**CONDOMINIUM AUTHORITY TRIBUNAL**

**DATE:** November 30, 2022
**CASE:** 2022-00417N
**Citation:** Joury v. Metropolitan Toronto Condominium Corporation No. 1163, 2022 ONCAT 135

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

**Member:** Mary Ann Spencer, Member

**The Applicant,**
Nathalie Joury
Represented by Edward Hore, Counsel

**The Respondent,**
Metropolitan Toronto Condominium Corporation No. 1163
Represented by Jonathan Miller, Counsel

**Hearing**: Written Online Hearing – September 9, 2022 to November 15, 2022

# REASONS FOR DECISION

## A. INTRODUCTION

[1] Nathalie Joury, the owner of a penthouse unit at Metropolitan Toronto Condominium Corporation No. 1163 ("MTCC 1163"), alleges that the telecommunications antennae located on the building's roof are a nuisance, annoyance and disruption and are interfering with the use and enjoyment of her unit in contravention of MTCC 1163's governing documents. She requests that the Tribunal order MTCC 1163 to either move or remove the antennae. She also requests that the Tribunal award her costs and a penalty in this matter.

[2] MTCC 1163's position is that the application should be dismissed. It submits that the Tribunal does not have jurisdiction to hear this matter because the telecommunications antennae are not among the nuisances defined in the *Condominium Act, 1998* (the "Act") and Ontario Regulation 48/01 ("O. Reg. 48/01") and because the rule the Applicant alleges was contravened does not apply to the corporation. It also argues that Ms. Joury's application is out of time. It requests its costs in this matter.

[3] For the reasons set out below, I dismiss the application without costs.

## B. BACKGROUND

[4] Ms. Joury has owned a corner penthouse unit at MTCC 1163 since 2004. The unit has an L-shaped balcony with an open overhead view.

[5] In October 2009, MTCC 1163 signed an agreement with Globalive Wireless Management Ltd. (now Freedom Mobile) to lease space on its roof for telecommunications equipment. The terms of the agreement provided for two ten-year extensions. In 2010, the corporation signed a similar lease with Data & Audio Visual Enterprises Inc. (now Rogers) which provided for three five-year extensions. The Freedom Mobile lease was amended in 2018 and the Rogers lease was amended in 2019. Both amendments permit the replacement and upgrading of the equipment on the building's roof.

[6] Marianne Lo Presti, the president of MTCC 1163's board of directors, testified that Rogers began upgrading its equipment in September, 2019. The board did not consult with owners before the upgrade. It did notify owners of the work in a "Project Update" dated November, 2019, which included the following points:

- Rogers and Freedom Mobile rate increases negotiated
- Rogers upgrading antennas on roof

[7] The date when the work was completed is unknown although it appears this was sometime in 2020; the President's report included in the November 2020, AGM package sent to owners states that both Freedom Mobile and Rogers had upgraded their equipment.

[8] Photographs indicate there are now four pole-mounted antennae, estimated to be approximately 15 feet tall, installed on the roof above Ms. Joury's unit. Two of the antennae are located at the edge of the roof directly above the open balcony and extend from the corner along one side. The antennae have bundled wires at the base of their poles. A 2019 photograph of the building indicates the antennae originally placed on the roof were significantly smaller. A 2014 photograph indicates that none were located above Ms. Joury's unit.

[9] Ms. Lo Presti testified that she was unaware of any complaints about the equipment on the roof before the upgrade took place. However, she stated that in December 2019, the board did discuss two complaints about aesthetics and the safety of the upgraded equipment. She indicated that those complaints had already been addressed at that time by MTCC 1163's condominium manager who had contacted Rogers. In response to one of the complaints, Rogers had agreed to relocate some of the antennae. Ms. Lo Presti does not know how many were moved.

[10] Ms. Lo Presti testified that she was unaware of any other complaints until Ms. Joury raised concerns about the upgraded antennae in January 2022. These concerns were about their safety; in particular, about the emission of unsafe levels of EMF (electromagnetic field) radiation.

