



Court File No. **VLC-S-S-217245**
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

THE MATTER OF THE JUDICIAL REVIEW PROCEDURE ACT R.S.B.C 1996 C. 241 AND IN
THE MATTER OF THE PERSONAL INFORMATION PROTECTION ACT, S.B.C. 2003 C. 63

BETWEEN:

THE OWNERS, STRATA PLAN BCS 1964

PETITIONER

AND:

BAWO DAIBO and
INFORMATION AND PRIVACY COMMISSIONER OF BRITISH COLUMBIA

RESPONDENTS

PETITION TO THE COURT

THIS IS THE PETITION OF:

THE OWNERS, STRATA PLAN BCS 1964
c/o Access Law Group
1700 – 1185 West Georgia Street
Vancouver BC V6E 4E6

ON NOTICE TO:

BAWO DAIBO
2005-638 Beach Crescent
Vancouver, BC V6Z 3H4

INFORMATION AND PRIVACY COMMISSIONER OF BRITISH COLUMBIA
4th Floor - 947 Fort Street
Victoria, BC V8V 3K3

THE ATTORNEY GENERAL FOR BRITISH COLUMBIA
Legal Services Branch
6th Floor – 1001 Douglas Street
Victoria, BC V8V 1X4

This proceeding has been started by the Petitioner for the relief set out in Part 1 below.

If you intend to respond to this Petition, you or your lawyer must:

- (a) file a Response to Petitioner in form 67 in the above-named registry of this Court within the time for response to Petition described below, and
- (b) serve on the Petitioner
 - (i) 2 copies of the filed Response to Petition, and
 - (ii) 2 copies of each filed Affidavit on which you intend to rely at the hearing.

Orders, including Orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the Response to Petition within the time for response.

Time for response to Petition

A Response to Petition must be filed and served on the Petitioner:

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed Petition was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed Petition was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed Petition was served on you, or
- (d) if the time for Response has been set by Order of the Court, within that time.

(1) The address of the registry is: 800 Smithe Street, Vancouver, B.C. V6Z 2E1
(2) The ADDRESS FOR SERVICE of the Petitioner is: 1700 - 1185 West Georgia Street Vancouver, B.C., V6E 4E6 Fax: 604-689-8835
(3) The name and office address of the Petitioner's lawyer is: Ms. Kathrine Uppal Access Law Group 1700 - 1185 West Georgia Street Vancouver, BC, V6E 4E6

CLAIM OF THE PETITIONER:

Part 1: ORDER(S) SOUGHT

1. An order that the entirety of Order P21-06, dated June 29, 2021 of a delegate of the Information and Privacy Commissioner be quashed;
2. In the alternative, an order that the following provisions of Order P21-06, dated June 29, 2021 of a delegate of the Information and Privacy Commissioner be quashed:
 - a. Paragraph 2: "Except for the purposes identified in item 1 above, I require the Organization to stop collecting and using personal information through its video surveillance system." The petitioner challenges this aspect of the Order P21-06 only with respect to surveillance cameras at exterior access points to the Strata Corporation buildings. No challenge is brought with respect to the aspect of Order P21-06 pertaining to videocameras in the interior portions of the building.
 - b. Paragraph 3: "I require the Organization to stop collecting and using personal information through its key fob system."
 - c. Paragraph 5: "I require the Organization to provide the OIPC's registrar of inquiries with information and evidence that proves it complied with the above requirements." The petitioner challenges this paragraph of the order only with respect to orders or portions of orders sought to be quashed herein.
3. An order remitting the orders, or portions of orders, quashed by this court back to the Information and Privacy Commissioner for British Columbia reconsideration;
4. Costs; and
5. Such further and other relief as to this Honourable Court may seem just.

Part 2: FACTUAL BASIS

Background

1. Adjudicator Lisa Siew (the “Adjudicator”), a delegate of the Information and Privacy Commissioner for British Columbia, issued Order P21-06 on June 29, 2021 (the “Order”).
2. The Order requires The Owners, Strata Plan BCS 1964 (the “Strata Corporation”) to stop collecting and using personal information through its video surveillance system except for 3 purposes found by the Adjudicator to be justified under the *Personal Information Protection Act* (“PIPA”). The Order also requires the Strata Corporation to stop collecting and using personal information through its key fob monitoring system. Finally, the Strata Corporation was ordered to demonstrate compliance by filing confirmatory information or evidence with the OIPC registrar.
3. The Order was made after an investigation and mediation, which did not resolve the issues that then became the subject matter of the inquiry.
4. The original complaint was filed on or about January 19, 2017.
5. An investigation took place, which involved a mediation component, which did not resolve the complaint. In the course of the investigation procedure, the Strata Corporation submitted extensive evidence to the Investigator as to the security threats at the building which necessitated the collection and use of personal information by the video surveillance and key fob systems.
6. The Investigator then transferred the matter for inquiry by an adjudicator. Neither the Investigator nor the Registrar of Inquiries informed the Strata Corporation that the evidence submitted to the Investigator would not be provided to the Adjudicator on the inquiry.
7. The inquiry received submissions in 2018, but was then adjourned for some time at the request of the complainant/respondent to account allow for matters brought before the Civil Resolution Tribunal, between the complainant and the Strata Corporation, to be resolved.
8. The Strata Corporation was represented by legal counsel in very early stages but then started to represent themselves as the Inquiry proceeded.
9. The Civil Resolution Tribunal decision was issued and the complainant then requested for the inquiry to proceed. Further submissions and evidence were submitted in 2020.
10. The OIPC issued its reasons for decision (“RFD”) on June 29, 2021 and made several orders referred to as Order P21-06.

