

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: November 28, 2022

CASE: 2022-00157N

Citation: York Region Standard Condominium Corporation No. 1201 v. Us, 2022 ONCAT 133

Order under section 1.44 of the *Condominium Act, 1998*.

Member: Patricia McQuaid, Vice-Chair

The Applicant,

York Region Standard Condominium Corporation No. 1201
Represented by Joy Mathews, Counsel

The Respondent,

Andriy Us

Hearing: Written Online Hearing – August 2, 2022, to November 23, 2022

REASONS FOR DECISION

A. INTRODUCTION

- [1] The Applicant, York Region Standard Condominium Corporation No. 1201 (“YRCC 1201” or the “Applicant”), brought this application to the Tribunal in response to alleged conduct by the Respondent Andriy Us, a unit owner. YRSCC 1201 alleges that the Respondent’s conduct constitutes a breach of provisions in its declaration and rules related to noise, smoking and nuisance. YRSCC 1201 seeks an order requiring the Respondent to comply with these provisions and indemnification of its costs incurred in seeking compliance.
- [2] The Respondent did not participate in this proceeding though he did join the case at Stage 2 - Mediation. In Stage 2, the Respondent’s brother contacted the Tribunal and stated that he would be assisting with the case and a brief adjournment was granted to them at that time. They did not participate in Stage 2 - Mediation. When the case proceeded to Stage 3, I asked Tribunal staff to contact both the Respondent and his brother. They were both advised, by email to the Respondent and by telephone with the brother, that the case was proceeding and that an order could be made against the Respondent with or without his participation. I am satisfied that the Respondent has had notice of this case and of the consequences of not participating. The case proceeded in his absence.

[3] The issues for me to decide in this hearing are as follows:

1. Has the Respondent failed to comply with provisions in the governing documents related to smoking and noise; and, in particular, Rules 4(2) and 12(2) and 12(3)?
2. Is the Applicant entitled to orders for compliance and indemnification for costs incurred in seeking compliance, including the costs of this proceeding?

B. RESULT

[4] For the reasons set out below, I find that the Respondent has contravened s. 12(b) and 16(c) of the declaration and rules 4(2), 12(2) and 12(3). The Respondent shall reimburse the Applicant, as compensation, \$450 as well as costs pursuant to Rule 48 of the Tribunal's Rules of Practice in the amount of \$1400.

C. EVIDENCE AND ANALYSIS

Issue 1: Has the Respondent failed to comply with provisions in the governing documents related to smoking and noise; specifically, Rules 4(2) and 12(2) and 12(3), and as well as s. 12(b) and 16(c) of the declaration?

[5] The Applicant asserts that it has received numerous complaints from residents about the Respondent's "disruptive" behavior, which include smoking in the stairwell, consumption of alcohol and drunken conduct on the common elements and excessive noise late at night, all of which they allege unreasonably interfere with their quiet use and enjoyment. The Applicant's site manager for the condominium management company provided evidence about complaints received, and incident reports made, relating to the Respondent's conduct.

[6] When a respondent does not join a case, the Tribunal must decide the case based on the evidence provided by the applicant, weighed on the balance of probabilities. In this instance, I accept that the reports made in or about the time of the incidents accurately record what occurred. Upon reviewing the incident reports, it appears that between December 2018 and June 2022, there were approximately five reports related to noise and four related to smoking. In one incident, in September 2020, multiple complaints were received about loud music after 10 pm coming from the Respondent's unit and common areas, smoking in prohibited common areas and the Respondent's generally "unruly behavior". In addition, the site manager stated that he sent five notices to the Respondent – three in 2019 related to smoking and/or noise, one in 2020 concerning smoking in the common elements, noise and unruly behavior and one in January 2022 concerning noise.

There were a few other incident reports in evidence with less relevance to this dispute, such as a leak from the Respondent's unit and another related to a domestic dispute involving the Respondent to which I give little weight in making my decision.

- [7] On October 27, 2020, Applicant's counsel sent a letter to the Respondent noting that the Respondent had, at that point, received four written warnings regarding breaches of the condominium's rules. Counsel requested that the Respondent 'cease and desist' creating loud noise and smoking in areas not designated for smoking immediately and advised that he was required to pay the costs of the compliance letter.
- [8] The provisions in the Applicant's governing documents which it submits are relevant to the Respondent's conduct are as follows.

From the declaration, sections 12(b) and 16(c):

12 (b) Each Owner may make reasonable use of and has the right to occupy and enjoy the whole or any part of the common elements, and each Owner has the right to make reasonable use of, and has the right to enjoy any exclusive use common element area which has been designated to his Unit in Schedule "F", subject to any conditions or restrictions set out in the Act, the Declaration, the Corporation's bylaws (herein called the "by-laws") the Rules and easements and rights registered against the property. However, no condition shall be permitted to exist and no activity shall be carried on in the common elements that is likely to damage the property or that will unreasonably interfere with the use or enjoyment by other Owners of the common elements and the other Units, that results in the cancellation or threatened cancellation of any policy of insurance referred to in the Declaration, or that will lead to a contravention of any covenant, term or condition contained in any easements and rights registered against the property.