[11] On June 20, 2022, after she had commissioned a report on EMF levels in her unit and on her balcony, Ms. Joury sent a letter to the board of directors asking that the antennae be immediately removed because they were placing the health and safety of the penthouse residents at risk. It is Ms. Lo Presti's testimony that this letter was the first time Ms. Joury raised additional concerns that were not related to health and safety. Ms. Lo Presti testified that MTCC 1163's board discussed Ms. Joury's concerns and asked Rogers about moving the antennae but Rogers stated it would be costly to do so. She stated that she did not know what that cost would be. She also testified that no further action was pursued once Ms. Joury filed her application with the Tribunal.

[12] Ms. Joury submitted her application to the Tribunal on June 24, 2022. She alleges that "the towers, cables, wires, and equipment are a nuisance, annoyance and disruption" which "unreasonably interfere with her use and enjoyment of her Unit."

## C. ISSUES & ANALYSIS

[13] Ontario Regulation 179/17 ("O. Reg. 179/17") establishes the jurisdiction of the Tribunal. That jurisdiction does not extend to section 117 (1) of the Act which states that no person shall "cause a condition to exist or an activity to take place in a unit, the common elements or the assets, if any, of the corporation if the condition or the activity, as the case may be, is likely to damage the property or the assets or to cause an injury or an illness to an individual." While Ms. Lo Presti's evidence was that the primary concerns Ms. Joury raised with the corporation were about the safety of the telecommunications equipment, I advised the parties that I would hear no health and safety related evidence and I make no finding on this issue.

[14] At the outset of this Stage 3 - Tribunal Decision proceeding, the parties agreed that the issues to be decided in this matter were:

1. Does the installation of the equipment on the roof contravene the provisions of the condominium corporation's governing documents that prohibit, restrict, or otherwise govern nuisances, annoyances and/or disruptions, in particular Rule 2.1.11, and the former provisions 4(a), 4(b) and 4(c) of Article III of the declaration?

2. If it is found that the equipment does contravene the provisions of the governing documents, what remedy is appropriate?

3. Should an award of costs be assessed?

**Issue No. 1: Does the installation of the equipment on the roof contravene the provisions of the condominium corporation's governing documents that prohibit, restrict, or otherwise govern nuisances, annoyances and/or disruptions, in particular Rule 2.1.11, and the former provisions 4(a), 4(b) and 4(c) of Article III of the declaration?**

[15] Rule 2.1.11 of MTCC 1163's rules dated July 7, 2013, states:

> No television dish, antenna, aerial, tower or similar structure shall be erected in, on or fastened to any unit or any portion of the common elements.

The former provisions 4 (a), 4 (b) and 4 (c) of Article III of its declaration address the corporation's ability to make substantial alterations or additions to the common elements and set out a requirement for owners' votes. Section 4 (c) states that the corporation may, in its absolute discretion, determine whether a change is substantial.

[16] Section 1. (1) (d) of O. Reg. 179/17 establishes the Tribunal's jurisdiction with respect to disputes about certain provisions in a corporation's governing documents. The sections relevant to this dispute state:

> (iii.1) Provisions that prohibit, restrict or otherwise govern the activities described in subsection 117 (2) of the Act or section 26 of Ontario Regulation 48/01 (General).
>
> (iii.2) Provisions that prohibit, restrict or otherwise govern any other nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation.

[17] In his closing submission, Counsel for MTCC 1163 argues that the Tribunal should dismiss Ms. Joury's application because the Tribunal does not have jurisdiction to decide this matter because the activities described in s. 117 (2) of the Act and s. 26 of O. Reg. 48/01 are limited to unreasonable noise, odour, smoke, vapour, light and vibration. He further submits that if the Tribunal does find that it has jurisdiction, that there has been no contravention of Rule 2.1.11 because that rule does not apply to the corporation. He also argues that Ms. Joury's application was out of time.

[18] Ms. Joury's counsel submits that the Tribunal has jurisdiction to decide this dispute

based on Article III 1. (a) of MTCC 1163's declaration which states, in part:

> Subject to the provisions of the Act, this Declaration, the By-laws and any Rules, each Owner has the full use, occupancy and enjoyment of the whole or any parts of the Common Elements, except as herein otherwise provided. Notwithstanding the foregoing*, no condition shall be permitted to exist,* and no activities shall be carried on any part of the Common Elements that is likely to damage any property or impair the structure or integrity of any building situate on the Lands *or that will unreasonably interfere with the use or enjoyment, by other Unit Owners, of the Common Elements and/or the other Units*…[emphasis added]

[19] While Article III 1. (a) of the declaration does not use the specific words 'nuisance', 'annoyance' or 'disruption' I find that the fact it prohibits "unreasonable interference" with the use or enjoyment of the common elements and/or the other Units, as the italicized text above highlights, establishes the Tribunal's jurisdiction as set out in s. 1. (1) (d) (iii.2) of O. Reg. 179/17.

