CITATION: Metropolitan Toronto Condominium Corp. No. 905 v. Davies, 2024 ONSC 3288
COURT FILE NO.: CV-23-00697247-0000
DATE: 20240607

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 905 Applicant	Michael A. Spears and Natasha Mazzitelli, for the Applicant
– and –	
HEATHER DAVIES Respondent	Self-Represented
	HEARD: May 22, 2024

AKAZAKI J.

REASONS FOR JUDGMENT

[1] The applicant condominium corporation seeks a compliance order pursuant to ss. 117, 119, 134 and 136 of the *Condominium Act*, R.S.O., 1998, c. 19 ("the Act") against one of its unit owners and residents, Heather Davies. The grounds of the complaint began with a video camera installed behind the window of her mailbox and concluded with invective directed to the building staff over interrupted hot water to her unit.

[2] Of the unauthorized surveillance, Ms. Davies questioned how else she could have caught the culprits defacing and taking down her board election signs from the mail room bulletin board. Of the inappropriate communications, she confessed to having snapped in exasperation after several months without hot water endangered her and her spouse's health.

[3] The applicant's grounds were valid. Within reason, so too were the respondent's explanations. The court's task is to adjudicate this dispute and to apply the Act in the way it was intended: to preserve the balance between communal and private living within the multi-unit communities where a great number of people in Ontario now choose to call their homes. To do this, it is important to grasp the context in which the events in question

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occurred. The evidence showed there was more wrong done to Ms. Davies than she had done to others.

COMPLIANCE ORDERS UNDER THE ACT

[4] The above-cited sections in the Act provide the basis for a court order restraining misuse or misconduct in a condominium. Sections 134 and 136 provide the court broad jurisdiction to administer the Act, regulations, condominium declarations and bylaws. The more relevant provision is s. 134(1):

> **Compliance order**
>
> 134 (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement. 1998, c. 19, s. 134 (1); 2000, c. 26, Sched. B, s. 7 (7).

[5] The exception to direct resort to the court is a dispute under s. 132, pertaining to the mediation and arbitration of certain agreements. That section does not apply.

[6] Section 117 prohibits certain activities, and s. 119 requires condominium stakeholders to comply with the Act, the declaration, bylaws and rules.

THE MAILBOX VIDEO RECORDING

[7] Ms. Davies' use of a video camera in her unit's mailbox was an isolated event within the respondent's lengthy involvement in the life of the building's community. She is a retired emergency room physician with considerable interest in public health and urban living. The record showed that some residents appreciated her interventions in residents' affairs and others did not. The proximity among actors in the sharing and governance of a plot of real estate inevitably blurs line between social responsibility and personality conflict. The participants in this dispute took these issues seriously, at times too seriously, and at times not seriously enough.

[8] Without peering too deeply into the antecedents of the rift among the residents, the earliest event giving rise to the applicant's dispute consisted of a number of 2020 emails from Ms. Davies to the board of directors that the recipients considered abusive. The subject matter was another resident's renovation work on the floor occupied by Ms. Davies and her spouse. This resulted in a letter of warning from the applicant's lawyers, dated July 29, 2020.

[9] In early 2021, during the middle of the Covid-19 public health restrictions, Ms. Davies ran for a seat on the board of directors. Her supporters brought to her attention the fact that

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her election posters were being defaced or taken down from the mail room bulletin board. A strong believer in the provincial and municipal health advisories, she was not going to wait in the common area to catch the culprits. She purchased a small electronic camera and installed it in her mail box. The tiny window allowing one to see whether it contained post provided a perfect vantage for capturing activity in front of the bulletin board. She reinstated her election posters. The respondent did not make it clear whether the purpose of the camera was for protection of the campaign posters, or whether the posters were intended to bait the area for catching the vandals. Based on her submissions at the hearing, the latter seemed the better characterization.

[10] The "posters" in question were 3½ by 8 inch leaflet-size documents on which Ms. Davies had expressed her interest in representing the residents on the board and had listed her priorities such as open board meetings and accomplishments about various building initiatives such as the introduction of a bottle recycling program. There were also some promotional materials prepared by "L'Esprit Residents Association" (RA), of which Ms. Davies was an activist. The board had a history of clashing with the RA as an unofficial opposition party.

