COURT FILE NO: SC-19-00002919-0000
DATE: 2025-01-15

ONTARIO
SUPERIOR COURT OF JUSTICE
(OSHAWA SMALL CLAIMS COURT)

B E T W E E N:

DONALD MERRIFIELD

Plaintiff

- and -

LES RUSSEL, JIM ROWSELL, DURHAM STANDARD CONDOMINIUM CORPORATION NO. 213, and GOLDVIEW PROPERTY MANAGEMENT LTD.

Defendants

LEGAL REPRESENTATIVES AT TRIAL:
Plaintiff: Rajan Mahavalirajan
Defendant: Natalia Polis

TRIAL: JUNE 27, 28, AND SEPTEMBER 5, 2024

JUDGMENT

DEPUTY JUDGE DAVID M. JOSÉ

1) For the reasons that follow:

a) Judgment is granted in favour of the Plaintiff, as against Durham Standard Condominium Corporation No. 213, in the sum of **$5,221.19**;

b) Prejudgment interest is awarded in the sum of **$559.23**;

c) The Claims against the remaining Defendants are dismissed; and

d) Post-judgment interest will accrue at **4.0%** as prescribed under the *Courts of Justice Act*, R.S.O. 1990, c. C.43., for any amount that remains unpaid after thirty (30) days from the date of judgment.

2) In the event that the parties cannot resolve the issue of costs within the next fourteen (14) days, they shall file written submissions on costs in conformity with the parameters set out in the last paragraph of this judgment.

REASONS

Brief Overview of the Case

3) In 2011, the Plaintiff, Donald Merrifield (herein the "**Plaintiff**"), purchased a condo unit

(herein the "**Unit**") located in Durham Standard Condominium Corporation No. 214 (herein the "**Condo Corp**") in Whitby, Ontario. At all times material, the Defendant, Mr. Les Russel, was the property manager of the Condo Corp since roughly 2015, and Mr. Jim Rowsell, was a condo unit owner, and the president (and one-of five directors) of the Board of Directors (the "**Board**"). The Defendant, Goldview Property Management Ltd. ("**Goldview**") was the property management company retained by the Condo Corp.

4) During the last few years of his unit ownership, before selling the Unit in or about February 2019, the Plaintiff received five (5) formal letters from the lawyers retained by the Condo Corp (herein the "**Letters**") to address the Plaintiff's conduct that the Condo Corp felt was in clear violation of their Declarations and Rules (herein the "**Constating Documents**"), as well as a breach of the *Condominium Act*, 1998, S.O. 1998, c. 19 (the "**Act**"). Legal fees for four-of-the-five Letters were charged back to the Plaintiff, along with a caution that collection would be pursued through a lien enforcement against the Unit if the Plaintiff did not pay the legal fees voluntarily by a given deadline date.

5) There is no dispute that the Plaintiff paid all the charges, totalling **$5,221.19** ($2,164.44 + $672.35 + $593.35 + $1,791.05).

6) In short, the Defendants assert that the Plaintiff's conduct was reprehensible, harassing, and causative of psychological injury to the personal Defendants, other staff, and some of the other residents.

7) The Plaintiff denied that he breached any provisions of the Constating Documents and/or the Act: he paid each of these demanded legal fees "under protest," affixing a 'No Admission of Fault or Liability" type disclaimer. The first such disclaimer (Exhibit #10), for example, expressly asserted that the Plaintiff was denying all allegations and was making the payment "*under duress…. by way of threatening to place another new lien against my home*." Although the wording of the disclaimer changed with each payment, they generally sent the same message that the Plaintiff disagreed with the assertions, he called them "*unproven accusations*" and "*concocted false claims*", and that he was paying under protest and duress to protect his Unit from lien enforcement.

8) The thrust of the Plaintiff's claim is that throughout this process, inclusive of the receipt of the five lawyer Letters, he was effectively given little-to-no particulars and little-to-no proof of his alleged digressions, thereby depriving him of his ability to defend himself. Put simply, the Plaintiff asserts that the Condo Corp, through its Board, lawyers, or otherwise, acted like bullies. The Plaintiff seeks the return of the $5,221.19 in legal fees he paid under protest.

9) The Claim was initially much broader in scope; however, at the opening of trial the Plaintiff brought a motion to reduce the prayer for relief from $25,000.00 to $10,000.00, and to limit the claim to the recovery of $5,221.19 paid under protest, and for punitive damages. With no opposition from the Defendants, both motions were granted.

Conclusion

10) I find in favour of the Plaintiff, for the following reasons:

a) The Condo Corp failed to satisfy me, on a balance of probabilities, that the Plaintiff's conduct breached the provisions of Constating Documents and/or the Act;

b) Even if the Plaintiff's conduct did breach the Constating Documents and/or the Act,

i) the Condo Corp's threat of immediate lien enforcement without recourse to the courts was unlawful; and

ii) the Condo Corp's conduct was unreasonable.

11) The Plaintiff shall have judgment against the Condo Corp equal to the full amount of money he paid under protest, totaling $5,221.19. The claim for punitive damages is dismissed absent a separate actionable wrong and absent conduct that offends the court's sense of decency. All claims for oppression type damages are dismissed on the ground that this court lacks jurisdiction to award such damages. The Claim against the remaining Defendants shall be dismissed on the grounds that the Plaintiff has failed to satisfy me, on a balance of probabilities, that their actions fell outside the scope of work being conducted by or on behalf of the Condo Corp.

12) This judgment should not be taken to mean that the Plaintiff conducted himself properly, throughout: my decision is more predominantly grounded in the inadequacy of the proof proffered by the Defendants to meet their burden to prove that the Plaintiff conducted himself in contravention of the Constating Documents and/or the Act. Perhaps if the Defendants marshalled their evidence better, the outcome might have been different.

Legal Issues

13) The following issues arise from the facts of this case:

a) Did the Plaintiff's behaviour constitute a breach of the Act, and/or the Constating Documents?

b) Were the chargebacks associated with the Letters lawful?

c) Did the Condo Corp act reasonably vis-à-vis the Plaintiff?

d) Is the Plaintiff entitled to punitive damages and/or oppression remedy type damages?

14) As noted previously, my conclusion on all of these issues is in the negative.

The Evidence

15) Testimony was heard from the Plaintiff himself, Mr. Rowsell, and Mr. Russel. No one was independently tendered from, or on behalf of, Goldview. Fifty-two (52) exhibits were tendered.

Testimony and Chronology

16) The Plaintiff explained that things were really good before Mr. Russel came on board. He felt well served by the previous management, citing one example where he was being accused of pounding on the floor, and after being given the details of the allegations, he was able to establish that he was out of the country at that time, gaining much support from the Board who sided with him.

17) When the "new" property management company was hired in-and-around 2015, and Mr. Russel came on board, the Plaintiff says he made a point of reaching out to Mr. Russel to get some reassurance that management would continue to support him parking his 1923 Ford Model T (herein the "**Model T**") in the underground parking lot: he says that Mr. Russel responded with something to the effect of "*you can have it there for now*." This was perhaps the high-water mark, because thereafter the interactions went downhill.

July of 2017 – Allegation that the Plaintiff was Repairing his Vehicle

18) Both parties agreed that the first "incident" between the parties occurred in the summer of 2017, when Mr. Russel accused the Plaintiff of repairing his Model T in the underground parking lot contrary to the Rules. Mr. Russel says he saw that the engine cowl was open and the seat removed, with the Plaintiff and his son (Joel Merrifield) "*working on something*." Mr. Russel says that he gave them a verbal warning, and this was followed by an infraction letter sent on July 25, 2017.

19) The Plaintiff vehemently denied such: he says he kept his Model T clean, but it was never repaired it in the garage. The Plaintiff testified that he was upset at this point because he says Mr. Russel never provided any specifics, such as the dates and times he was allegedly repairing his vehicle indoors, or what proof they had, despite his request for same.

20) No CCTV cameras were aimed to capture this alleged event. No photograph(s) or video(s) (taken from cellphone or otherwise) were provided to corroborate the existence of a dismantled vehicle. Even if I accept that the Model T was in a dismantled state, Mr. Russel did not tender any evidence to help me discern whether what he observed that day was just a good cleaning, or an actual repair. For example, it would have been helpful to know if car parts, tools, tool boxes and new car parts were scattered around the Model T.

21) It is also noteworthy, in my view, that during another incident (noted below) that occurred in May 2018 (the gas siphoning incident), Mr. Russel testified that the Plaintiff was upset to learn that there were no CCTV cameras pointed towards his Model T. I consider the Plaintiff's desire to have

his Model T under CCTV surveillance belies the Defendant's position that the Plaintiff was conducting unauthorized repairs to his Model T: if the Plaintiff was repairing his vehicle in the underground garage, it would be very odd indeed for him to want CCTV cameras pointed at his Model T.

22) Regardless, I do not have to decide which version is correct because this incident is not directly a part of this lawsuit. It is, however, helpful to understand how the parties interacted with one another, historically, and how I come to assess the veracity of the evidence tendered by the parties.

Fall 2017 – Accusation the Plaintiff's Son Broke the Garage Door

23) Things changed more significantly for the worse after the Model T made contact with, and damaged, the garage door on or about September 30th, 2017. The Plaintiff blamed the incident on poor maintenance of the garage door, and more specifically a faulty brake solenoid that was engineered to hold the door open, whereas the Condo Corp blamed the Plaintiff's son, who was driving the Model T at the time, for simply driving into the garage door (herein the "**Model T Garage Door Incident**"). The Plaintiff brought a Small Claims Court Claim to recover the chargebacks for the garage door repair costs. The Plaintiff's garage door Claim was resolved years ago, and was not before me for adjudication.

24) In the process of trying to establish his case that the garage door was malfunctioning when his Model T was damaged, the Plaintiff would, from time-to-time, and amongst other things, photograph and/or videotape the garage door to document how it opened and closed, or to document the state of the components. On other occasions, the Plaintiff would record the activities of repair technicians and/or the superintendent working on the garage door, or other areas throughout the condo. By about mid-2018, the Plaintiff would use his recording device to protect himself from what he perceived to be mistreatment from staff and/or other residents: something the Plaintiff says he was advised to do by the police.

25) Mr. Russel testified that things changed when the Plaintiff was told that he would be charged for the garage repair costs after the Model T Garage Door Incident. He says that the Plaintiff became much more abrupt and negative thereafter.

February 2018 – Board Meeting Interruption by the Plaintiff

26) Mr. Rowsell testified that the Plaintiff interrupted a meeting of the Board in February 2018, at which time the Plaintiff displayed a "brazen attitude" against Mr. Russel (the property manager).