11. This petition is an application for judicial review of the Order.

The Parties

12. The Petitioner is a strata corporation duly constituted as The Owners, Strata Plan BCS 1964 pursuant to section 2 of the *Strata Property Act*.

13. Bawo Daibo is the complainant in the complaint that was filed at the Office of the Information and Privacy Commissioner for British Columbia which ultimately led to the Order. He is a principal of the company 1893569 Alberta Ltd. (the “Company”). The Company owns strata lot 93 in the Strata Corporation.

14. The Information and Privacy Commissioner, through the Office of the Information and Privacy Commissioner (“OIPC”) is a tribunal established under the provisions of the Personal Information Protection Act (“PIPA”).

Facts

15. The Strata Corporation is responsible for the governance and maintenance of common property that consists of 176 strata lots, including townhouses. The strata lots are located in buildings that are commonly known as “Icon 1” and “Icon 2”.

16. Icon 1 and Icon 2 share common amenities, including a concierge service, a pool and hot tub, and an exercise room.

17. Icon 1 and Icon 2 are located in downtown Vancouver nestled between the Granville Street Bridge and George Wainborn Park and between Beach Crescent and Kinghorne Mews.

18. According to the evidence before the OIPC, the strata complex has 28 video cameras; 18 of those are located in internal areas and 10 of those are located at external locations.

19. According to the evidence before the OIPC, key fobs are required to authorize access in approximately 30 different locations around the strata complex, including exterior entrances, common amenities such as the gym and pool, and to authorize the elevators to stop at a particular floor.

20. The Adjudicator found that the Strata Corporation is collecting personal information by video surveillance and by both the key fob inventory and key fob system.

21. The Adjudicator found that the Strata Corporation has appropriately “notified owners and residents that it is collecting personal information from its video surveillance system or key fob system for the following purposes:

- To prevent, detect and investigate break-ins and thefts.
- To prevent and investigate damage to strata property.
- To enforce bylaws and rules related to theft, vandalism, nuisance or damage and the safety and security of the strata complex, the owners, residents and visitors.
- To ensure the safety of the complex owners, tenants, occupants and visitors against threats or assaults.
- To monitor access to the strata complex for security and safety reasons by collecting information about key fob usage of any owners or residents.

22. Then the Adjudicator went on to consider whether the Strata Corporation’s specified purposes are appropriate under ss.11 and 14 of PIPA.

23. The Adjudicator found that the specified purpose of “preventing, detecting and investigating break-ins and thefts” is not an appropriate purpose according to the reasonable person test, in light of the privacy interests impacted.

24. As a result, the Adjudicator ordered that the Strata Corporation to stop collecting and using personal information through its video surveillance system except for the purposes related to enforcement of its garbage disposal bylaws and the prevention and investigation of property damage in the parkade area.

25. The Adjudicator also found that collection and use of personal information through the key fob system was inappropriate according to the reasonable person test, in light of the privacy interests impacted, and therefore ordered the Strata Corporation to stop collecting and using personal information through its key fob monitoring system (consisting of the automatic computer logging of individual fob swipes).

Part 3: LEGAL BASIS

1. This Petition is brought pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (the “*JRPA*”) and the Supreme Court Civil Rules.

Standard of Review – Substantive Review

2. The standard of review applicable to errors involving the exercise of discretion is reasonableness.

Sochowski v. British Columbia (Information and Privacy Commissioner), 2008 BCSC
1390

3. The standard of review of reasonableness also applies when an administrative tribunal is interpreting or applying its “home statute”.

Taylor v British Columbia (Information and Privacy Commissioner), 2017 BCSC

4. The Supreme Court of Canada recently discussed the application of reasonableness at length.

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65

Standard of Review – Procedural Fairness

5. The standard of review applicable to questions of procedural fairness is correctness. In the procedural fairness context, the appropriate standard of review has also been described simply as “fairness”.

6. The question for this Court is whether the Petitioner was treated fairly. The reviewing court is not required to give deference to the tribunal’s own assessment of whether its procedures were fair.

Mission Institution v. Khela, 2014 SCC 24 at para. 79

Seaspan Ferries Corp. v. British Columbia Ferry Services Inc., 2013 BCCA 55 at paras. 49 and
52

The Cambie Malone's Corporation v. British Columbia (Liquor Control and Licensing Branch),
2016 BCCA 165 at para. 14

Error in failing to establish the party who has the burden of proof

7. The Adjudicator did not establish which party bears the burden of proof because PIPA does not set out this burden. The approach used is that each party must provide information and evidence to support and justify its position.