[11] It took about a half hour after installation on January 30, 2021, for the camera to capture former board member Paul Gregoroff, defacing a RA poster advertising a virtual all-candidates meeting with heavy black marker. He then thought twice about what he had done, and put it in the waste bin. He then removed Ms. Davies' election poster, tore it up into shreds, and dropped it into the bin. Before he left, he put up one of his own stating that the organizers of the meeting were a "cabal" with a "fascist agenda." The next day, Douglas Payne, a member of the board, was captured on video removing another copy of Ms. Davies' posters and placing it in the same bin.

[12] The applicant admitted in its court filings that Mr. Payne had removed "non-compliant materials from the bulletin board." On cross-examination, he admitted he removed any signs that did not state the name and unit number of the person putting up it up, as well as the date it was put up.

[13] After she had captured video clips of these individuals' actions, she extracted the footage and posted it on a private YouTube feed. In his affidavit, another board member named Kirk Cooper stated he considered the installation of the camera a violation of his privacy and had concerns for his safety as well as that of his partner. There was no evidence that any of the footage included Mr. Cooper or his partner.

[14] The parties each focus on the insult committed by the other, one complaining of the breach of the privacy of the residents and the other of the violation of the democratic board election process.

[15] The applicant's position is that the placement of the video camera in the mailbox was a breach of residents' privacy and a misuse of Ms. Davies' exclusive use common element (the mailbox assigned to her unit). A common element is an area owned and operated by the condominium corporation and maintained proportionately at the expense of unit

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owners. An exclusive use common area is part of the common facilities registered for exclusive use by the unit's occupants, such as a parking space, a balcony, or in this case a mailbox. The mailroom is a common element for use by all residents.

[16] The respondent argued that the mailroom is a public area where anyone can photograph or videograph any activities. I disagree. The common elements of a condominium building are private property in which there is an expectation of privacy. It may be a lower expectation than the private units themselves, but it is not the same as a street scene, a public square, or a shopping mall. Apart from postal employees and delivery couriers, the only persons entitled to be present in a mail room are those collecting their post and deliveries. A non-resident has no business being in the mail room except to accompany a resident or to be a resident's agent for picking up mail. A resident does not expect to be filmed from inside another unit owner's mailbox. For example, a resident in a time of personal financial crisis might receive a collection letter and open it on the spot. Consider the impact on that person to find that the letter and his facial expression have been captured by a camera in another resident's mailbox.

[17] The respondent also argued that the common elements are all under video surveillance. There is an expectation of being captured by these cameras. It is one matter to expect security services contracted by the condominium to help keep residents safe. A resident's own vigilante videography device does not fall within such expectation.

[18] The right to residents' privacy in common elements is a matter of gradation. However, the law recognizes such a right, the breach of which can attract damage for injury at large. I refer to the reasons in *Jones v. Tsige*, 2012 ONCA 32, at paras. 70-71:

> [70] I would essentially adopt as the elements of the action for intrusion upon seclusion the Restatement (Second) of Torts (2010) formulation which, for the sake of convenience, I repeat here:
>
> > One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.
>
> [71] The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. …

[19] The applicant cited no specific section of the corporation's declaration or bylaws disallowing the respondent's placement of a camera in her mailbox. It relied principally on the provision in s. 117(1) of the Act prohibiting the use of a common element could "cause an injury or an illness to an individual." Having regard to the Court of Appeal's

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decision in *Jones*, this use of the mailbox is prohibited by s. 117(1) because it could cause harm the law recognizes as compensable in damages. I therefore find that the planting of a camera was a misuse of a common element belonging to the corporation, even if it is of exclusive use. Ms. Davies was wrong to have done this and to have uploaded the clips to a YouTube account. The clips should be taken down.

[20] The breach cannot, however, be considered in isolation. Even before the pressures the Covid-19 times brought to bear on civil society, factions in our society have arrogated to themselves freedom of expression on their own terms, including the power to interdict the speech of others. The persons who removed Ms. Davies' innocuous campaign posters on the grounds of enforcement of the rules of the mail room bulletin board could have been guilty of picky officiousness. However, tearing them up or defacing them revealed a common animus against a political rival clearly intending to exclude Ms. Davies from seeking election to the board. In a setting where signs and symbols matter, these were acts of violence and vandalism and not rule enforcement.

[21] If the mailbox camera breached s. 117(1) because of the potential harm to a resident, so, too was the vandalism. Moreover, the latter also constituted "nuisance, annoyance or disruption to … the common elements" as set out in s. 117(2)(a).