27) While in the stand, Mr. Rowsell provided little-to-no details as to what the Plaintiff said or did during this event.

28) Mr. Rowsell said that following this incident, they decided to get their lawyers involved, and they updated their harassment policy at this time in order to make it clear that they were not going

to accept any harassment.

29) The Plaintiff did not give any evidence about this board meeting incident; I will elaborate more on this in the analysis section.

March 29, 2018 – First Registered Letter from Condo Corp Lawyer

30) The first letter from the Condo Corp lawyer followed on March 29, 2018 (Exhibit #7): a four-page letter. The description of the problem was expressed in the following passages, which were identically found in the letter of the same date addressed to Mr. Merrifield's son, Joel (Exhibit #42):

> "We understand that you have been acting in an aggressive, rude, condescending, confrontational and intimidating manner towards the Corporation's board members, employees, visitors and agents. Your conduct includes, but is not limited to, cornering board members and residents on the elevator, harassing property management, refusing to leave management's office, hindering Corporation operations, berating visitors and residents, and interfering with agents and employees of the Corporation. Various complaints have been made to the Corporation and the police have been required to attend the premises.
>
> Your conduct has created a hostile and toxic work and living environment. Residents and employees have further raised safety concerns. Your conduct is having an adverse impact on the health and wellbeing of other residents."

31) The letter proceeds to convey that this conduct violates section 117 of the Act, and Rules A.1, A.5, and A.6. No legal charges were demanded for this legal letter.

32) Most of the things outlined in this Letter were not led into evidence at trial in any cogent or persuasive manner.

33) From this first lawyer Letter onwards, each of the Letters instructed the Plaintiff to avoid all direct personal contact with Condo Corp personnel, and to adhere to the *"following communication guidelines*", which outlined that the Plaintiff was to communicate with management only in writing, the Plaintiff was to communicate with the Board only through property management (which presumably also meant only in writing), and the Plaintiff was only to communicate with security by phone, except in the case of an emergency.

March/April 2018 – The "Face-to-Face" between the Plaintiff and Mr. Russel

34) Mr. Russel testified that after the first Letter was sent to the Plaintiff, the Plaintiff stormed into his office, stood two (2) feet away from him, speaking in a very accusatory aggressive tone, so much so that he called 911. The police arrived and spoke to everyone. No charges were laid.

35) Mr. Russel did not give any substantive details about his altercation while testifying. The Plaintiff says he has no recollection of acting aggressively towards Mr. Russel following his receipt of the first Letter.

36) Mr. Russel said this was the only time he called the police to address the Plaintiff's conduct.

I suspect that the Plaintiff was hot-under-the-collar after receiving the first Letter, and perhaps understandably so. The first Letter was very accusatory, with very little details, and it imposed limitations on the Plaintiff's ability to meet and speak with staff, etc.

37) It is uncontested that this exchange came-and-went without additional fanfare.

May 2018 – Gas Siphoning Incident

38) In May 2018, the Plaintiff asserts that gas was siphoned from his Model T, and was looking for management to help identify the thief.

39) Mr. Russel testified that the Plaintiff was upset to learn from him that there was no CCTV camera set up to capture his Model T. Mr. Russel provided little-if-any evidence regarding the nature of the Plaintiff's alleged misconduct (ie: the words said, threats made, etc). Mr. Russel said the Plaintiff was upset. I believe most people would be too.

June/July 2018 – The Withdrawal of the Plaintiff's Bicycle Rack Location

40) The Plaintiff explained that in or about July 2018, the Condo Corp took away his bicycle spot which he said was ideally situated because of his disabilities: he said that the reassigned spot was almost impossible for a disabled person to reach.

41) Mr. Russel said that the Plaintiff was his normal "*rough-around-the-edges*" during this situation, but the Plaintiff was not "*over the top aggressive*." After further discussions, everything was eventually corrected to everyone's satisfaction. The Plaintiff agreed.

42) Mr. Russel, was on holidays and not present during an event in the manager's office on June 15, 2018 when Nadeem Shaikh ("**Nadeem**") was sitting in for him as the temporary interim manager. As such, the evidence about this incident came through the testimony of Mr. Rowsell.

43) Mr. Rowsell wrote a letter to the Condo Lawyers on June 18, 2018 (Exhibit #45), which was partially redacted. The unredacted portions were tendered as a contemporaneous note of what Mr. Rowsell observed only a few days earlier, on June 15, 2018. There were two separate events noted: one first hand observation, and the second based on hearsay because Mr. Rowsell himself was not present to witness the interaction between the Plaintiff and Nadeem later in the day on June 15, 2018.

44) Mr. Rowsell's email says that he witnessed the Plaintiff "*in the garage videotaping the garage door and adding commentary related to our Property Management. It was very derogatory. My spouse and granddaughter were with me, so there was no confrontation*."

45) In the stand, Mr. Rowsell was unable to recount the derogatory words allegedly uttered by the Plaintiff during this event, and the email doesn't provide any further clarification: neither do the lawyer Letters.

46) Even though this passing in the garage created no confrontation, Mr. Rowsell, according to his email, saw the need to call the superintendent, Dan King, to discuss the Plaintiff's *"inappropriate behaviour."*

47) The second event noted in Mr. Rowell's email describes what occurred a little afterwards, in the management office. Apparently, soon after Mr. Rowsell's call with Mr. King, the Plaintiff *"had come to our Property Management office and was being hostile with Nadeem! He even tried to close the office door and confine Nadeem! Dan King was alerted by a resident and he came to the office. Dan began recording the interaction. It did not go well. From what I've been told, Don Merrifield started into an attack towards Dan King accusing him of plotting to murder his son Joel. This situation has been substantiated by Durham Regional Police. They have interviewed Merrifield's for 4 hours and they have exonerated Dan in all ways. The police comments were not flattering to Merrifield's. Our temporary Property Manager, Nadeem was placed in a very uncomfortable position. Apparently Joel* (the Plaintiff's son) *made an appearance in all of this at some point."*

48) Mr. Rowsell was unable to provide any significant supplementary evidence about this event during his testimony. This leaves me with a lot of questions. For example, what does "attack" mean? Mr. King did tell someone that he "*would like to have killed Joel*" as confirmed by Mr. King's own handwritten admission (Exhibit #49), so was it inappropriate for the Plaintiff to remind Mr. King of this during this chance encounter? Remember, the Plaintiff did not seek out Mr. King: the Plaintiff was in the office to speak with Nadeem about a parking spot when Mr. King arrived afterwards. Was the "attack" physical, or was it an attack on Mr. King's character, or a verbal assertion of a fact (ie: you threatened to kill my son)?

49) Nadeem also prepared what is purported to be a contemporaneous "statement of incidence" (Exhibit #48) wherein she says the following about the same incident, on June 15, 2018: "…(the Plaintiff) …. *entered the management office and asked about bicycle rack assignment and when I explained several times as there is no new spot available and it has been allocated and he may use what has been allocated to him. He continued to cause heightened level of agitation by his tone and high elevation of his pitch even though I explained to him any further communication should be in writing through email or concierge plus and simultaneously he showed further aggression in his voice to Superintendent Dan which is not acceptable and witnessed by me and recorded by video*."

50) Nadeem did not testify. I nonetheless find it compelling that she wrote nothing about the Plaintiff confining her, or trying to close the door on her. I do not accept Mr. Rowsell's description to this effect.

51) During cross-examination, the Plaintiff said none of these things occurred. The Plaintiff recalled that he was upset to lose his spot on the bicycle rack and attended the office to speak to Mr. Russel about this. Mr. Russell had just left on holidays, so he had to discuss matters with Nadeem. The Plaintiff said Nadeem wasn't helpful because it seemed to him that she was petrified

to make a call to Mr. Russel to get things cleared up. The Plaintiff denied ever slinging racial epithets towards Nadeem. I accept this because it is consistent with Nadeem's statement about his incident, which was devoid of any reference to the Plaintiff lobbying racial slurs towards her.

52) I draw a negative inference from the Defendants' failure to produce the "recording" made by Mr. King, as mentioned by both Mr. Rowsell and Nadeem: the recording likely failed to support their allegations against the Plaintiff, otherwise it would have been produced.

53) Mr. Rowsell testified that the magnitude of the aggression toward Nadeem between June and July 2018 required them to call the police to protect Nadeem when the Plaintiff and his son came to the office. I don't accept this testimony. Of all the documents tendered, the only reference to police being involved during this time frame comes from Mr. Rowsell's email to the lawyer dated June 18, 2018 which refers to the police interviewing the Plaintiff: but this is clearly not a police intervention at the behest of management.

54) The police interview referred to in Mr. Rowsell's email occurred several days earlier when the Plaintiff reported Mr. King's death threats to the police, and wanted Mr. King charged. Indeed, from Dan King's own handwritten note dated June 14, 2018 (Exhibit #49), Mr. King said: "*On June 13 I received a phone call from the police. The officer informed me that Joel Merrifield was in to see him and that he wanted to charge me. It was … about the problem I had with his brother back in February. I had told his brother back then that I would like to have killed Joel, so he never drove into the garage door and there were no issues*."

55) Mr. King says in his note that the police told him that they would not be charging him. The police undoubtedly came to this conclusion after interviewing the Plaintiff, his son, and Mr. King: likely for a few hours. It is completely understandable why tempers may have flared a little during the Plaintiff's chance encounter with Mr. King in Nadeem's office two days later, on June 15, 2018: and I suspect that they flared in both directions.

56) Critically important, in my view, is that despite this awful circumstance of learning that someone wanted to kill your son, the Plaintiff did not go on some rampage against Mr. King or management. Indeed, on June 15th the Plaintiff simply went to the office to discuss his bicycle spot with Nadeem, and as Nadeem wrote in her statement, the Plaintiff's demeanor turned to "aggression" only after Mr. King arrived: perhaps understandably so. But after both gentlemen let off some steam, there is no evidence that the Plaintiff went on a campaign against Mr. King, management or the Board members.

57) The Defendants tendered a handwritten note (Exhibit #46) from another unit owner, who says that on June 22, 2018 he "*overheard Mr. Don Merrifield in a loud and aggressive manor* (sic) *screaming at the Property Manager*." Recall again that this would be the temporary manager, Nadeem, at this time. The note goes on to state that "*I went into office and asked if Nadeen* (sic) *was okay, then left*." I presume that he left because things were okay and he would have stayed if they were not. The note says that this person stood in the hallway for about 20 minutes, at a time

when the Plaintiff left. Chronologically, this was probably in and around the time that the Plaintiff was trying to deal with the bicycle parking spot that was taken away from him.

58) Screaming at staff is not acceptable behaviour, but in isolation I cannot give this one statement, unaddressed to anyone, and not subject to cross-examination, much, if any, weight. It is not an incident in any statement given by Nadeem, nor reflected in the security guard notes.