[20] Counsel for MTCC 1163 further submits that this case should be dismissed because Rule 2.1.11 does not apply to the corporation. I note that while Ms. Joury, and her witness, owner Moira Gazzola, both testified that MTCC 1163 contravened rule 2.1.11 when it permitted the upgrading of the equipment on its roof, and, while Ms. Joury's Counsel indicated in his closing submission that he would refer to the rule, that he made no further reference to it in his submissions. Rather, as noted above, he relies on Article III 1. (a) of MTCC 1163's declaration.

[21] I agree with Counsel for MTCC 1163 that Rule 2.1.11 does not apply to the corporation. The sentence immediately preceding the list of rules set out in MTCC 1163's rules dated July 7, 2013, is: "The following rules shall be observed by owners, all residents, guests, visitors and tradespersons." A plain reading of the rules indicates they do not apply to the corporation itself. Further, as Counsel for MTCC 1163 points out, all of the rules in section 2 of the corporation's rules fall under the heading and apply to "Suites".

[22] However, while Counsel for MTCC 1163 argues that the Applicant has made the issues to be addressed in this matter "a moving target", the fact that Ms. Joury relies only on an article of the declaration does not change the fundamental issue of whether the antennae are a nuisance, annoyance or disruption. Moreover, I note that in her application to the Tribunal, a copy of which is attached to the Stage 2 Summary and Order in this matter, Ms. Joury wrote that she relied on *both* Article III 1. (a) of the declaration and rule 2.1.11.

[23] I also dismiss Counsel for MTCC 1163's argument that Ms. Joury's application was out of time. Section 1.36 (6) of the Act states that an application must be made within two years after the dispute arose. Ms. Joury submitted her application to the Tribunal on June 24, 2022. While Counsel for MTCC 1163 suggests the antennae to which Ms. Joury objects were in place before June, 2020, the evidence before me indicates only that the equipment was installed sometime in 2020. Further, the date of installation does not represent the date this dispute arose which Ms. Lo Presti's evidence indicates was June, 2022, when Ms. Joury first submitted non-safety related concerns to the corporation.

[24] Ms. Joury's Counsel's submissions focus on the alleged failure of MTCC 1163's directors to meet their obligation under s. 37 of the Act to exercise care and diligence in fulfilling their duties. He submits that MTCC 1163 did not act reasonably when it allowed the upgraded antenna to be installed in a location "that a reasonably prudent person would have known would unreasonably interfere with [Ms. Joury's] use and enjoyment of her unit", that it failed to consult with the owners before it allowed the upgrades; that it failed to hold a vote to obtain the owners' consent to the upgrades; and, that it failed to investigate and appropriately respond to Ms. Joury's concerns. Counsel referred to the Tribunal's decisions in *Tamo v. Metropolitan Toronto Condominium Corporation No. 744 et al.*, 2022 ONCAT 41 (CanLII) and *Davy v. Toronto Standard Condominium Corporation No. 2121*, 2021 ONCAT 114 (CanLII), cases which dealt with those corporations' enforcement of specific pet and parking rules respectively, and where the reasonableness of the boards' enforcement decisions were at issue.

[25] As I have found rule 2.1.11 does not apply to the corporation, the reasonableness of its enforcement is not at issue. Further, the reasonableness of the Board's decision-making in amending its agreements with Freedom Mobile and Rogers is not the fundamental issue to be decided in this matter. The first and fundamental question to be addressed is whether the upgraded antennae constitute a nuisance, annoyance or disruption and whether they unreasonably interfere with Ms. Joury's use and enjoyment of her unit or her balcony in contravention of Article III 1. (a) of MTCC 1163's declaration. If I find the antennae are a nuisance, annoyance or disruption, the further question to be addressed is one of remedy.