[22] I conclude, from an overall assessment of the facts, that Ms. Davies was not filming the mail room to snoop on her neighbours in the act of collecting their mail. Rather, it was an isolated and venial infraction intended for the sole purpose of capturing the acts of vandalism and political provocation of which she had been alerted. This is a classic case of two wrongs not making a right and compelling the court to make compliance orders against both parties for their respective violations of s. 117. Between the two offences, the ones committed against Ms. Davies were more serious than the one by her.

THE HOT WATER PROBLEM

[23] The second issue the applicant raised was abusive communication by Ms. Davies after the unit owned by Ms. Davies and her spouse started experiencing problems with hot water supply in November 2022. The applicant produced a series of communications from Ms. Davies exhibiting angry and abusive language. The applicant's position was that these communications, including written and verbal invective directed at staff and board members, triggered the condominium corporation's duty to prevent mental injury or illness in accordance with health and safety and occupational standards.

[24] The language turned to a shade of blue in a series of work orders Ms. Davies processed through the building management's electronic "BuildingLink" portal. This portal contains a fillable form to insert the unit details and the problem to be resolved by maintenance staff. Ms. Davies did not deny having sent these forms in. Her response the use of profane and insulting language was that she did not believe anyone was reading them, because of a lack of response to previous entries: "There was no indication that anyone had read them, or that anyone had seen them, or that anyone intended to act upon them in any way."

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[25] Ms. Davies' response on this issue contained a narrative starting not in November but in May of 2022. The building has historically had a problem with the slowness of hot water reaching a unit. Both of the occupants have medical conditions that lower their immune systems. Ms. Davies' partner suffers from Crohn's Disease, a chronic gastrointestinal problem that requires access to hot water for personal hygiene. These unit owners therefore were particularly sensitive to the issue, so much so that, in April 2020, the partner requested accommodation pursuant to the *Accessibility for Ontarians with Disabilities Act*, 2005, S.O. 2005, c. 11 and has made a human rights complaint that is yet to be resolved.

[26] In May 2022, the respondent and her spouse observed that the problem with the hot water to their bathroom was deteriorating. They reported the issue to the property manager and communicated with the office over the course of several months, including sending pictures of thermometer readings showing the water never rose above 59° F. By December, the temperature had dipped to 52° F, before the plumber finally fixed the problem in the building's hot water riser. The temperature now reaches 118° F.

[27] The applicant's materials isolated the dealings with Ms. Davies from the time her communications became aggressive and abusive, in November and December of 2022. In one of her BuildingLink entries, she told them to "FIX IT NOW YOU HORRIBLE FUCKS" and referred to Mr. Payne and other board members as "YOU HORRIBLE CRIMINAL MONSTERS." In another, she referred to them as "craven, miserable, rotten, lying no-good piece of shit" and as a "psychopath with no empathy."

[28] I do not accept the excuse in Ms. Davies' affidavit that she did not expect anyone to read these comments because, in her mind, no one paid attention to her and her spouse's situation. Closer to the truth of the matter was her admission, after I questioned her on the subject during the submissions, that she had snapped under the stress of the situation.

[29] As in the case of the first issue regarding Ms. Davies' use of a mailbox camera to catch her political adversaries vandalizing her posters, the narrative arc of the hot water dispute presents the justice of the situation somewhere between the parties' respective positions. Undoubtedly some of Ms. Davies' animosity in November and December arose from the months of perceived inaction on the part of the management. In turn, the existing or festering grudge held by the parties to the situation, even from before the mailbox incident, led to Ms. Davies' belief, stated in some of her confrontational emails, that the management and board were "gaslighting" her and her spouse by refusing to treat the plumbing complaint seriously.

[30] By starting the narrative in the case after Ms. Davies' communications became more desperate and aggressive, the applicant required the court essentially to overlook the elephant in the room. By November, these vulnerable individuals had lived without hot water – a basic element of developed society – for half a year. The board of directors owed them a fiduciary duty to instruct building management to escalate steps to isolate the cause of the problem and to fix it within days, not months. Ms. Davies' paranoia, that the management or the board were intentionally dragging their heels, was unjustified but not unexpected.

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REMEDY

[31] The application was technically well founded, in that the respondent's conduct by secretly filming the mail room and by verbally abusing the building management staff and board members were likely in contravention of s. 117 of the Act. However, in both instances the respondent was provoked into these actions, first by election interference by residents opposing her candidacy, and second by unreasonable delay or lack of urgency in providing necessary hot water to the respondent's unit.