July 30, 2018 – Second Registered Letter from Condo Corp Lawyer

59) Although not explained during testimony, I presume the June 15th incident with Nadeem and Mr. King was the genesis for the next Condo Corp lawyer Letter dated July 30, 2018 (Exhibit #9), which outlined the problem as follows:

> "Notwithstanding the clear direction provided in our prior letter that you must immediately cease and desist from engaging in confrontational, aggressive, demeaning and threatening conduct, you continue to engage in such behaviour. Furthermore, you have disregarded the communications guidelines set out in our March 29, 2018 letter and continue to attend at the management office and verbally accost board members.
>
> Your conduct has created a hostile and toxic work. and living environment. Residents and employees have further raised safety concerns.

60) This letter also addresses the Plaintiff's recording in the common areas, as follows:

> We further note that you are not permitted to record/film other owners, residents, invitees, board members, property management personnel, and employees and agents of the Corporation while on the common elements. The Court of Appeal has confirmed that there is a reasonable expectation of privacy on the common elements (see R. v. White, 2015 ONCA 508)."

61) A charge of $2,164.44 was demanded for this letter, with the caution that if unpaid, it "*will be collected via a condominium lien against the unit as per section 85 of the Act*." This same type of caveat was included in each of the Letters that followed.

August and September 2018 – Various Additional Incidents

62) In the August to September 2018 time frame, Mr. Rowsell testified that two further incidents occurred. The Plaintiff had his three-wheeled bike delivered on a Sunday, in violation of the rules. On another occasion, the Plaintiff purportedly got into an argument with a 75-year-old "*garden unit owner*" who was apparently *"freaked out"* by the actions of the Plaintiff and his son.

63) Again, no details were provided of this alleged altercation. Mr. Rowsell testified that both the Sunday delivery violation, and the old lady incident was *"too much."* In addition, the Plaintiff was still apparently filming the garage door in August/September 2018. Rowsell testified that the Plaintiff and his son got into a disagreement with another tenant (who was a police officer), which got heated, but again, no details were provided (ie: what said, who was yelling at who, who instigated it, etc).

October 2018 – Alleged Damage to Model T Trunk Lid by Mr. Russel

64) In early October, 2018, the Plaintiff says he witnessed Mr. Russel rummaging around his Model T, and when he approached the Model T, Mr. Russel scuttered off. When he looked at his car, he said the sheet metal around the trunk was deviated, which he blamed on Mr. Russel.

65) Mr. Russel said that he explained to the Plaintiff that all he did was lift the tarp to see the licence plate, and that he damaged nothing. Mr. Russel testified that he was "confronted" by the Plaintiff, but he gave no testimony describing the "confrontation." I have to assume it was not "over the top aggressive," to use Mr. Russel's earlier description, because if it was anything other than that, I would have expected to have heard such evidence.

66) Again, I do not have to make a finding on whether the trunk lid was damaged, and by whom. I simply must decide whether, during this event, the Plaintiff conducted himself in a manner that breached the Constating Documents and/or the Act.

October 2018 – Stolen Mail

67) Mr. Russel recounted that sometime in October 2018 where there was another "abrasive encounter" with the Plaintiff when the Plaintiff wrongly accused him of tampering with his mail: an assertion that Mr. Russel says was absurd because Canada Post (and not him) had exclusive access to the mail room. Mr. Russell did not share any further details about this incident while in the stand, other than saying that the Plaintiff was upset and accusatory.

October 2018 - Demand for Removal of Trays under the Model T

68) The Plaintiff testified that notwithstanding the use of trays of absorbent material under his Model T for years, Mr. Russel nonetheless saw the need to compel the Plaintiff to remove them, in and around October 2018. By all accounts, the Plaintiff complied without any fanfare.

October 24, 2018 – Non-Renewal of Model T Parking Spot

69) On October 24, 2018, Mr. Russel sent the Plaintiff an email to advise him that the Condo Corp would not be renewing his parking spot: explaining that they wanted to keep that area available for "*other condominium uses like an EV charging station etc*." There was no contract, pending or otherwise, for the installation of an EV charging station at the time.

70) Despite what the Plaintiff perceived as a contrived ancillary attack to have him remove his Model T from the parking lot, he said that he complied, even though it caused him quite some hardship to find an alternative storage spot for his Model T on such short notice, and which forced him to re-winterize the Model T once it arrived at its new location during the winter.

71) When describing this incident, Mr. Russel said that the Plaintiff was not happy, but conceded that the Plaintiff also wasn't angry.

October 2018 – "Threats"

72) According to Mr. Rowsell, in and around October 2018 the Board members were still hearing from other residents complaining about the Plaintiff: again, very little particulars or specifics were provided.

73) Mr. Rowsell said that he heard that on October 8th, 2018 the Plaintiff pulled aside a former Board member and said words to the effect *"the day of reconning will come"* and *"I've got so much on you the day will come."* In addition to this being hearsay, this detail was never enumerated in any of the Letters. Regardless, I don't believe this one short exchange, even if it did occur, is tantamount to harassment. Telling someone, on one occasion in a brief exchange, that you are going to hold them accountable is not harassment in my view.

74) Mr. Rowsell recounted receiving a letter from Dan Harrison (not produced) purportedly relaying an incident where the police had to be called because Mr. Harrison felt threatened. Again, little-to-no specific details were provided by Mr. Rowsell, and no statement from Mr. Harrison was tendered. I am unable to give this much weight, especially when devoid of particulars to help me understand what happened that day (ie: who instigated things, what was said and by whom, etc). If the police were called, I heard no evidence of the Plaintiff being charged, so I assume whatever may have happened, the Plaintiff did not cross-the-line.

October 19, 2018 – Third Registered Letter from Condo Corp Lawyer

75) Mr. Rowsell said that as a consequence of the foregoing, the third lawyer Letter dated October 19, 2018 was delivered (Exhibit #11), which contained a charge of $672.35 and a demand for payment that would be collected through lien enforcement if unpaid. The issue was presented in much the same manner as the prior letter: namely a number of assertions that the Plaintiff failed to adhere to the communication limits placed on him and that he continued to behave aggressively and confrontational. No specifics were provided in relation to dates. Very little specifics were provided about the precise actions or events that purportedly crossed the line (ie: times, things said, the Plaintiff's actions, etc).

October 2018 – Moving Day Altercation

76) The Plaintiff says that when he was helping his son move out of the Condo at the end of October 2018, he was physically attacked by Mr. Rowsell. According to the Plaintiff, this incident occurred when he and his son were waiting for the elevator in order to load more moving boxes, and the doors opened to Mr. Rowsell and one other person in the elevator. The Plaintiff said that Mr. Rowsell went into a rage, began cursing, and then ran his elbow into the Plaintiff's throat which caused the Plaintiff to fall backwards and hit the back of his head on an adjacent wall. This was then followed by Mr. Rowsell lunging at the Plaintiff's son, which caused both gentlemen to trip over some of the boxes. According to the Plaintiff, his son cut his leg during this altercation. The Plaintiff's son was able to take a partial video of this incident, which was made an exhibit (Exhibit #23).

77) The police were called and according to the Plaintiff, they told him that Mr. Rowsell was being charged. The Plaintiff said that he eventually received a letter from the court advising him that Rowsell was convicted of one fine and he had to pay $100 in restitution: a cheque in that amount was included in the Crown's letter (Exhibit #31).

78) Mr. Rowsell denies that he was convicted, but acknowledges that restitution in the form of a cheque for $100 was made to the Plaintiff as a result of this incident.

79) Mr. Russel testified that on this moving day there were some delays that were not the Plaintiff's fault. Mr. Russel testified that the Plaintiff was understandably upset. Mr. Russel did not witness the elevator "incident" between the Plaintiff and Mr. Rowsell.

80) Mr. Rowsell says that as he was going up to his 10th floor unit, the doors opened on the 5th floor, three people got on, and just as the doors were about to close, the Plaintiff stopped the door. Mr. Rowsell explained that despite having been told to stay away from board members, the Plaintiff's son apparently started to push his cart (full of boxes) into the elevator that struck him. Mr. Rowsell concedes that he lost his temper, and pushed the cart back towards the Plaintiff's son. Mr. Rowsell denies any physical altercation with the Plaintiff. Mr. Rowsell says that he paid the consequences for losing his temper at that moment, but he still maintains that he was struck first.

81) I've looked at the short cellphone footage taken by the Plaintiff's son, of this elevator event (Exhibit #23) and it seems clear that Mr. Rowsell was objecting to the Plaintiff and his son entering into the elevator even before the cart was being pushed forward. In other words, this was not a situation where Mr. Rowsell was willing to make some room to let the Plaintiff and his son into the elevator. Mr. Rowsell immediately told the Plaintiff and his son to stay out and he made no attempt to move over: indeed, he appears to be taking a physical stance to block the cart's path even before the cart was pushed forward into the elevator. The Plaintiff's son said words to the effect that they had the right to use the elevator to move out. When the Plaintiff's son started to push the cart forward into the elevator, the yelling escalated, at which point Mr. Rowsell became very physical, and pushed the cart and boxes back very aggressively while lobbying a few expletives, ending with the sentiment "*I've had it…I've had it with you guys…*" The Plaintiff calmly says to Mr. Russel "*you are insane*," to which Mr. Rowsell yells back "*yes I am*."

82) This video certainly does not make the Plaintiff look like the aggressor or harasser. This said, the video also doesn't support the version of events proffered by the Plaintiff either. The Plaintiff says that he was assaulted, his throat struck, etc. None of that comes out from the video. Perhaps I misunderstood the evidence, and there was another incident on moving day not captured on video, but even if that were the case, nothing turns on this since I am not making a finding of assault or battery against Mr. Rowsell.

83) The importance here is that the Plaintiff did not openly seek out an interaction or an altercation with Mr. Rowsell: rather, the Plaintiff and his son were moving (on moving day) and by happenstance ran into Mr. Rowsell. The Plaintiff cannot be condemned for that, in my view. In

addition, the only aggressor was Mr. Rowsell. This circumstance that could have been completely avoided with a modicum of sensibility and patience, in my view, on the part of Mr. Rowsell.

November 28, 2018 – Fourth Registered Letter from Condo Corp Lawyer

84) Presumably because of the elevator incident, the Condo Corp lawyers sent their fourth letter dated November 28, 2018 (Exhibit #16), which contained a charge of $593.35 with a caution that this would be collected through a lien if unpaid.

85) Not unlike the prior Letter, this Letter provided no particulars as to events (dates, words said, actions taken, etc): it contained the generic assertion that the Plaintiff was continuing to breach their communication restrictions, and that he continued to be confrontational and aggressive.