8. The Strata Corporation says this is an error as it defies the rules of natural justice. A party bringing a complaint to a decision maker, whether it be the judiciary or a tribunal shall bear the burden of proof.

Unreasonableness: Error in finding that the purposes for video surveillance are inappropriate

9. The Adjudicator noted that the Strata Corporation's purpose for collecting and using personal information from its video surveillance system was for the following purposes:

- (a) To prevent, detect and investigate break-ins and thefts.
- (b) To ensure safety of the complex owners, tenants occupants and visitors and provide assistance during a health emergency.
- (c) For bylaw enforcement, including ensuring proper garbage disposal.
- (d) To prevent and investigate damage to strata property.

10. The Adjudicator found that the purpose of preventing, deterring and detecting break ins or thefts was not appropriate to support the collection and use of people's personal information from the video surveillance system. The following factors were considered: the sensitivity of the information, manner of collection and degree of intrusiveness, insufficient evidence to establish legitimate security concerns or threats and failure to consider or try other available security measures.

11. The Strata Corporations submits this finding is unreasonable. The finding results in making an order that requires the Strata Corporation to stop collecting and using video surveillance from its external video cameras.

12. Evidence before the OIPC set out that between 2016 and 2017 there were at least 28 recorded instances of intruder concerns by concierge on duty.

13. The Adjudicator failed to differentiate external video cameras from internal video cameras. External video cameras collect less information about owners and residents of the Strata Corporation and instead are focused to prevent, detect and investigate break-ins and thefts. Furthermore, external video cameras which merely record who enters and leaves a building represent far less of a privacy impact than internal cameras which can capture the day-to-day conduct of residents including their use of amenities and their associations with other persons.

14. Furthermore, the Adjudicator upheld the PIPA compliance of exterior cameras pointed at the parkade gate on the basis that:

“it [is] appropriate for the Organization to be proactive in safeguarding the parkade area from damage and for ensuring that when it does happen, there may be some evidence that would assist in holding the responsible individuals accountable.” (RFD, paragraph 214).

“eyewitness accounts will not always be an available option.” (RFD, paragraph 215)

“the concierge is only located in the Icon 2 building and cannot reasonably be expected to continuously patrol the parkade areas in both Icon buildings for incidents of vandalism or accidental damage. Even if security patrols were increased, these patrols would not be as effective as video surveillance since there would be gaps in coverage and room for human error or inattention.” (RFD, paragraph 216)

15. Those factors are equally applicable to all other exterior cameras. The Adjudicator failed to provide a rational basis for not upholding all other exterior cameras on the same basis as the parkade cameras. The decision therefore lacks internal rationality under *Vavilov* and must be quashed.

Unreasonableness: Impossibility of Compliance with Order P21-06

16. The Adjudicator’s Order for the Strata Corporation to “stop collecting and using personal information through its key fob monitoring system” does not consider the reality of the key fob system.

17. The key fob system inherently collects information and saves that information on a database. The only way to stop collecting personal information is to stop use of the key fob system entirely.

18. To discontinue use of the key fob system will affect security and access to all of Icon 1 and Icon 2. Furthermore, the Adjudicator’s decision itself upheld the PIPA-compliance of the use of the key fob system for access-control purpose.

19. Accordingly, the Adjudicator’s decision was internally inconsistent and unreasonable.

Procedural Fairness: Error in granting relief that was not sought by the Complainant

20. In the Respondent’s original complaint, he did not request that any external video cameras be decommissioned. In fact, he listed 14 (fourteen) cameras, located in internal, amenity, parkade and elevators be “removed”. In creating this list, he had the benefit of a list of the cameras and their locations. He did not name any locations that include external video cameras.

21. Notwithstanding this position, the Adjudicator’s Order has the effect of decommissioning all video cameras except those in the parkade and garbage disposal areas.

Procedural Fairness: Delay


22. The OIPC process commenced in 2017 and did not result in a decision until 2021. The nature of strata corporations particularly is that the strata council under which they are managed changes; the policies change, the rules change and the governance changes. In sum, strata corporations are in flux. Many of the submissions that were made early in the process are no longer relevant. The Strata Corporation has now had the opportunity to refine its processes as it relates to the collection and use of personal information, however, this information did not have the benefit of being considered by the Adjudicator given the process that unfolded over the course of 4 years.

Part 4: MATERIAL TO BE RELIED ON

1. The Record of Proceeding to be filed by the OIPC together with its Petition Response.
2. The Evidence submitted to the Investigator in 2017-2018 by the Strata Corporation, if not contained in the Record of Proceeding referenced above.

The Petitioner estimates that the hearing of the Petitioner will take 2 hours.

DATED August 11, 2021



Signature of lawyer for Petitioner,
Ms. Kathrine Uppal

To be completed by the Court only:

Order made

in the terms requested in paragraphs _____ of Part 1 of this Petition

with the following variations and additional terms:

Date: _____

Signature of Judge Master

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE OWNERS, STRATA PLAN BCS 1964

PETITIONER

AND:

BAWO DAIBO and
INFORMATION AND PRIVACY COMMISSIONER OF BRITISH COLUMBIA

RESPONDENTS

PETITION TO THE COURT

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