[32] Provocation is an ancient common-law "partial" defence to serious criminal offences. It can reduce the legal sanction for an act, if the accused lost self-control as a result of the victim's acts (subjective element) and the provoking act is capable of depriving an ordinary or reasonable person of such self-control: *R. v. Cairney*, [2013] 3 SCR 420, at paras 25-28. Historically, it arose from a recognition of human frailty: Wayne N. Renke, "Calm Like a Bomb: An Assessment of the Partial Defence of Provocation," 2010 47-3 *Alberta Law Review* 729, at 730. A breach of s. 117 is a civil form of offence, subjecting the offender to sanction under s. 134. If the common-law rule is applicable to serious criminal offences, such as reducing murder to manslaughter, there is no principle excluding its operation in lesser statutory violations.

[33] The actions of Ms. Davies of which the applicant complains cannot be excused by the circumstances which provoked them. However, the court must recognize the fact that her wrongs were in response to wrongs to her, arguably more serious than hers in nature and consequence.

[34] A judgment ordering Ms. Davies to refrain from filming residents from her mailbox is almost moot, because the situation that led to it has long passed. Her abusive communications to the applicant's board and management must also be stopped. The wording of the judgment will sanction and restrain these behaviours.

[35] I am, however, cognizant of the shared responsibility for the events in question. In that regard, I am concerned that the corporation's application, largely justified, can be used ultimately to oust Ms. Davies and her spouse from the condominium through the combined operation of s. 85 and of s. 134(5). Section 85 imposes a lien on the unit for unpaid common expenses, ultimately to be enforced by power of sale in the same manner as mortgage arrears. Subsection 134(5) can lead to immediate arrears, on the order of costs in a compliance application:

> (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. 1998, c. 19, s. 134 (5).

[36] The applicant sought $87,310.90 in full indemnity costs. The operation of s. 134(5) has led to the default principle that costs of s. 134 compliance litigation must be awarded on a

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full indemnity basis, because the other unit owners "are blameless and should not have to bear the legal costs of securing the compliance of one of the unit owners": *YRSCC No. 972 v. Lee*, 2021 ONSC 3877, at para. 27. The imposition of $87,310.90 in costs against a retired person on a fixed income would put her continued residency in jeopardy. Because of the operation of s. 134(5), the unit bears the cost and thus Ms. Davies' spouse's occupancy could also be affected. Awarding a lower amount is also of no use, because s. 134(5) requires the imposition of full indemnity after the court orders the first dollar of damages or costs.

[37] The difficulty in applying that reasoning here is that the "other unit owners" are not all blameless. In particular, at least one of the two persons who provoked the first incident was a member of the applicant's board. The inaction on the hot water file that provoked the respondent's inappropriate response was inaction by the applicant's board. I appreciate that there is much emotion and sense of injustice to be spread around among the participants, both directly and between the board and the RA.

[38] The power to award costs is found in s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The default rule is for the successful party to be awarded costs, unless there is good reason to deprive it of costs or to award costs to the unsuccessful party. While judges at the trial level are encouraged to hone in on important factors instead of a 'grocery list' of costs factors, there should be an explanation for departing from the default rule: *Birtzu v. McCron*, 2019 ONCA 777, at paras. 8-21.

[39] In this case, the factor that overrides the default rule is found in rule 57.01(1)(b), the apportionment of liability. The only reason why I would not impose a sanction for the applicant's conduct, inaction, or condonation of injurious conduct to the respondent, is that she did not bring her own application for relief. Despite that procedural bar to a division of success, the election poster removal and defacement, as well as the unreasonable delay in fixing the hot water, are grounds for mitigating the sanction against the respondent for her breaches of s. 117. The justice of the case leads to the conclusion that the respondent should not be exposed to the costs of the proceeding and to the jeopardy of ss. 134(5) and 85 of the Act. There has been enough strife in this community. It must end here.

[40] Accordingly, I will order compliance in respect of the unauthorized filming and the inappropriate communications with the applicant's board, management, and other personnel. I will not impose a complete bar on the respondent from communicating with such persons, because of the risk of inadvertent non-compliance and because the respondent has rights under the Act, declaration and bylaws, to participate in the life and governance of the condominium. Despite my compliance orders, I hereby order that there be no costs of the proceeding.

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Akazaki J.

Released: June 7, 2024

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REASONS FOR JUDGMENT

AKAZAKI J.

Released: June 7, 2024