December 2018 / January 2019 - Kicking of the Garage Door Sensor and the Fifth Registered Letter

86) On January 17, 2019, on the eve of the Plaintiff moving out, the Plaintiff received another lawyer Letter (Exhibit #19) alleging that the Plaintiff's son kicked and broke the garage door reflector while walking past the garage door from the outside-in. Unlike the prior letters, this time some details were provided. For example, it states that "*on December 21, 2018 at 9:07 a.m. you and your son were entering …. the parking garage ….* (and) *…. Joel was observed kicking the garage door's reflector*."

87) The Plaintiff says this is all nonsense. The Plaintiff explained that what his son did this day didn't differ from what they, and others, have done for years: namely, stretch out a leg to break the beam to prevent the door from lowering on their heads. The Plaintiff was adamant that his son never kicked the reflector, and he demanded proof of this allegation in the form of CCTV footage.

88) According to the Plaintiff, no matter how many times he asked, Mr. Russel refused to let the Plaintiff see the CCTV video that allegedly captured his son kicking the reflector. This required the Plaintiff to escalate things with the Condo Corp lawyers, who then counselled Mr. Russel to release the video to the Plaintiff. Mr. Russel released an edited version to the Plaintiff, which then required the Plaintiff to further involve the Condo Corp lawyers to eventually obtain a full unedited lengthier version of the video. The issue over the production of the video is, for the most part, borne out in the documentation.

89) This again would prompt the Plaintiff to begin filming and photographing various parts of the garage door, and its operation, to document what he considered poorly maintained garage door equipment.

90) After a careful review of the video that was eventually provided to the Plaintiff (Exhibit #22), I concur with the Plaintiff that the video comes nowhere close to establishing that the Plaintiff's son kicked the reflector, as alleged. Since the January 17, 2019 Letter significantly centered on this allegation, I find that the related chargeback in this letter, of $1,791.05, was wholly unjustified.

February 25, 2019 –The Last In-Person Payment of Condo Fee – the "Replacement Cheque"

91) On February 25, 2019 the Plaintiff attended at the management office to provide a replacement cheque for his condo fees: the initial one having been lost by Mr. Russel (by his own admission). This event was recorded by the Plaintiff (Exhibit #39). Nothing untoward happened during this exchange, in my view, beyond Mr. Russel being agitated that it was being recorded by the Plaintiff, and perhaps one incident where Mr. Russel physically inserts the receipt into the Plaintiff's front coat pocket instead of handing it to the Plaintiff.

Various Dates – Filming

92) The Plaintiff does not deny that after the Model T Garage Door Incident, he began recording the garage door to document how the damage was caused by its failure. He would need that proof for his Small Claims court case.

93) The Plaintiff testified that by the time of the November 27, 2018 Letter, he said that he was beginning to be treated badly by the staff – they were lunging out of doors at him, and making funny faces at him, etc. He testified that "once I got my video camera out, then it stopped." The Plaintiff testified that the police officer told him that he was well within his rights to record anyone that was showing aggression towards him.

94) Mr. Russel testified that he never saw the Plaintiff filming in person, but it was something that other people had brought to his attention. He said that after looking at CCTV footage, he found roughly three (3) separate examples of the Plaintiff filming, but he provided little-to-no details about what he observed. Mr. Russel recalled that perhaps 10-12 owners had approached him about this, and asking if the Plaintiff was allowed to do this because they didn't like it. His advice to them was to leave the matter with him, and to not confront the Plaintiff about it.

95) Mr. Rowsell said that in the summer of 2018 the Plaintiff would deliberately take a chair and sit in the BBQ patio area to bother people, including one time taking a seat near Mr. King and his wife at the fire pit, after which he started recording them. In June/July 2018, Mr. Rowsell recounts that several Board members were out at the garage door with a garage door repair company, to assess the safeguards that would prevent the door from falling, only to be videotaped by the Plaintiff. Mr. Rowsell said that this *"was very problematic"* and further explained that this was a volunteer job such that it was offensive to have the Plaintiff filming them from different angles, including continuing to film them as the Plaintiff drove off. I believe that much of this was likely the byproduct of the lawsuit that was started after the Model T Garage Door Incident, and the death threat Mr. King made against his son which was purportedly left unaddressed and unenforced by the Condo Corp as a breach of their harassment policies.

96) On December 25, 2018 Mr. Russel sent an email to the Condo Corp lawyers, documenting what the Plaintiff was doing (Exhibit #50). This email reads:

"Mr. Donald Merrifield has continued to use his phone to record people in the common

> elements of the building. More specifically it has been reported that: 1. people refuse to get on the elevator because he's recording them and they are uncomfortable in his presence. Others have got off when he gets on for fear of the same abuse. 2. Looking into and recording the workmen in a private ground level residence for several minutes, and up on the rooftop while some contractors were completing work for the condo for an extended period of time. 3. giving the evil eye to residents in the hallway has occurred numerous times.
>
> ….
>
> Donald also came into my office to present his latest missive denying everything in your last letter of November 27th. He could have mailed, or couriered, or given the letters to Security and had no contact with me. I felt uncomfortable having him in my office as I am unsure of what he is going to do or not do to me.
>
> A further letter is required re the harassment and toxic environment he is perpetuating in this building with the Residents, the Board and Management. We do not see any other way to try to get this matter addressed except to continually provide letters from you to him about his behaviour. While there is only 2.5 months till he's gone, the residents, the board and I have no doubt that his behaviour will continue to ramp up.
>
> Please draft a 5th letter re harassment and toxic environment he is creating, and respond to his latest 6 page denial. We have CCTV footage on a flash drive proving the behaviour for both the last, and this required letter, so we have evidence in spite of his claims to the contrary.
>
> I look forward to seeing your draft responding to both of these issues, the larger fee related to the letter, and the firmer language that hopefully can be employed in regards to Mr. Donald Merrifield's ongoing behaviour.
>
> We will be beginning the Lien process on Monday December 10th as your last letters specified payment to be received on the 10th. I do not expect to get any payment from him."

97) The 2nd last paragraph of this email is troubling to me because it appears to me that Mr. Russel is looking to see "*a larger fee*" for the next lawyer letter – that is rather vindictive in my view. The Defendants were careful throughout the trial to distance themselves from any notion that they were "*fining*" the Plaintiff, which in theory is true because they only sought a chargeback of the lawyer fees; however, when you assess the tenor of this email it comes across as a desire to fine penalize, and sanction the Plaintiff, in my view.

98) I don't put a lot of stock in the contents of the December 25, 2018 email. It is all just nebulous, in my view. The term "people," for example: is it one, two, ten, twenty, a hundred? Is it the same "cabal" of people (ie: Mr. Russel and his close net of friends?). I would have been far more impressed if there were references to such disturbances recorded in the notes of several security guards. Kiteley J., for example, completely discounted the references to "other owners" in supporting affidavits relied upon by the condominium defendants on the grounds that it was nothing more than hearsay (*York Condominium Corp. No. 60 v. Brown*, 2001 CanLII 3938 (ON SC) ("**Brown**") at paragraph 34). Even though I can certainly rely on hearsay evidence, the term "people" is too nebulous to warrant much if any weight.

99) Mr. Russell conceded during his testimony that nothing happened when the Plaintiff dropped off his response: the Plaintiff just dropped his responding letter on his desk and left.

100) During his evidence in chief, Mr. Russel said he never, in person, saw the Plaintiff filming. How pervasive could the "problem" have been if Mr. Russel, the property manager, never personally saw it? Mr. Russel said during his testimony that ten-to-twelve owners asked if the Plaintiff was allowed to film as they didn't like it. Again, this falls very short of the mark to persuade me on a balance of probabilities that the Plaintiff conduct was harassment or a nuisance.

101) Recording workmen for a few minutes? What is the offensive angle to that? Giving the "evil eye:" are we attempting to control facial gestures, and if so, how do we define what an "evil eye" is so we know when an occupant or visitor has crossed the line?

Security Logs

102) The Defendants produced some logs from their security personnel (Paragon Security), and these notes were not, in my view, very supportive of the Defendants' position.

103) In a report dated March 18, 2018 (page 1 of Exhibit #43), there is a notation at 6:05 p.m. that the Plaintiff came to report a pickup truck in the visitor parking that was blocking a large part of the sidewalk, and that he bumped his leg into it. According to the note, the security guard proceeded to tell the Plaintiff that he was not supposed to speak with them directly, at which point the Plaintiff "*became enraged*" and during the discussion he used the word "*totalitarian*" and "*bastard*" to describe the property manager. The note says that the Plaintiff "*threatened to sue them (unknown who), claiming 'a lot of people who live here have had enough' (unknown what)*." There is no further description of the Plaintiff's conduct.

104) Context is important. This March 18, 2018 encounter with the security guard is, by all accounts, the first time the Plaintiff is being told to his face that he is not free to speak with the security personnel, which would be infuriating. Indeed, the Plaintiff had yet to receive the first Letter (forbidding him to speak with staff) dated March 29, 2018. If the only byproduct of this was a short exchange, in circumstances where the Plaintiff should be given some leeway to vent, I don't consider this to be harassment. Had the Plaintiff gone on a rampage thereafter, that would be a different story. Telling a security guard that he was going to sue them (with the security guard scratching his head as to who), is not, in my view, harassment.

105) During cross examination, the Plaintiff was steadfast in his position that the allegations in the first Letter were unfounded: he had no recollection of yelling at security guards, or harassing anyone. He admitted that he called Mr. Russel a "*bastard*" in private discussions with others, but has no recollection of saying such words to his face, or to any of the security guards. The Plaintiff denied calling Mr. Russel a "*totalitarian*," but he said this would be accurate based on the way Mr. Russel treated him.

106) The Defendants tendered a note from a security guard dated "June 2018" with a time stamp

of 5:00 p.m. (Exhibit #47). It doesn't deal with the Plaintiff, but rather his son, whose is described as having a "*heightened level of agitation*" when discussing the bicycle rack assignment for his father.

107) A security guard note dated April 7, 2018 (which came after the first lawyer Letter), and at 9:45 p.m., states that the Plaintiff entered the lobby with his teenaged grandson, "*and said he needed to speak with me. I told him, 'be right with you'. He could observe that I was engaged in a tasking* (sic) *(extinguishing a smoldering ash can at Lobby entrance). When I turned my attention to him, Donald admonished me for not explaining what I was doing*." The balance of the note describes the Plaintiff reporting details about two suspicious males near the 7th floor elevators (dressed in outside attire, holding flash lights, speaking in hushed tones), which prompted the guard to conduct a floor sweep.

