

# Court of King's Bench of Alberta

**Citation: Aubin v Condominium Plan No 862 2917, 2022 ABKB 723**

**Date:** 20221031  
**Docket:** 1903 00548  
**Registry:** Edmonton

Between:

**Mary Jean Aubin**

Applicant

- and -

**The Owners: Condominium Plan No. 862 2917**

Respondent

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**Memorandum of Decision  
of the  
Honourable Applications Judge B.W. Summers**

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## **Introduction**

[1] This Memorandum of Decision considers what obligation, if any, that a condominium corporation (the Respondent) has to address concerns of a unit owner (the Applicant) with respect to noise transference through a wall between common property and the unit owner's suite. In this case, the common property is the social lounge ("Lounge") which is available for the use of all unit owners and their guests. The Applicant's complaint is that the wall does not adequately prevent or limit the transference of sound from the Lounge to her unit.

## **Background Facts**

[2] The Applicant owns a unit in Hillside Estates. Hillside Estates is a condominium complex with 347 units in two buildings: A and B. The Applicant's unit is on the ground floor of building B and is next to the Lounge. The Applicant's bedroom is adjacent to the wall next to the Lounge. The Applicant's unit is the only unit adjacent to the Lounge.

[3] The Applicant purchased her unit in 2008. In that year the Applicant became aware of noise transference from the Lounge. Part of her evidence includes the following (from her Affidavit sworn January 2, 2019 (“First Affidavit”)):

7. The noise from the Lounge is inordinate.
8. When only two people are in the Lounge I can generally hear any conversation between them. Depending on where they are standing in the room and the volume of their conversation, I can sometimes make out what they are saying.
9. When a party is being hosted in the Lounge then the noise level is to such an extent that it is as though the party is happening within my bedroom.
10. When cleaning staff vacuum the room and the vacuum hits the wall then vibrations can be felt on my side of the wall where my bed is placed. When furniture is moved against the wall the same thing occurs.

[4] The Applicant served on the Board of Directors for Hillside Estates from 2012 to 2018. In that time the Applicant brought forward complaints and concerns a number of times.

[5] On June 13, 2018 the Applicant wrote to the Board requesting that an acoustic expert be retained in order to verify the high level of noise transference and if the measurement confirmed the level of noise transference, the issue be addressed.

[6] Over the next several months correspondence was exchanged between the Applicant and her lawyer on the one hand, and the Board and the Property Manager and the Board’s lawyer on the other hand. In essence, the Board took a number of measures to address noise coming from the Lounge including installing a clock and a sign advising that the Lounge must be vacated by 11 pm, changing the operating hours for the Lounge, moving furniture in the Lounge so it was not up against the wall adjacent to the Applicant’s bedroom and instructing cleaning staff on reasonable hours for cleaning.

[7] The Applicant did not find these steps to be adequate. In her First Affidavit, she stated:

20. The noise from the Lounge has a significant impact upon me and has caused me considerable stress.
21. The Lounge hours of operation are from 9:00 a.m. to 10:50 p.m. which means that, provided the hours are respected, I can only expect to be able to sleep during these hours let alone enjoy any activity in my room such as reading.
22. I do not have similar issues with noise on the wall that I share with another unit. On that other wall I just do not hear similar noises, for example, I cannot hear a conversation through that wall in the same way that I can hear one through the Lounge wall.
23. It was only recently that I realized that the wall separating my unit from the Lounge was common property. Until then I was under the impression that it was my property and that I would have to undergo any expense to address the noise. I was never in any position to undertake such an expense and I now understand that the wall in question is common property.

24. The ongoing battle to have the Board address these issues combined with the noise itself has been mentally and emotionally exhausting. What was just an inconvenience when I first moved in has grown to be more bothersome over time.

25. I am not comfortable in my own home. When I hear noise through the Lounge wall it causes me great stress. I need relief from this situation and to be able to enjoy the place that I live.

[8] In a letter dated November 2, 2018 addressed to counsel for the Applicant, counsel for the Respondent set out the Respondent's position, which I summarize as follows:

Over the years the Corporation had taken significant steps to reduce the noise transference from the Lounge;

Based on information provided to counsel for the Respondent, "it appears that the wall was built to the specifications of the original construction and is no different from the walls between any other owner's Unit/s and the common property;

A majority of the Corporation's board of directors is of the opinion that the common property walls are in a state of good and serviceable repair;

What the Applicant was seeking with respect to the wall amounted to a capital improvement which required a special resolution of the owners; and

As the Applicant purchased her unit in 2008 her claim was limitation barred.