[26] Ms. Joury alleges that the antennae are interfering with her use and enjoyment of her unit, in particular, of her balcony. She testified:

> The towers are large and ugly. They completely dominate and overwhelm my balcony. They are a nuisance. They unreasonably interfere with my use and the pleasant enjoyment of my Unit. They are a significant annoyance and disruption to me.

Her primary concern appears to be with the appearance of the antennae. She further testified:

> The sudden unexpected installation of the towers, cables and electrical equipment within a few feet of my home has caused me anxiety and stress. I am annoyed, and angry. The towers have changed the character of my balcony and the view of my home. I despise looking at my unit now when I am driving or walking home towards the building. I am embarrassed when clients or friends come to the building for the first time. No other residential condominium buildings in this area have any towers like this on their roof. This is a residential building not a hi-tech factory.

[27] The terms "nuisance, annoyance and disruption" are not defined in the Act or in the governing documents of MTCC 1163. In its recent decision in Carleton Condominium Corporation No.132 v Evans, 2022 ONCAT 97 (CanLII), summarizing Antrim Truck Centre Ltd. V. Ontario (Transportation) 2013 SSC 13 (CanLII), the Tribunal wrote at paragraph 20:

> … it is instructive to consider the well-established jurisprudence on the law of nuisance. To support a claim of nuisance, the interference must be substantial and unreasonable; the requirement for substantial interference can incorporate a component of frequency and duration of the interference. A 'trivial' interference will not suffice to support a claim in nuisance. It is instructive to consider the well-established jurisprudence on the law of nuisance. To support a claim of nuisance, the interference must be substantial and unreasonable; the requirement for substantial interference can incorporate a component of frequency and duration of the interference. A 'trivial' interference will not suffice to support a claim in nuisance.

Similarly, 'trivial' annoyance or disruption is not sufficient to support a claim. Conceivably, many things about community living may annoy residents or cause disruption from time to time. As with nuisance, the annoyance or disruption needs to be unreasonable, or, as Article III.1(a) of the declaration states, "unreasonably interfere" with an owner's use or enjoyment of the common elements or units.

[28] While Ms. Joury clearly does not like the fact that the upgraded antennae are located where they are on the building roof, there is no evidence that they interfere with her use of either her unit or her balcony which I note is an exclusive use common element. For example, there is no evidence that the antennae create any noise or vibration which could potentially disrupt Ms. Joury's quiet enjoyment. Other than speaking to their appearance, Ms. Joury did not indicate how their presence was a disruption. In fact, on cross-examination, she agreed that the antennae do not impede her use of the balcony.

[29] I acknowledge that the antennae are visible from the street and from other units as the photographs entered as evidence in this matter indicate. The photographs also indicate they are visible from Ms. Joury's balcony when looking at the roofline, where part of the view of the sky is now obstructed. However, a partially obstructed view over the roofline does not constitute an unreasonable interference; there is no obstruction of the outward view from either the unit or the balcony. In this regard, Counsel for MTCC 1163 referred me to *Webster v. Low*, 2009 CarswellOnt 6986, a case in which the Court states, at paragraph 6 "The law in Canada and in Ontario is clear that loss of enjoyment of a view does not constitute a nuisance" and then cites extensive case law including the Supreme Court's decision in *St. Pierre v. Ontario (Minister of Transport and Communications)*, [1987] 1 S.C.R. 906. While Ms. Joury's Counsel argued that Webster is distinguished on the facts because the obstruction in that case was on a publicly accessible lake some distance from the complainant's residence, I find the case law on this issue persuasive, notwithstanding that the specific view obstruction in this case differs.

[30] Ms. Joury further testified that she did not use her balcony during the summer of 2022 because she did not feel comfortable with the bundled wires above her. However, I note that the photographs indicate the bundled wires are on the roof and do not hang over the balcony. She also testified:

> The recent posting of a danger sign as shown in Exhibit 5 near my unit contributed to this feeling of unease. No resident, as far as I know, received any explanation as to why the danger sign was posted.

The sign to which Ms. Joury refers is located in a stairwell on a door to the roof. Under the title 'Warning', it states, 'radiofrequency energy' and 'area of restricted occupancy'. While this sign might well cause Ms. Joury concern, it, like the discomfort she indicates the wires cause her, and which her Counsel submitted represent a potential danger should they fall, relates to health and safety, which, as set out above in paragraph 15, is outside of the jurisdiction of this Tribunal and is an issue that would have to be pursued in a different venue.