108) This note falls very short of establishing misbehavior on the part of the Plaintiff. Indeed, the note indicates that the Plaintiff explained that he knew this exchange with the security guard might get him in trouble, but he "*did not care*." I commend the Plaintiff for doing so. The safety of all the condo occupants was potentially at stake, and it was most appropriate to deal with it this way than expecting the Plaintiff to fumble with his phone on hope that he could get through or to write a letter to security: it needed to be addressed immediately, while the threat was imminent. Indeed, the security guard ends his note by stating that he "*thanked Donald for the information*" before conducting a sweep of the building. This does not convince me that the Plaintiff was a menace, as made out by the Defendants.

The Plaintiff's Position re: His Conduct in General

109) The Plaintiff testified that notwithstanding the lack of specifics as to dates, times, events, circumstances and corroborating material in all of the subject lawyer Letters (save and except for the last one), all of the harassment allegations in the first lawyer Letter, and either repeated or adopted thereafter, were false. He said that the threat in the initial Letter to the effect that he was facing up to $50,000, or more, in costs nearly caused him to fall on the floor: explaining that it was all too much for someone with a heart condition, lung problems, a brain injury and physical disabilities.

110) The Plaintiff testified that he is a peaceful person, and that he did not act in the manner alleged in the Letters.

111) Although there were a few times I felt that the Plaintiff was embellishing some circumstances, I generally felt that the Plaintiff was honest and forthcoming throughout.

Mr. Russel's Testimony re: The Plaintiff's Conduct in General

112) Mr. Russel testified that the "threat levels" emanating from the Plaintiff's conduct would change depending on the circumstances. He went on to explain that it was difficult to manage the Plaintiff because it was difficult to predict how he would react. Mr. Russel testified that many unit

owners would come to complain that they were afraid of the Plaintiff, they were scared of what he would do, and that they were going out of their way to distance themselves from the Plaintiff.

113) Again, I heard no details about the alleged "threats." I heard that the Plaintiff was angry, upset, and perhaps accusatory, at times, but never that he overtly threatened anyone, or that he relentlessly got into everyone's business on a routine basis.

114) When asked specifically whether he feared for his safety, Mr. Russel said "on occasion," but he really could only specifically recall the one time he called the police. He proceeded to say that he normally just accepted the Plaintiff, recognizing that he didn't have to like the way the Plaintiff talked down to him, or yelled at him, because in the end it is his obligation to listen to the Plaintiff because he is a unit owner.

115) Mr. Russel denied ever pushing the Plaintiff. He admits that he may have swore at the Plaintiff, musing in the witness box that "*Mr. Merrifield can wear on you*."

Mr. Rowsell's Testimony re: the Plaintiff's Conduct in General

116) It was hard to reconcile the evidence of Mr. Russel with that of Mr. Rowsell. Mr. Russel in his role of property manager really didn't see much of anything, and for the most part just coped with the Plaintiff's issues when they arose, from time-to-time. Mr. Rowsell, on the other hand, portrayed the situation to be much more dire. The friction was certainly palpable in the video taken of the elevator incident: but as I commented previously, the agitator was Mr. Rowsell in my view.

117) Mr. Rowsell was upset at just about everything the Plaintiff did: for example, he was mad at the Plaintiff when he reported the Condo Corp. to the gas company for not having a gas line painted yellow, instead of reporting it to them; he was mad that the Plaintiff had his three-wheeled bike delivered on a Sunday; he was mad that the Plaintiff wanted to use the elevator for moving on moving-day, etc. Much of this is petty, in my view.

118) Mr. Rowsell testified that he felt that the Plaintiff was not following the Letters, and indeed completely ignoring them: according to Mr. Rowsell, "*it was getting out of hand*." Mr. Rowsell testified that notwithstanding the introduction of a chargeback, and the threats of lien, nothing changed.

General Observations

119) In the Defendant's closing submissions, the Defendants describe an altercation between the Plaintiff and Mr. Russel on January 25th, 2019, shortly before the Plaintiff moved out, as one where the Plaintiff *"verbally harassed and intimidated Mr. Russel."* I have reviewed the entire video of this event (Exhibit #39), and I fail to see this as an overtly harassing and intimidating series of events. If this is how the Defendants assess and describe what, in my view, comes across as a rather benign exchange, then it becomes excessively difficult for me to accept the Defendants' assertions about the Plaintiff's conduct as a whole.

120) Indeed, the only time things escalated during this January 26 h 2019 meeting, as seen in the video, is when Mr. Russel took issue with the Plaintiff recording the event. It is noteworthy that no one else was present, Mr. Russel was in an area with a security camera literally above his head, and there was no legitimate reason, in my opinion, for Mr. Russel to get agitated because the Plaintiff was recording the event. Indeed, the Plaintiff had a good reason to do so because he wanted to ensure that his "cheque" didn't mysteriously go missing again, and the video would be his proof that his "replacement" cheque was indeed given to management. Mr. Russel admitted that he lost the Plaintiff's first cheque: I would figure the recording would be welcomed by Mr. Russel, in this circumstance.

121) There was no overtly colourful or threatening language or gestures used by the Plaintiff. The Plaintiff obviously had trust issues, and perhaps understandably so: this led him to want things to be done by-the-book so to speak, and this perhaps agitated Mr. Russel, but with a modicum of good nature and people-management skills, there was nothing about this exchange, in my view, that could not have ended in a handshake, if there was a will on the part of Mr. Russel.

122) If anything, Mr. Russel was the aggressor during this exchange, when he stuffed the receipt into the Plaintiff's coat pocket rather than handing it to him. If this is how Mr. Russel presents when he knows he is being videotaped, I can't imagine how he would conduct himself when he felt he was in private.

123) It is noteworthy that at one point during the trial the Plaintiff, despite his big frame and rugged appearance, broke down and cried in the stand, ruminating that "*those guys ruined my life*." He would later testify that he sold his unit to get away from them. I believe these sentiments were heartfelt, and not contrived.

Analysis - Did the Plaintiff's Behaviour Constitute a Breach of the Act, and/or the Constating Documents?

The Governing Provisions

124) Section 117 of the *Condominium Act*, 1998, S.O. 1998, c. 19 (herein the "**Act**") prohibits any person from permitting a condition to exist or carrying on an activity "if the condition or activity is likely to damage the property or cause injury to an individual," with "injury" not only being physical in nature, but potentially psychological as well (*Metropolitan Toronto Condominium Corporation No. 747 v. Korolekh,* 2010 ONSC 4448, at paragraph 71).

125) Based on Rules A.1, A.5 and A.6 within the Constating Documents, germane to the present case is:

a) the prohibition in Rules A.1 and A.5 against noise, nuisance, harassment, threats, annoyance, defamation, hateful speech, illegal activity and/or harmful conduct; and

b) the prohibition in Rule A.6 against hindering or impeding the Board of Directors or the

Property Manager from carrying out the Corporation's duties and obligations.

The Burden of Proof

126) The burden of proof is on the Condo Corp to establish that the Plaintiff's conduct contravened the Act or the Constating Documents (Brown, *supra*, at para 15; Metropolitan Toronto Condominium Corporation No. 747 v. Korolekh, 2010 ONSC 4448, at para 75).

The Prohibition Against "Injury" in the Act

127) Although I accept that the Defendants didn't like the Plaintiff, and felt perhaps uncomfortable when he engaged with them from time-to-time, I don't find the Plaintiff's conduct, even as described by the Defendants during trial, to be of the kind and nature that would cause or potentially cause physical or psychological injury as set out in section 117 of the Act.

128) I would say that the psychological harm, if any, was transient and trifling, at best, and insufficient to ground an infringement under section 117 of the Act, based on the evidence presented at trial.

The prohibition in Rules A.1 and A.5 against noise, nuisance, harassment, threats, annoyance, defamation, hateful speech, illegal activity and/or harmful conduct

129) Based on the evidence before me, I am not satisfied, on a balance of probabilities, that the Defendants have demonstrated that the Plaintiff conducted himself in a manner that triggers recourse under any of the Rules.

Threats, illegal activities, harmful conduct

130) Based on the evidence, I am convinced that the Plaintiff did not injure anyone, threaten anyone, or participated in any illegal activities, or conducted himself in a manner that caused harm to anyone.

131) I don't believe Mr. Russel when he says he felt threatened by an eighty (80) year old man with disabilities. I accept that things may have become uncomfortable, but that is a far cry from feeling threatened. I heard little-to-no details about what the threatening gestures or actions were, aside from the Plaintiff speaking close to his face, on the one occasion when police were called, and no charges laid. I saw on two videos how the personal Defendants handled themselves, and in neither case did they look scared of the Plaintiff, and in both cases the Defendants were the aggressors.

Nuisance

132) I am not satisfied that the Plaintiff's conduct created a nuisance, which is a degree of interference that is substantial and unreasonable. As was held in *Carleton Corporation No. 132 v. Evans*, 2022 ONCAT 97, at paragraph 20, to which I agree, a "trivial" interference, as the case before me, will not suffice to support a breach of the rules grounded in nuisance.

Defamation and Hateful Speech

133) I am not at all convinced that the Plaintiff lobbed racial slurs towards Nadeem as referenced by Mr. Rowsell in his email dated June 15, 2018 to the Condo Corp lawyers, and repeated in the stand. First, Mr. Rowsell was not present, and as such, it was just hearsay. Second, the Plaintiff denied such, and I tend to view the Plaintiff as an individual who would not go down that path. Third, and perhaps most influential to my conclusion, is that Nadeem herself, in her own typed statement, does not mention one word about the Plaintiff uttering racial slurs, epithets or hateful speech towards her, and neither does the security guard notes, all of which is contrary to assertions put forth by the Defendants. I also note that the "recording" made by Mr. King, as referred to by both Mr. Rowsell and Nadeem in their email/statement of the event, was not produced, leading me to draw a negative inference that it was not helpful nor supportive of the Defendants' position.

Annoy

134) The rule says that "no one shall harass or annoy" others, and Rule A.5 specifically requires the assessment to be done on an objective basis, which I would have concluded in any event even without that provision because it would be inequitable for anyone to lose their rights or to be penalized solely on the basis of someone's subjective response.

135) I would think the term "annoy" is reserved for things like loud music, or uncontained smoking fumes, etc, consistent with how annoyances are described in section 26 of Ontario Regulation 48/01. However, even if the term "annoy" has broader application, I believe that the correct test requires the degree of annoyance to be at a level that would significantly interfere with a person's daily activities, intermittently or otherwise, assessed objectively. I heard no evidence that the Plaintiff's conduct interfered at this level.

136) I heard nothing to suggest that it was anything but business as usual for the most part: it was perhaps an unpleasant few minutes, every once in a while. There were no day-to-day issues with the Plaintiff.