[9] One member of the Board, Sharon Losinski, suggested that the Corporation's employee, Garrett, at least examine the wall to offer an initial opinion to the Board. That suggestion was rejected by the Board. Another Board member, Robert Drinkwater, wrote to Ms. Losinski, and the other Board members, stating:

I agree with Nathan and Madgy. We have no obligation to do anything about the wall. The only exceptions would be if the wall wasn't built to code at the time of construction, or if it was modified by the corporation in a way that did not comply with the building code. (I think Suzie once showed us a court case in Alberta where a corporation was ordered to repair a wall when a neighbour complained about cigarette smoke. Unfortunately for that corporation, the wall wasn't built to code.)

Despite the noise, I don't think we have evidence the wall isn't to code, and I'm guessing that finding out means ripping away some of the wall to look. I don't think we are obligated to do that. If the owner wants to, and can demonstrate the wall didn't meet code in 1973, then we would have to pay to bring it to code. Otherwise, the wall is not the corporation's problem.

[10] The Applicant retained an acoustic engineer in December of 2018. He determined that the sound rating on the Lounge Wall was NIC 38, "which indicates that the airborne sound isolation is very low. This degree of sound isolation will allow typical party noise to be audible, intelligible and unacceptable in the receiving room ie the bedroom. Upgrading the demising wall to NIC/STC 60 or more is expected to provide very good soundproofing."

[11] The Applicant commenced action by filing an Originating Application on January 7, 2019. In that application she sought a declaration that the Corporation had engaged in “improper conduct” (as that term is defined in the *Condominium Property Act* (“CPA”)) with respect to her complaint regarding noise from the Lounge.

[12] Both sides filed multiple affidavits. The Applicant was cross examined on her affidavits. The president of the Corporation, Nathaniel Vos, was cross examined on his affidavits. There was further evidence of noise emanating from the Lounge including construction workers using it as a staging or storing area for work they were doing elsewhere in Hillside Estates and their access to the Lounge was not limited to posted Lounge hours.

### **Legal Issues**

[13] There are essentially two legal issues for consideration:

- (a) Has the Respondent engaged in “improper conduct” and if so, what remedy should be provided? and
- (b) Is the Applicant’s claim limitation barred?

### **Improper Conduct**

[14] Section 67 of the *CPA* deals with improper conduct as follows:

Court ordered remedy

67(1) In this section,

- (a) “improper conduct” means
  - (i) non-compliance with this Act, the regulations or the bylaws by a developer, a corporation, an employee of a corporation, a member of a board or an owner,
  - (ii) the conduct of the business affairs of a corporation in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party,
  - (iii) the exercise of the powers of the board in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests 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,
  - (iv) the conduct of the business affairs of a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit, or
  - (v) the exercise of the powers of the board by a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit;

- (b) “interested party” means an owner, a corporation, a member of the board, a registered mortgagee or any other person who has a registered interest in a unit.
- (2) Where on an application by an interested party the Court is satisfied that improper conduct has taken place, 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.
- (3) The Court may grant interim relief under subsection (2) pending the final determination of the matter by the Court.

[15] The Applicant, as a unit owner in Hillside Estates, is an interested party.

[16] The Applicant asserts that the failure of the Board to act upon her complaint is oppressive or is unfairly prejudicial to her, or that it unfairly disregards the Applicant’s interests.

[17] Counsel for the Applicant and counsel for the Respondent both refer to the decision of Mr. Justice Chrumka in *934859 Alberta Inc v Condominium Corporation No. 0312180*, 2007 ABQB 640 (“*934859*”) with respect to the interpretation of subsection 67(1) of the *CPA*. Relevant paragraphs are as follows:

[93] Oppression or oppressive conduct has been defined and discussed in a number of the cases cited above. It has been defined to be conduct that is burdensome, harsh or wrongful or which lacks probity or fair dealing.

[94] The term “unfairly prejudicial” has been defined to mean acts that are unjustly or inequitably detrimental.

[95] The term “unfairly disregards” may be defined as unjust and inequitable. Unfairly itself has been defined as “in an unfair manner, inequitably, unjustly”. Fair has been defined as “just, equitable, free of bias or prejudice, impartial”. Prejudice means “injury, detriment or damage caused to a person by judgment or action in which the person’s rights are disregarded: hence injury, detriment or damage to a person or a thing likely to be the consequence of some action”. Prejudicial means “causing prejudice; detrimental damaging “to rights, interests, etc.”

