of the infractions. The wording of s. 119(2) to the effect that an owner shall take "all reasonable steps" to ensure that an occupier of the owner's unit complies with the Act, the declaration, the by-laws and the rules, implies that the owner has to know what is going on at the unit so that he or she can take whatever steps would be reasonable to deal with any problems. Put another way, it only stands to reason that the owner has to be notified of any unacceptable conduct on the part of the tenant if it is the owner's responsibility to vouch for that conduct and to take reasonable steps to correct problems. In many, if not most, situations, the unit owner who is renting to a tenant does not live at the condominium complex. If the property manager of the complex does not inform the owner of tenant infractions, how can the owner live up to his or her responsibility to ensure that the tenant abides by condominium rules? It would be contrary to public policy to expect unit owners to

> become private investigators checking up on their tenants to see if they are breaching any rules. It makes much more sense for the condominium's property manager to notify the unit owner of any significant or on-going breaches.

[31] I agree with those comments, which are applicable to the facts of this case. I also cannot overlook the willingness of the Owner to consent to the very relief that was granted.

[32] 933's repeated failure to inform the Owner of the ongoing problems and its unreasonable demands to the Owner to terminate the tenancy while providing no evidentiary assistance for the Owner to obtain such relief, as well as the Owner's willingness to consent to the relief obtained, all persuade me that this is a situation in which no order as to costs should be made as against the Owner, either under the *Courts of Justice Act* or the *Condominium Act*.

Amount of Costs

[33] The total legal expense incurred by 933, as set out in its Bill of Costs, is $33,469.73. That sum represents the legal bills incurred by 933 in preparing and prosecuting the application before me. It also includes the professional time spent in attempting to achieve a resolution of the dispute, something the Tenant was unwilling to do.

[34] The time spent and the hourly fees charged are detailed in a formal Bill of Costs. For the most part, the hours and rates are unremarkable for a proceeding such as this. The only notable excess is the duplication of senior and junior counsel time on the first appearance. I am also surprised at the disbursement for process server fees. Taking those factors alone into consideration, I would reduce the sum claimed for Full Indemnity costs to $31,000.

[35] I am not prepared to award that amount, however, for two reasons. First, I find there is some merit to the Tenant's submission that she was rebuffed when she attempted to deal with 933 in trying to remedy the noise problems. She was told she should communicate via the Owner and that management of 933 did not wish to deal with her. She was not given any information regarding the complaining neighbour or the layout of their apartment, which precluded her from trying to resolve the problem by modifying her own layout to reduce the likelihood of further problems. Although 933 has an obligation to enforce its bylaws and rules, its communication style left something to be desired, which suggests that complete indemnity costs are not warranted.

[36] Secondly, the underlying principle of a costs award is that it should be "fair and reasonable" taking into account the principle of indemnity for the successful party, the expectations of the unsuccessful party and the complexity of the issues and with a view to balancing compensation of the successful party with the goal of fostering access to justice: *Boucher v. Public Accountants Council (Ontario)* (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (C.A). An award of costs of the magnitude of $31,000

against the tenant would, in my view, be excessive when measured against these criteria. It would also fail to take into account the shortcomings of the conduct of 933 that I have detailed above. At the same time, I cannot overlook the refusal of the Tenant to accept 933's offer to resolve the case on a "no costs" basis if she consented to the very relief that was ultimately granted.

[37] Taking into account these considerations, I would reduce the $31,000 otherwise claimable by 25%. I therefore fix 933's recoverable costs at the all-inclusive sum of $23,250.

Conclusion and Disposition

[38] For these reasons, I fix 933's costs at $23,250 and order the respondent Saskia Kalicharan to pay that sum within 90 days. Ms. Kalicharan's claim for costs is dismissed. No costs were sought by the Owner and I award none against her.

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Justice D. G. Stinson

Date: June 22, 2020