Harass

137) The term "harass" must be assessed on an objective standard, as codified in Rule A.5, or otherwise. Again, I did not hear enough evidence to convince me, on a balance of probabilities, that the Plaintiff was harassing others. Based on the evidence, I am fully convinced that the Plaintiff was not trying to get anyone fired, or to humiliate them, hinder their work, or to antagonize them, etc. For the most part, the Plaintiff just wanted answers, to what I consider some legitimate questions: details about what he purportedly did wrong, and what proof they had of his alleged misconduct, or to talk about his bicycle spot or parking space, or to alert them of dangers, or to move out, etc.

138) The June 15, 2018 incident in the manager's office, as codified in the June 18, 2018 email from Mr. Rowsell to the Condo Corp lawyer (Exhibit #45) and Nadeem's written statement (Exhibit #48), still falls very short of convincing me that the Plaintiff was harassing anyone. First, it is clear

that the Plaintiff was attending to address his bicycle parking spot assignment: that is a legitimate purpose, and is not a visit to harass or antagonize anyone. Second, as I explained earlier, there was very little evidence given to help me understand the nature of the Plaintiff's alleged "attack" as referenced in Mr. Rowsell's email.

139) In many of the alleged incidents, the Plaintiff did not start the problem. For example, the moving day incident was not started by the Plaintiff – he did not seek out Mr. Rowsell to harass him. The Plaintiff didn't seek out Mr. King even after the Plaintiff learned that Mr. King uttered death threats against the Plaintiff's son. If that does not show you the caliber of the Plaintiff's demeanour, I don't know what would.

140) The cases relied on by the Defendants are not remotely similar to the facts before me. *York Condominium Corporation No. 444 v. Ryan*, 2023 ONCAT 81 dealt with a unit owner who repeatedly shouted at a neighbouring smoker, often with profanity (such as calling her trailer trash, idiot, stupid, stupid bitch, and disgusting). This apparently occurred at least sixty-two (62) times, with the offending unit owner affixing notices on the smoker's door and going on email campaigns that often chastised the manager and supervisor with further derogatory comments.

141) The case of *Toronto Standard Condominium Corp. No. 2395 v. Wong*, 2016 ONSC 8000, had a unit owner uttering death threats and exhibiting strange behaviour, such as rearranging furniture in the lobby and sleeping on the lobby couch with a table on top of her, leading to a request to have her undergo a court ordered psychological medical examination (which was denied by the court).

Filming

142) If the Condo Corp is relying on a breach of a rule, the rule must squarely address the impugned conduct (Brown, *supra*). Rule B.6 within the Constating Documents is the closest rule that touches on recordings in the common elements, but it was not contravened by the Plaintiff. Rule B.6 reads as follows:

> "The filming of any motion picture for commercial purposes in any residential unit or on the common elements is prohibited except when authorized by the prior written consent of the Board of Directors."

143) A few of the Letters cite the case of *R. v. White*, 2015 ONCA 508, in support of the Defendants' position that it was impermissible for the Plaintiff to record in the common areas because the *"Court of Appeal has confirmed that there is a reasonable expectation of privacy on the common elements."* This appellate case is of little direct application to the present case because the ruling held that residents of a small residential condominium building had a reasonable expectation that police would not trespass into the common areas of the building (stairwells, hallways) and listen through poorly insulated walls to people conversing in their apartments.

144) Perhaps a change will be made to the Rules in the future; however, it is quite possible that many unit owners would want the freedom to film in common areas as a means to protect

themselves. I simply cannot assume that every owner finds it offensive, or wishes to forever prevent themselves from recording things in the public space for the purpose of protecting their interests.

145) In the right circumstances, however, aggressive filming, even if permitted in the common areas, could elevate to become harassment, so condo unit owners should not believe that they have free reign to film for indiscriminate reasons. However, in the case before me I am satisfied that the Plaintiff was, for the most part, filming things for a purpose: in most cases to document what he perceived to be problems (ie: the garage door operation, etc), or to protect himself when interacting with management. Indeed, there is not one complaint in the security guard notes about the Plaintiff videotaping or recording (Exhibit #43). It suggests to me that it was rather isolated, and not to the point of qualifying as harassment.

146) Mr. Russel conceded during cross examination that based on what he observed on CCTV footage, the Plaintiff was simply filming different aspects of the garage door functionality (ie: the sensors, the brakes, etc). This does not sound egregious to me, given the circumstances.

147) I am mindful that Mr. Rowsell said that the Plaintiff did film some people (ie: Mr. King) in the BBQ patio area, but again, this was not portrayed as a routine thing that the Plaintiff did, and this did come off-the-heals of the death threat to his son, which was left unaddressed by the Condo Corp.

148) The fact that Mr. Russel conceded that he never personally encountered the Plaintiff filming goes a long way towards convincing me that the Plaintiff's videotaping was not as pervasive and problematic as the Defendants attempt to portray.

149) Absent a specific rule banning the filming in common areas, and absent some egregious videotaping, the Plaintiff, in my view, should not have been subject to any reprimand for recording in the manner that he did.

150) The only clear "violation" was that the Plaintiff did continue to engage with staff from time-to-time, after the lawyer Letters forbade him from having direct contact with staff and Board members. However, I find that the Condo Corp did not have the right to impose those restrictions on the Plaintiff because they failed to convince me on a balance of probabilities that the Plaintiff conducted himself in a manner that was in breach of the Constating Documents or the Act.

The prohibition in Rule 6 against hindering or impeding the Board of Directors or the Property Manager from carrying out the Corporation's duties and obligations

151) Mr. Russel, the property manager, admitted that even after the Letters were sent, the Plaintiff didn't come into the office often – just when he had an issue. Again, this does not sound like hindering or impeding (or harassing) behaviour to me. Indeed, Mr. Russel went further and conceded, by way of example, that he didn't feel threatened when the Plaintiff came into his office in response to the December 5, 2018 Letter because all the Plaintiff did was come into his office

and then immediately leave after placing his six (6) page responding letter on Mr. Russel's desk.

152) Based on Mr. Russel's evidence, I cannot conclude that the Plaintiff was a menace to the operations as alleged. The Plaintiff may have been a handful, but I found the Plaintiff to be a very principled man, who legitimately had concerns that were being ignored, and the Condo Corp did little to placate matters: indeed, they did the opposite (ie: they took away the Plaintiff's bicycle spot followed by his parking spot, they told the Plaintiff he could not talk to them or staff, etc).

153) I accept that the Plaintiff was "agitated" during the June 15th 2018 meeting in the manager's office (with Nadeem), but there is nothing in the Constating Documents that prevent people from being agitated. By all accounts, when this June 15, 2018 discussion was over, it did not carry over into ensuing days: essentially, the Plaintiff let off some steam when he brought to Mr. King's attention, rightfully so in my opinion, that the threat on his son's life did not sit well with him, and after saying his peace, the Plaintiff moved on, without going on some campaign of retribution that would hinder or impede the operations of the Condo Corp. It is important, as well, to remember that the Plaintiff did not seek out Mr. King on this day: Mr. King came into the office after the Plaintiff initially entered the manager's office to speak to management about his bicycle spot.

154) In conclusion, the Defendants have failed to satisfy me, on a balance of probabilities, that the Plaintiff's conduct breached Rule A.6.

Analysis - Were the chargebacks associated with the Letters lawful?

155) The Defendants assert that the chargebacks enforceable by lien were valid by virtue of two indemnity provisions in the Declaration (Articles 2.2 and 6.1) and pursuant to the preamble in the Rules that reads:

> "Any losses, costs, damages (including legal fees) incurred by the Corporation by reason of a breach of any of the Rules in force from time to time, by any Owner, or by his/her family and/or household, and/or tenants and./or their family and household members and/or guests, invitees and licensees, shall be borne and paid for by such Owner and may be recovered by the Corporation against such Owner in the same manner as common expenses or by other legal means as may be appropriate."

156) Based on my conclusion that the Defendant's failed to convince me, on a balance of probabilities, that the Plaintiff's actions violated the Act and/or the Constating Documents, the indemnity/collection provisions are a moot point. However, even if I were to find that the Plaintiff was in breach of the Act or Constating Documents, I find that the chargebacks were unlawful in the manner in which they were carried out by the Condo Corp.

157) I disagree with the Defendants' assertion that the indemnity provisions in the Declaration allow the solicitor fees to be claimable as a common expense recoverable by way of lien under section 85 of the Act. Legal fees incurred to enforce compliance with the Act or the Constating Documents are not recoverable through a lien absent a court order as required by section 134(5) of the Act: *Amlani v York Condominium Corporation No. 473*, 2020 ONSC 5090 (Div. Crt.)

("**Amlani**").

158) The Condo Corp argues that Amlani is inapplicable to the present case because:

a) the governance in Amlani required the parties to engage in a mediation type process, whereas no such requirement exists in the governance for the subject condo. Therefore, unlike in Amlani, there was no breach of the condo governance by the Condo Corp;

b) the contravention in Amlani only impacted the interior use of the owner's unit (smoking), and not in any common element, which the court held was required in order to trigger section 85 of the Act. Therefore, unlike in Amlani, they argue that the Plaintiff's harassment took place in the common elements, and hence, the legal costs are enforceable; and

c) the indemnity provision in Amlani was restricted to the collection of common area property damage costs, which is not the case before me where the indemnity provision allows for all legal costs incurred to enforce compliance of the Constating Documents to be claimed as common expenses and collectable through a lien under section 85 of the Act.

159) The Condo Corp did not squarely address section 134(5) of the Act, but I presume the Condo Corp would argue that section 134(5) is simply one way to enforce compliance related legal expenses through a lien, and that section 134(5) does not usurp a properly worded indemnity provision which represents another means upon which to enforce compliance expenses through a lien.

160) I reject all of these arguments.

161) The *ratio* in Amlani is not, in my view, dependent on whether the parties were bound to a mediation type process. It was just one example in that case where the condominium corporation breached its own governance, but even if they hadn't, the result in Amlani would have been the same: grounded in the illegality of pursuing a lien to recover enforcement related legal fees absent a court order.

162) I am not convinced that the alleged harassment in the open areas of the condominium is tantamount to damage to the common elements as envisioned in the Constating Documents and/or the Act. The Divisional Court in Amlani noted, after reviewing the definitions in the Act, that "*an act to or with respect to common elements …. is a reference to the physical component of the common elements*." Given the case in Amlani was about smoking and second-hand smoke nuisance, the appellate court concluded that there was "*no allegation of harm or damage to the land or building*." Similarly, in my view, the Plaintiff's alleged confrontational or harassing conduct is not something that was creating damage to the land or building: as such, it takes this matter outside the bounds of a common element expense, in my view.