[18] In *Ryan v Condominium Corporation No 0610078, 2021 ABCA 96* (“*Ryan*”) the Court of Appeal stated that the foregoing passage from *934859* is an appropriate description of oppressive conduct for the purposes of s. 67(1)(a)(iii.1) of the *CPA*.

[19] In *Ryan*, the Court of Appeal also referenced the decision of Mr. Justice Wilson in *Laakso v Condominium Corporation No 8011365, 2013 ABQB 153* (“*Laakso*”) where he advocated a two-pronged approach, taken from the corporate context, as follows (from paragraph 26 of *Laakso*):

At the first stage, the Plaintiffs must establish a breach of reasonable expectations. If successful, the court must go on to consider whether the conduct complained of amounts to oppression, unfair prejudice or unfair disregard.

The concept of reasonable expectations is objective and contextual, taking into account the facts of the specific case, the relationships at issue and the entire context. The actual expectation of a particular stakeholder is not conclusive. The Plaintiff must identify the expectations that were allegedly violated and establish that those expectations were reasonably held, based on factors that may include general commercial practice, the nature of the corporation, the relationship between the parties, steps that the claimant could have taken to protect itself, the fair resolution of stakeholders’ conflicting interests and, importantly, representations and agreements.

[20] Both counsel also refer to the following from Master Schlosser’s (as he then was) decision in *Leeson v Condominium Plan No 9925923, 2014 ABQB 20* (“*Leeson*”):

[16] The learned authors of *Condominium Law and Administration*, Carswell, vol. 2, (Looseleaf) Ch. 23 (T. Rotenberg), identify British Columbia as the pioneering jurisdiction for an oppression remedy in the condominium context. Mr. Rotenberg notes five general principles that apply in this setting:

- (a) It is a broad remedy, broadly applied; attempts to narrow its impact and effectiveness should therefore be resisted.
- (b) The purpose of the oppression remedy is to protect the objectively reasonable expectations that caused the relationship to begin or continue.
- (c) Either the cumulative results of the conduct complained of or a specific egregious act ultimately determines whether there is an actionable wrong.
- (d) The court must balance the competing interests of the minority, who are to be treated fairly, with the rights of majority to govern. Only if the minority’s interest is unfairly treated will the courts intervene.
- (e) The selection of a remedy must be sufficient to achieve the desired result. Remedies should not be narrowly limited, and may be granted against individuals in appropriate cases.

[21] Counsel for the Applicant also places reliance upon the decision of Master Schlosser (again, as he then was) in *Hnatiuk v Condominium Corporation No 032 2411, 2014 ABQB 22*.

In that case the Applicants (one of whom was allergic to cigarette smoke) complained of the smell of smoke emanating from the unit below their unit. A contractor retained by the condominium corporation opened up the bulkhead separating the Applicants' unit from the furnace room and found that fire separation had not been installed. That was corrected and it substantially reduced the smell of smoke, but did not eliminate it entirely. It was suspected, although not determined that there may not be fire separation in the bulkhead between the Applicants' unit and the unit below. Drawings could not prove one way or another. The only way that it could be determined was by opening up a second bulkhead between these two units. The board was rightly concerned about inconveniencing and displacing the other unit owner while the issue was being addressed.

[22] Most importantly, Master Schlosser found that although the Applicants' expert did not prove to the ordinary civil standard that there was a deficient fire separation in the second bulkhead, it did at least raise a *prima facie* case for investigation and the corporation had a duty to find out.

[23] In this case before me, I find that the Applicant has made out a *prima facie* case that the Respondent has a duty to investigate whether the wall separating the Lounge and the Applicant's wall is deficient with respect to the transference of sound. Evidence has been provided that it is inadequate.

[24] I find that the Applicant's expectation that the Respondent investigate is reasonable, both in an objective and contextual respect. The Applicant's unit is the only unit, out of the entire 347 units, that borders on the Lounge. The Lounge is common property for the use of all unit owners and their guests. The Lounge, by its very nature, is a space that will generate noise. Its use as a space for construction workers, for staging or storing, indicates how important the space is for things to be done for the entire complex, with the least inconvenience to all 347 unit owners.