16 (c) The Owner of each Unit shall comply, and shall require all residents, tenants, invitees and licensees of his Unit to comply with the Act, the Declaration, the by-laws, the Rules, any rights and easements registered against the property.

From the rules, rules 4(2) and 12(2) and (3):

4 (2) No smoking is permitted in the common elements, including without limitation, halls elevators, lobbies, stairwells, the recreation facilities and in front of the building, except in outdoor areas designated by the Board of Directors and/or the Property Manager.

12(2) No Owner shall create or permit the creation or continuation of any noise or nuisance, which in the opinion of the Board of Directors or Property Management,

may or does disturb the comfort or quiet enjoyment of the Units or common elements by the Owners.

12 (3) Excessive noise, caused by an instrument, television, radio, CD player/stereo or other device or otherwise, which in the opinion of the Board of Directors, the property Management and/or the Security Personnel may be calculated to disturb the comfort of the other Owners shall not be permitted. No noise caused by an instrument, television, radio, CD player/stereo or other device or otherwise after, shall be permitted 10:00 pm.

- [9] Four of the incident reports indicate that the Respondent was observed to be smoking in the stairwells or in the BBQ area, a common element area, in violation of rule 4(2). Loud music emanating from the Respondent's unit has been a source of complaints on several occasions, though only two were after 10 pm. There have, however, been at least two occasions when the Respondent, sometimes joined by other individuals, has been loud, either through their behavior or by playing music in the BBQ area, causing a noise disturbance, the most recent documented incident in evidence being in June 2022. These incidents are violations of rules 12(2) and (3). Though the incidents are sporadic, they are each indication of noncompliance with the Applicant's rules, rules with which the Respondent is under a duty to comply both by virtue of s. 16 of the declaration and by the *Condominium Act, 1998* (the "Act") itself.¹
- [10] Further, I accept, based on the evidence before me, that the Respondent has carried on activity, specifically by creating noise, in the common elements that supports a finding that he has unreasonably interfered with the use and enjoyment by other owners of the common elements contrary to s. 12(b) of the declaration.
- [11] The Applicant also cites s.117(2)(a) of the Act which states that no person shall carry on an activity in a unit or in the common elements which results in the creation or continuation of an unreasonable noise that is a nuisance, annoyance or disruption to individuals in a unit or common elements. As noted above there have been distinct incidents in which the Respondent has created unreasonable noise, which is a violation of the Act, the declaration and the rules. However, I do not find that the Respondent's conduct itself, as documented in the evidence before me, constitutes a nuisance. To support a claim of nuisance, the interference must be substantial; the requirement for substantial interference can incorporate a component of frequency and duration of the interference.² Here, the incidents have occurred over a period of almost four years but are in fact relatively infrequent. Though there were four incident reports generated in 2019, there was only one in

¹ S. 119 of the Condominium Act, 1998

² *Antrim Truck Centre Ltd. V. Ontario (Transportation)* 2013 SCC 13 (CanLII), at paragraphs 19 and 26.

2020 and two in 2021. On a couple of occasions, as noted in the incident reports, the Respondent did turn down the noise when told to do so by security. The fact that the incidents are intermittent suggests that the Respondent has not ignored all warnings given and notices sent to him as submitted by the Applicant.

[12] This is not to say that the Respondent's conduct has not been, at times, difficult for the Applicant's staff to manage. And on each occasion, that conduct may be disruptive for other residents. Living in a condominium community requires respect and consideration of one's neighbours which is something that the Respondent may need reminding about.

Issue 2: Is the Applicant entitled to orders for compliance and indemnification for costs incurred in seeking compliance, including the costs of this proceeding?

[13] The Applicant seeks to be indemnified by the Respondent for the costs it incurred in this matter. These are as follows:

1. Costs of \$450 resulting from the compliance letter sent from the Applicant's legal counsel to the Respondent.
2. Legal costs of \$7824 related to this proceeding.

[14] In seeking these costs, the Applicant cites section 29 of its declaration which states:

Each Owner shall indemnify and save the Corporation harmless from any loss, costs, damage, injury or liability which the Corporation may suffer or incur resulting from or caused by an act or omission of such Owner...to or with respect to the common elements or any units, except for any loss, costs, damages, injury or liability caused by an insured (as defined in any policy or policies of insurance) and insured against the corporation.

All payments pursuant to this clause are deemed to be additional contributions toward the common expenses and recoverable as such.

In addition, and more relevant to the claim for the compliance, is rule 2(3) referred to by counsel in his compliance letter sent on October 27, 2020:

Any and all losses, costs or damages incurred by the Corporation by reason of breach of the Act and/or any terms in the Corporations' Governing Documents by any Owner and/or Resident, or any person, thing or animal for whom the Owner and/or Resident is responsible, shall be paid for by such Owner and may be recovered on a solicitor and client basis by the Corporation against such Owner and/or Resident in the same manner as common expenses or as may be

provided in the *Condominium Act, 1998* or in any other lawful manner. Each Owner is ultimately liable to cover all costs incurred by the Corporation for any Resident and/or those persons or things for which the Owner is responsible.