163) I do not accept the proposition that the wording of the Constating Documents can alter the application of Amlani. I believe this issue was squarely addressed by the Ontario Court of Appeal in *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc*., 2005 CanLII 13778 (ON CA) ("**Metropolitan**"), where it was concluded that a lien available to the condo corporation is a creature of statue under section 85(1), and a failure to meet the indemnification obligation in a declaration requiring unit owners to indemnify the condo corporation for "any costs" incurred to enforce condominium rules breaches does not constitute a default on an obligation to pay common expenses that triggers an automatic lien under section 85(1) (para 30 to 32 of Metropolitan).

164) Metropolitan is also helpful because it provides a brief historical review of the legislation governing condominiums which highlights how predecessor legislation had no section addressing a condominium corporation's ability to enforce and recover compliance expenses (such as legal fees), which was a problem that was raised during a consultative process, and presumably was addressed through the inaugural introduction of the wording found in section 134 of the Act, which the appellate court said "*went some way towards addressing the concerns*" that innocent condo unit owners would be bearing the costs associated with compliance efforts that the condo corporations were duty-bound to pursue.

165) The fact that the government had to be lobbied to introduce a provision like section 134 of the Act undermines the argument that the problem could have been (and has been) cured through "deft" drafting of constating documents: an argument also rejected in *York Condominium Corporation No. 50 v. Overholt*, 2023 ONCAT 123.

166) It is rather dystopian, in my view, that over the course of a few decades there has been a shift from having absolutely no legislative provision to recover compliance related legal expenses, to a modern-day view that condo corporations have the right to charge back every compliance related expense, fully enforceable through a lien on the owner's unit, with no hearing: this degree of development has certainly not been borne out in the legislative changes up to now, in my view.

167) I agree with the following pronouncement made by the application judge in Amlani, fully endorsed and approved by the Divisional Court (at paragraph 14):

> "It is one thing to allow the corporation to enforce, by way of lien, common expenses that are applicable to all unit holders and that a majority of unitholders have approved. It is entirely another to allow a condominium corporation the unfettered, unilateral right to impose whatever costs it wants on a unitholder, refer to them as common expenses and thereby acquire the right to sell the unitholder's apartment."

168) If the Constating Documents permit, as the case here, a condominium corporation can *chargeback* legal expenses against the offending unit owner, but they cannot enforce those chargebacks through a lien unless and until a court has determined that those enforcement chargebacks are appropriate, and worthy of collection through a lien on the offending owner's unit. It gives the unit owner their "day in court" to challenge these charges, which if enforced through a lien, could have a devasting impact on the unit owner.

169) The unit owner is incentivized to pay the charges if upon reflection they are worried that their conduct crossed the line, because there is a plethora of cases demonstrating that an unsuccessful challenge can cost a recalcitrant unit owner tens, if not hundreds, of thousands of dollars when the dust settles. But conversely, condominium corporation should also be incentivized to act very diligently, because if they are wrong, they will not be able to collect the charges against the offending unit owner through a lien, and the court may impose oppression type remedies against them, all of which may lead to backlash from the other unit owners who will have to jointly fund the entire exercise. The system works best when both parties face risk, which incentivizes everyone to act fairly and responsibly: the byproduct of which often leads to good decision making.

170) In my view the Defendants are not saved by the fact that no lien enforcement steps were actually taken on the Unit. This only occurred because the Defendants tricked the Plaintiff into paying under protest, thereby shifting the burden to get the matter before the court onto the Plaintiff instead keeping it on the Condo Corp where it belonged. In my view, it was incumbent on the Condo Corp to outline the proper process in their notice Letters: in this case notifying the Plaintiff that they could/would be bringing a court application to enforce the chargeback through a lien. Had they done so, there would be no need for the Plaintiff to make payments under-protest in order to protect his asset.

Analysis - Did the Condo Corp act reasonably vis-à-vis the Plaintiff?

171) Subsection 17(3) of the Act obligates the Condo Corp to take "*reasonable steps*" when discharging its duty to ensure that all stakeholders comply with the Act, the Declaration, the By-Laws and the Rules.

172) The Defendants assert that they took reasonable steps. This, however, is an unsustainable position, in my view, because attempts, as here, to obtain full indemnity for legal costs or other charges absent a court order is inherently unreasonable (*Peel Standard Condominium Corp. No. 779 v Rahman*, 2023 ONSC 3758 (CanLII), at paragraph 36; *Amlani v. York Condominium Corporation No. 473*, 2020 ONSC 194 (CanLII), at paragraph 46).

173) I disagree with the Defendants assertion that they took reasonable steps when they started the entire process by first sending "*a letter or letters from management*." First, these management letter(s) were not produced. Second, even in their closing submissions the Defendants were unable to commit to whether management sent a "letter" or "letters" before turning things over to their lawyers: they don't know themselves.

174) But management letters aside, "*reasonable steps*" should, in my view, include some of the following elements, most of which was done poorly, if done at all:

a) good record keeping;

b) a modicum of an investigation;

c) meaningful disclosure (subject to privacy rights);

d) attempts at de-escalation;

e) consideration of mediation type processes (if not mandated by the Constating Documents);

f) escalating management notice letters before advancing to lawyer letters, with continuing duties to incorporate the items above throughout the exchange of letters; and

g) lawful enforcement through the courts.

175) The Condo Corp asserts that their first lawyer Letter (sent March 29, 2018) was reasonable. I disagree.

176) Sending the identical first lawyer Letter to the Plaintiff and his son not a reasonable step. It is not possible that both the father and the son acted in the exact same manner to warrant the exact same allegations of misconduct. Indeed, the first lawyer Letter was purportedly sent because the Plaintiff interrupted a Board meeting: there was no evidence that the son did this as well, so why the exact same description of misbehaviour in both letters?

Poor De-escalation Efforts

177) The Defendants failed to convince me that they made efforts at de-escalation before moving matters on to their lawyers: indeed, I consider the Defendants to have taken steps to escalate discord, by:

a) Systematically taking privileges away from the Plaintiff that prior management had no difficulty in accepting or promoting (ie: demand for removal of the trays under the Model T, denial of bicycle spot, non renewal of the Plaintiff's parking spot when there was no immediate urgency to do so, etc);

b) Taking no steps to deal with Mr. King when it came to be known that he breached the Constating Documents by uttering words to the effect that he would have liked to have killed the Plaintiff's son (Exhibit #49);

c) Taking no steps to hold Mr. King in contempt of the rules for videotaping the June 15, 2018 event in the manager's office, if the Defendants' truly believed videotaping was forbidden;

d) Taking no steps to hold Mr. Rowsell in contempt of the rules for physically and verbally attacking the Plaintiff and his son (ie: the elevator incident);

e) Sending out Letters with little-to-no specific details as to dates, times, actions, words, corroboration, etc, and then ignoring subsequent pleas for details; and

f) Making no attempts to have a meeting with the Plaintiff before escalating matters to lawyer Letters.

178) Many of the things noted above gives rise to a concern that the Defendants might not have been compliant with section 37 of the Act which requires every director and every officer of the Condo Corp to act honestly and in good faith when exercising their powers and discharging their duties.

179) Mr. Russel testified that after the Model T Garage Door Incident, it seemed that nothing he could do would please the Plaintiff. I question the genuineness of this comment, because Mr. Russel, in my view, pushed a lot of provoking buttons that were not imminently necessary, as previously noted (ie: the trays, the bicycle spot, the parking spot, etc). In my view, these steps don't seem to be sympatico with "*nothing I could do would please the Plaintiff*" and it is equally an affront to the promotion of de-escalation.

Poor Record Keeping / Lack of Meaningful Disclosure / Lack of Investigation

180) Under cross examination Mr. Russel confirmed that they had no log books documenting unit owner complaints, no voice recordings of owner complaints, and no statements or affidavits were secured from unit owners, regarding any concerns about the Plaintiff or his conduct. I can appreciate that some of this might be confidential, but there is a difference between being confidential, and not existing: we are dealing with the latter, which to me is indicative that the "problems" with the Plaintiff were not as dire as the Defendants attempt to portray. Regardless, it is indicative of poor record keeping, which perhaps then becomes an impediment to meaningful disclosure.

181) It is also noteworthy that after the Plaintiff made a written demand for copies of all the videos "*that you claim show either myself or my son Joel in the act of accosting, harassment, intimidating, defaming, and shouting*" (Exhibit #52), the Condo Corp lawyer responded to the Plaintiff on December 21, 2018 (Exhibit #52), stating that they "*purposely included the most recent evidence*" and nothing more, and warned the Plaintiff that if he still thought the allegation were "*fabricated*," they have "*over 40 individuals*" who are prepared to swear affidavits with respect to his conduct. I believe this entire exchange was meant to convey to the Plaintiff that the Defendants had substantial proof against him (ie: they had more videos, they had 40 individuals with damning evidence, etc). None of this was produced at trial, beyond the one failed video allegedly showing the Plaintiff's son kicking the reflector.

182) It is rather astonishing that after a full three (3) days of trial, I still do not have a comprehensive understanding of the Plaintiff's alleged "misconduct," with any meaningful degree of specificity. In my view, this all stems from the lack of contemporaneous and meaningful particulars in the Letters, followed by the failure to provide the Plaintiff with particulars when the allegations were challenged by the Plaintiff; little of which was better clarified at trial.

183) I'm not suggesting that the warnings, notices and/or lawyer letters must always be rife with

details, because sometimes the events are so notorious and egregious they don't require much detail or elaboration; however, when the alleged wrongdoing centers around harassing behaviour that is more subtle or nuanced, as is the case here, then details are a must, in my view.

184) The Letters contain a lot of allegations of wrongdoing, some generic assertions, but nothing upon which to gauge the veracity of the allegations: no dates, little-to-no description of the words used by the Plaintiff, or specific details about his actions, the number of people present or the number of people raising concerns, the frequency, the corroborating proof that they have (and are prepared to share), etc.

185) To put matters into perspective, it was almost at the end of this three (3) day trial that I came to understand the genesis of the first Letter dated March 29, 2018 (Exhibit #7) when Mr. Rowsell was testifying about the Plaintiff interrupting the February 2018 Board meeting. Why this detail was not contained in the first Letter escapes me. It certainly could not have been too daunting to direct the Plaintiff to the date of the subject Board meeting, and a brief dissertation explaining the events, the conduct, the words, and/or the actions that allegedly violated the Constating Documents and/or the Act.