[25] The bylaws of the Respondent indicate that noise disturbance that interferes with an owner's comfort and quiet enjoyment of their property is not permitted. The Respondent's attempts to limit noise from the Lounge was certainly a proper initial response to see that the Applicant would be able to enjoy the same comfort and quiet enjoyment of her unit that other unit owners were receiving. However, the ongoing instances of noise disturbance, and the magnitude of the noise transference problem indicates that it was not unreasonable on the part of the Applicant to expect that more be done.

[26] Furthermore, I am of opinion, that the refusal of the Respondent to at least investigate the issue is oppressive and unfairly disregards the interest of the Applicant. It bears repeating that the Applicant is the only unit owner in the entire complex faced with this problem. If her complaint was with respect to noise transference between another unit and her own unit, I would find her expectation unreasonable. The Applicant's evidence, which has not been undermined, is that the noise transference from the Lounge to her bedroom is greater than the noise transference from another unit to her own unit.

[27] I wish to address a number of arguments made by or on behalf of the Respondent.

[28] Firstly, I disagree with Mr. Drinkwater's assertion that it is not the Respondent's obligation to investigate, but that of the Applicant. As the saying goes, the Applicant only owns the pain on the interior of the wall, but the rest of it is owned by the Respondent.

[29] It is not up to the Applicant to prove that the wall between her bedroom and the Lounge was not built to Code. The wall is common property. The Respondent is responsible to ensure that the common property is in a state of good and serviceable repair. Given the evidence of the acoustic engineer that the wall is inadequate in so far as noise transference and the evidence of the Applicant that the noise transference through this wall is higher than the wall separating her unit from another unit, the Respondent was put on notice that the wall may not be in a state of good and serviceable repair.

[30] Secondly, at this stage, it is not reasonable or fair to expect the Applicant to build a sound barrier on her bedroom wall. The Respondent should first investigate the extent of the problem and determine what options are available to address whatever deficiency that is identified.

[31] Thirdly, whether the noise transference amounts to an action in nuisance is a red herring. The issue is whether the Respondent is acting reasonably in refusing to investigate and make a determination whether there is a problem and what options that may be available to address it if there is a problem.

[32] Fourthly, whether or not the remedial step that may be required means that capital from the reserve fund will need to be expended has not been determined.

[33] What I believe is reasonably required at this stage is for the Respondent to hire an expert to take reasonable steps to determine if the wall is adequate with respect to dampening or lessening noise transference, from a public space to a private space and further opine on what steps may be required, at what cost to correct an unreasonable deficiency. If it comes to a deficiency needing to be corrected, the Respondent will then need to determine if it is something that requires a capital expenditure, or whether it falls within the ambit of an operational expense.

### **Limitations Issue**

[34] The Applicant first became aware of noise transference issue from the Lounge in 2008, more than ten years before she commenced this action on January 7, 2019. The Respondent asserts that that the Applicant's action is limitation barred.

[35] If the Applicant's action were in nuisance, there could be a limitations issue, although that issue would have to be explored in the context of an ongoing nuisance. However, the Applicant's action is not in nuisance. Her action is a complaint of improper conduct, based on the allegation of oppression and unfair disregard with respect to the complaint that she brought forward to the Board on June 13, 2018. Just because the Applicant tolerated the situation for a prolonged period of time does not mean that she lost all right to ask the Board to reasonably investigate her complaint and determine whether something needed to be done and what it might be and what it might cost.

[36] I find that there is no limitation bar to the remedy sought by the Applicant.

### **Conclusion**

[37] I find that there has been improper conduct on the part of the Respondent. Pursuant to subsection 67(2) of the *CPA*, I direct the Respondent to retain an expert or experts to determine if the wall is reasonably adequate to diminish, lessen or dampen the sound from a public space to a private space and if not, to determine options available to improve the wall to achieve a reasonable standard for that use.



[38] At this time I am making no determination as to what, if anything, must be done with respect to the wall. The Respondent will of course be required to take reasonable steps, within the bounds of its authority, according to the findings presented to it. It may be that the parties will require further direction from the Court on this subject.

[39] If costs cannot be agreed upon, an application may be made before me in morning chambers.

Heard on the 14<sup>th</sup> day of September, 2022.

**Dated** at the City of Edmonton, Alberta this 31<sup>st</sup> day of October, 2022.

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**B.W. Summers**  
**A.J.C.K.B.A.**

**Appearances:**

Heidi Besuijen  
Reynolds Mirth Richards & Farmer LLP  
for the Applicant

Robert Noce KC and Michael Gibson  
Miller Thomson LLP  
for the Respondent