[15] I note that the declaration provision does not clearly address compliance costs. The rule may well include compliance costs, though there may be an issue whether the rule can purport to make any such amount payable as common expenses. However, I recognize that the underlying intent of these provisions is that unit owners should not be required to pay for costs the condominium is required to incur due to the noncompliant conduct of another owner or resident.

[16] At the time the October 27, 2020 letter was sent by counsel to the Respondent, four notices had been sent to him by YRSCC 1201 regarding four different noise/smoking incidents, three of which were within a three month period in 2019. The September 2020 incident which gave rise to several complaints appears to have been the catalyst for the letter from legal counsel. Based on the underlying intent, particularly of the provision in rule 2(3), I find that it is fair and appropriate that the Respondent be responsible for the costs incurred by YRSCC 1201 at that point. The costs were reasonably incurred to enforce the rules. I order that the Respondent reimburse YRSCC the amount of \$450 pursuant to s. 1.44(1)3 of the Act.

[17] Regarding the legal costs of \$7824 related to this proceeding, the Tribunal's authority to make orders is set out in section 1.44 of the Act. Section 1.44 (2) of the Act states that an order for costs "shall be determined...in accordance with the rules of the Tribunal." The cost related rules of the Tribunal's Rules of Practice relevant to this case are:

48.1 If a Case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful Party will be required to pay the successful Party's CAT fees unless the CAT member decides otherwise.

48.2 The CAT generally will not order one Party to reimburse another Party for legal fees or disbursements ("costs") incurred in the course of the proceeding. However, where appropriate, the CAT may order a Party to pay to another Party all or part of their costs, including costs that were directly related to a Party's behaviour that was unreasonable, undertaken for an improper purpose, or that caused a delay or additional expense.

[18] In accordance with Rule 48.1, I will order that the Respondent reimburse the \$200 Tribunal fee.

[19] The Tribunal's Practice Direction: Approach to Ordering Costs, issued January 1,

2022, provides guidance regarding the awarding of costs. In this Practice Direction, the Tribunal outlines some of the factors the Tribunal may consider in deciding whether to order costs under Rule 48. These factors include the conduct of a party or its representative in the hearing, whether the parties attempted to resolve the issues before the case was filed, the provisions of the governing documents, and whether the parties had a clear understanding of the potential consequences for contravening them. The Tribunal may also consider whether the costs incurred are appropriate and proportional to the nature and complexity of the issues in dispute

- [20] The courts and this Tribunal have articulated the principle that it can be unfair for other owners to be called upon to subsidize the costs of enforcing compliance against another owner. It is also well-established law that an award of costs is discretionary and that condominium corporations must act reasonably and judiciously when incurring legal and compliance costs. I do not accept that the legal fees claimed here are proportional to the nature and complexity of the issues in this hearing which were straightforward and uncontested.
- [21] The cost outline submitted by the Applicant shows that 39 hours were spent on this matter, 30 of which were incurred by a paralegal at a lower hourly rate than counsel. Yet the Respondent did not participate which resulted in a streamlined process, with only one witness statement necessary. The amount claimed is very disproportionate to the issues in this hearing. I do find that the indemnification provisions in the declaration and rule have some relevance and it is appropriate in this context that the Respondent bear some of the burden of the legal costs to secure compliance through this hearing. Weighing the various factors noted above, I award costs of \$1200.

D. CONCLUSION

- [22] In summary, I have concluded that the Respondent has failed to comply with the governing documents and in particular, rules 4(2) and 12 (2) and 12(3) and s. 12(b) and s. 16 of the declaration. I am ordering the respondent to indemnify the Applicant for \$450 in legal fees, and pursuant to s. 1.44 (1) 4 and Rule 48 of the Tribunal's Rules of Practice, the Respondents shall reimburse the Applicant for the \$200 paid for Tribunal fees and legal costs of \$1200.

E. ORDER

- [23] The Tribunal orders that:

1. The Respondent shall comply with section 12(b) and s. 16 of the YRSCC 1201's declaration and rules 4(2), 12(2) and 12(3) and for specificity, the Respondent shall refrain from smoking in all common element areas and shall not create excessive noise, including music in his unit and common elements and specifically after 10 pm.
2. Pursuant to s. 1.44 (1) 3 of the Act, within 30 days of this Order, the Respondent shall pay YRSCC 1201 compensation in the amount of \$450 in respect of legal fees and expenses it incurred.
3. Within 30 days of this Order, in accordance with s. 1.44 (1) 4 of the Act and Rule 48 of the Tribunal's Rules of Practice, the Respondent shall pay \$1400 to YRSCC 1201 for its costs in this matter.

Patricia McQuaid
Vice-Chair, Condominium Authority Tribunal

Released on: November 28, 2022