186) For all intents and purposes, the Plaintiff may very well have thought the exchange he had during this Board meeting was innocuous and perhaps long forgotten by the time he received the March 29th, 2018 Letter, a month later. If the Plaintiff's attention was squarely drawn to this event in the first Letter, with a detailed description of his conduct, it may very well have triggered him to reflect on it in more detail, and perhaps lead him to agree that he lost his cool, and went too far on that day, such that it would remain a conscientious reminder moving forward for him to temper those offending words, acts, and/or conduct.

187) The Defendants failed to ask the Plaintiff, while he was in the stand, anything about the February 2018 Board meeting. To then lead evidence from the Defendants about this Board meeting, especially since it was the genesis of the first Letter that puts everything in motion, is in my view an affront to the rule in *Browne v. Dunn* [(1893), 6 R. 67 (H. L.)] and section 21 of the *Evidence Act*, R.S.O. 1990, c. E. 23.

188) It only became apparent to me, when I was reviewing the chronology of events, that the genesis of the first Letter was the Board meeting incident, and that the Plaintiff was not asked about that during his testimony days earlier (or in this case months earlier given the manner in which the trial dates were scattered). Had I picked this up instantly, I would have recalled the Plaintiff to give testimony on this alleged incident.

189) I have the discretion to completely ignore Mr. Rowsell's evidence about the February 2018 Board meeting, but in this case, I do not have to. Indeed, I can accept it at full value, because even at full value I don't know what happened on that day, beyond Mr. Rowsell saying that the Plaintiff interrupted a meeting of the Board in February 2018, at which time the Plaintiff displayed a "brazen attitude." Mr. Rowsell did not elaborate on this during his testimony, and the first Letter

does not explain things any better either. This alone prevents me from concluding the Plaintiff acted in a manner contrary to the Constating Documents and/or the Act, on a balance of probabilities.

190) The Defendants take the position that the Plaintiff never formally requested documentation to support the allegations in the Letters, until close to the end of their dealings in December 2018 and January 2019; however:

a) It is not the Plaintiff's onus to demand particulars: it is the Condo Corp's duty, in my view, to voluntarily provide meaningful particulars and descriptions; and

b) Even if it was the Plaintiff's obligation to request particulars, I conclude that he did. When the Plaintiff affixes a disclaimer to each of his cheques denying all allegations in the Letters, and calling them "*unproven accusations*" and "*concocted false claims*," the Plaintiff is in effect demanding proof, or at least further particulars.

191) The Plaintiff testified that he asked for proof all along. I get a sense of that as well when I read Mr. Rowsell's email to the lawyers dated December 5, 2018 (Exhibit #50) when he tells the Condo Corp lawyer that the Plaintiff "*we have CCTV footage on a flash drive proving the behaviour for both the last, and this required letter,* ***so we have evidence in spite of his claims to the contrary*****"** (**emphasis added**).

192) This is a fairly strong indicator to me that the Plaintiff made it well known that he was expecting, and demanding, some clarity and evidentiary corroboration for the denied allegations, and the Defendants interpreted it that way.

193) Ironically, the better proof came from the Plaintiff who was able to demonstrate, through videos, that the personal Defendants were the aggressors, and not him.

194) It seems that the Condo Corp never intended to be forthcoming. The first Letter, for example, contained the following statement: "*Please be advised that owners do not have the right to engage in an investigation or interrogation of the Board or staff of the Corporation. Further, the Corporation is not obliged to respond to requests for numerous documents and/or for ill-defined reasons, where the requesting party simply wishes to go on a "fishing expedition". Owners are not entitled to engage in an investigation and demand responses from management and the Board for the mere purpose of discrediting the decisions of the Board*" (the "**Disclosure Caveat**").

195) Although not indicated in the Letter, the Disclosure Caveat appears to mimic the *dicta* in cases like Brown, *supra,* at paragraph 32, which, in my view, is not applicable to the situation at hand. Brown addresses a condo unit owner's right to demand condominium records as enshrined in the Act, and pointed out that demanding records is proper, but demanding a response to follow-up investigative type questions arising from the documents is not. Attempts to hold the Board accountable for their actions can be taken up at meetings, or during elections, etc.

196) The Plaintiff was not on a "fishing expedition." The Plaintiff was not interrogating the actions or the decisions of the Board: he was asking for details about what he did wrong, and to have access to the corroborating documentation, if any, against him. In my view, the Disclosure Caveat has no application in circumstances such as this where the Board is accusing a unit owner of breaching the Constating Documents and/or the Act. In these situations, there is a concomitant duty to be fair, which requires meaningful details, and full disclosure, especially when requested: after all, it is the unit owner's actions that are under scrutiny, not the Board's conduct, in this circumstance. It should never be permissible for the accuser to withhold relevant and probative information from the accused, absent some recognized protected privilege or confidence.

197) Such disclosure: i) promotes procedural fairness, ii) it creates a fulsome contemporaneous record that is of tremendous benefit when the matter is before a trier of fact many months or years later, and iii) it is generally helpful putting pen-to-paper, because what may feel egregious at the time can often not look so appalling when written down.

198) The expectation is not elevated to that of a police investigation or forensic record keeping, but it cannot equally be at an almost non-existent level either, as the case here. When it gets to the point where serious consequences could arise (ie: infringing on an owner's mobility and property rights), the level of note taking, along with evidence gathering and preservation, escalates in-kind: concomitant with this is a higher degree of disclosure that needs to be given to the targeted person.

199) The Defendants assert that they did not silence the Plaintiff: he was free to communicate in writing, with his list of grievances. However, I agree with the caution expressed by Kiteley J. in Brown, *supra*: " *If the behaviour of …* [the unit owner] *… were restrained in the ways sought, it would reduce a burden on the Board, on officers and on managers, but it would send a message that a challenge to the authorities will attract serious negative consequences. That is not a message which ought to be communicated when the legislative environment is one which is intended to encourage openness*."

200) For clarity, I do not take issue with the amounts of the chargebacks. I am satisfied that they were reasonable, and there was no attempt to inflate the legal charges.

Analysis - Claims against Russel, Rowsell and Goldview

201) In my view, the claims against Mr. Russel, Mr. Rowsell and Goldview must be dismissed. In adopting the wording used in *Matlock v. Ottawa-Carleton Standard Condominium Corporation*, 2021 ONSC 390, at paragraph 29, I find that "a plain reading of" the allegations in the Claim "reveals that these complaints are directed against the individual board members in their role as the directing minds of the Condominium Corporation. There are no pleadings of material facts that make the conduct complained of their own."

Analysis - Punitive Damage Claim

202) Having considered the actions of the Defendants to be tittering on aggressive, I still do not find that the Defendants committed and independent or separate actionable wrong causing damage to the Plaintiff or that the Defendants' conduct was sufficiently harsh, vindictive, reprehensible and malicious to offend the court's sense and decency (*Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 SCR 595).

203) The Plaintiff's legal representative advanced the position that this case warrants an award of damages for oppressive conduct on the part of the Condo Corp, and relies on section 135 of the Act. The Plaintiff argues that the Condo Corp treated him in a manner that was coercive, harsh, and harmful, and that the Condo Corp's conducted themselves in a manner that unfairly disregarded his interests. I tend to agree.

204) I think it was oppressive to write Letters devoid of meaningful particulars and then to withhold particulars when sought, to suggest that they had a plethora of damning evidence against the Plaintiff, yet at trial producing no unit owner affidavits despite saying they had 40 willing to testify, producing no other videos (despite insinuating they had more, and never admitting they had nothing more), and failing to produce the video purportedly taken by Mr. King of the June 15, 2018 incident in the manager's office with Nadeem. This is in addition to the unlawful threat to place a lien on the Plaintiff's condo unit without recourse to the courts, and coercing the Plaintiff to pay under protest.

205) Notwithstanding the foregoing, this portion of the Plaintiff's claim is nonetheless denied because I do not have jurisdiction to award damages under section 135 of the Act: such matters must be brought before the Ontario Superior Court of Justice (*Foschia v Carleton Condominium Corporation No 25*, 2016 CanLII 106826 (ON SCSM)). If my hands were not tied through jurisdictional limitations, I would have awarded compensation to the Plaintiff under section 135(3)(b) of the Act, in the sum of $2,500.

Prejudgment and Post Judgment Interest

206) I see no juridical reason to disentitle the Plaintiff to prejudgment interest. Interest will be awarded at the rate prescribed by the *Courts of Justice Act*, R.S.O. 1990, c-C.43 ("**CJA**"), at the time the Plaintiff was separated from his money. In this case, prejudgment interest is awarded in the total sum of **$559.23**, calculated as follows:

a) $2,164.44 paid on September 10, 2018 (Exhibit #10): the sum of **$206.27**, calculated as follows: 2,164.44 x 0.015 (CJA rate in 3rd quarter of 2018) x 2319 (number of days between September 10, 2018 to today) / 365 (number of days in the year);

b) $672.35 paid on November 6, 2018 (Exhibit #14): the sum of **$75.00**, calculated as follows: 672.35 x 0.018 (CJA rate in the 4th quarter of 2018) x 2262 (number of days between November 6, 2018 to today) / 365 (number of days in the year);

c) $593.35 paid on December 20, 2018 (Exhibit #17): the sum of **$64.90**, calculated as follows: 593.35 x 0.018 (as above) x 2218 (number of days between December 20, 2018 to today) / 365 (number of days in the year); and

d) $1,791.05 paid on February 5, 2019 (Exhibit #30): the sum of **$213.06**, calculated as follows: 1,791.05 x 0.02 (CJA rate in the 1st quarter of 2019) x 2171 (number of days between February 5, 2019 to today) / 365 (number of days in the year).

207) Post-judgment interest, at 4.0%, is payable on any of the awarded amounts that are not paid to the Plaintiff within 30 days of the date of this Order, in accordance with the CJA.

Costs

208) At the conclusion of trial the parties advised that at least one offer to settle was delivered that could potential impact my ruling on costs: as such, it was agreed that cost submissions would be filed in writing after the release of my judgment. In this regard, if the parties cannot resolve the issue of costs as between themselves within the next fourteen (14) days:

a) The Parties shall deliver written cost submissions within twenty (20) days from the date of this Judgment;

b) If the Parties wish to address any assertions or allegations raised in the opposing parties' written cost submission that is not addressed in their initial written cost submission, they shall have an additional five (5) days to deliver a Reply written cost submission brief;

c) The Parties are reminded to enclose a copy of any relevant Offer to Settle communication that they intend to rely upon;

d) The written cost submission, and any reply written cost submission, shall be no longer than seven (7) and three (3) pages, respectively, using 1.5 spacing; and

e) Any case law relied upon should be hyperlinked, and ideally all relied upon portions highlighted.

Wednesday January 15, 2025
Date

Deputy Judge David M. José
Signature of Judicial Officer