[31] The final argument raised by Ms. Joury was the potential reduction in market value of her unit. She testified that the antennae "unfairly affects my resale value" although she also stated that she has not considered selling her unit. Witness David Papernick, a real estate broker with over 20 years experience, testified that many buyers would not consider purchasing Ms. Joury's unit and that its resale value would be reduced because of the proximity of the antennae. On cross-examination, he stated that other factors such as location, the condition of the unit, and the financial well-being of the corporation would have an impact on price. A

speculative future loss, which I note assumes that the existing antennae will still be in place when and if Ms. Joury sells her unit, is not an unreasonable interference with Ms. Joury's current enjoyment or use of her unit.

[32] For the reasons set out in the preceding four paragraphs, I find that the antennae located on the roof do not contravene Article III 1 (a) of MTCC 1163's declaration and that they do not constitute a nuisance, annoyance or disruption. Therefore, I dismiss Ms. Joury's application.

[33] Because I have found there is no nuisance, annoyance or disruption there is no need to address Issue 2, the question of remedy.

**Issue No. 3: Should an award of costs be assessed?**

[34] Ms. Joury requests $10,000 in legal costs and disbursements and a $5,000 penalty on the grounds that the corporation "failed to investigate her concerns, made no offer to investigate or mitigate her concerns making this proceeding necessary." MTCC 1163 requests $17,977.17 in legal costs in accordance with the indemnification provision set out as Article VI of its declaration.

[35] With respect to Ms. Joury's request for penalty, the Tribunal may only assess a penalty with respect to a dispute relating to a request for records under s. 55 of the Act. Therefore no penalty is applicable in this matter. With respect to her request for legal costs, Ms. Joury was unsuccessful in this matter and therefore I award her no costs.

[36] MTCC 1163's request for $17,977.17 in legal costs is comprised of $3,148.18 in costs it accrued to respond to concerns Ms. Joury's safety-related concerns, which it characterized as "pre-proceeding" costs, and $14,828.99 in costs associated with the proceeding.

[37] I award no costs to TSCC 1163 with respect to its pre-proceeding claim. The costs TSCC 1163 accrued to respond to the safety-related concerns Ms. Joury raised before she filed her application with the Tribunal are not related to the issues before me. I note they include costs the corporation incurred to obtain a responding report to the EMF report Ms. Joury commissioned.

[38] With respect to the costs associated with this proceeding, the authority of the Tribunal 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 rule of the Tribunal's Rules of Practice relevant to this case is:

> 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.

[39] The Tribunal's Practice Direction: Approach to Ordering Costs, issued January 1, 2022, provides guidance regarding the awarding of costs. Among the factors to be considered are whether a party or representative's conduct was unreasonable, for an improper purpose, or causes a delay or expense; whether the case was filed in bad faith or for an improper purpose; the conduct of all parties and representatives; the potential impact an order for costs would have on the parties; and, whether the parties attempted to resolve the issue in dispute before the CAT case was filed.

[40] TSCC 1163 claims its costs related to the proceeding for the following reasons:

> The Applicant commenced an application which she knew or ought to have known had no basis for success. Furthermore, when the original basis for the application (vibration/electromagnetic radiation) was proven to be groundless, the Applicant attempted to seek shelter under other weak arguments, none of which presented a nuisance which was properly within the jurisdiction of the CAT.

Ms. Joury's application makes no mention of health and safety issues, including vibration/electromagnetic radiation. Further, I have found that the dispute did fall within this Tribunal's jurisdiction. Rule 48.2 is clear that the Tribunal will not normally award costs. The fact that the application has been dismissed is not in itself a reason to award costs. Ms. Joury had the right to make application to the Tribunal and notwithstanding it was not successful, I do not find that it was made for an improper purpose. Further, I find there was no unreasonable conduct. While I acknowledge that new governance issues were raised by Ms. Joury's Counsel in his closing submission, TSCC 1163's request for costs was filed before those issues were raised and was not amended to include any additional costs it may have incurred to respond. For these reasons, I award no costs.

## C. ORDER

[41] The Tribunal Orders that:

1. The application is dismissed without costs.

Mary Ann Spencer
Member, Condominium Authority Tribunal

Released on: November 30, 2022