

### **Corrected Decision**

This decision includes a correction to a repetition in paragraph [1] as well as a typographical error in paragraph [3] to reflect the correct amount of costs that the Respondent is ordered to pay (\$4,000 + \$200 filing fee).

### **CONDOMINIUM AUTHORITY TRIBUNAL**

**DATE:** November 28, 2024

**CASE:** 2024-00170N

**Citation:** Metropolitan Toronto Condominium Corporation No. 736 v. Latyshko, 2024 ONCAT 177

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

**Member:** Susan Sapin, Member

**The Applicant,**

Metropolitan Toronto Condominium Corporation No. 736

Represented by Michael Pascu, Counsel

**The Respondent,**

Andrew Latyshko

Self-Represented

**Hearing:** Written Online Hearing – June 24, 2024, to October 26, 2024

### **REASONS FOR DECISION**

#### **A. INTRODUCTION**

- [1] The Applicant, Metropolitan Toronto Condominium Corporation No. 736 (“MTCC 736,” or “the corporation”) seeks an order that the Respondent, Andrew Latyshko, the owner of a unit in MTCC 736, cease causing unreasonable noise that is a nuisance, annoyance or disruption to the owner of a unit directly above his. MTCC 736 alleges that Mr. Latyshko has been banging on the walls and ceiling of his unit and shouting at the owner of the unit above and her son in retaliation for noise he claims is coming from her unit.
- [2] Mr. Latyshko joined the hearing but did not otherwise participate. Nor did he participate in the Stage 2 – Mediation despite invitations and messages from both

the Tribunal Member and staff to engage. Tribunal staff contacted Mr. Latyshko by email and telephone, explained the Stage 3 – Tribunal Decision process to him, offered to assist him with the online platform, explained that he could request accommodation if he required it, and explained the consequences to him if he did not participate in the hearing. Counsel confirmed that the required Notices of Case were sent to Mr. Latyshko. I am satisfied that Mr. Latyshko has received the Notice of the Hearing and has chosen not to participate. Accordingly, the hearing proceeded without him.

- [3] For the reasons below, I find that Mr. Latyshko has breached the provisions of the *Condominium Act, 1998* (the “Act”) and the corporation’s governing documents regarding the creation of unreasonable noise, and that he must cease his behaviour. I further find that Mr. Latyshko must pay MTCC 736 its filing fee of \$200 and costs of \$4,000.

## **B. BACKGROUND**

- [4] Some background facts are helpful to explain how an escalating noise dispute between two unit owners ultimately resulted in MTCC 736 having to bring this application. However, the only issue in dispute is Mr. Latyshko’s failure to comply with the Act and the corporation’s governing documents.
- [5] The uncontradicted evidence submitted by MTCC 736 in the form of documents and testimony from Gordon Marshall, the condominium manager, and the owner of the unit above Mr. Latyshko’s, is that Mr. Latyshko began to complain about noise coming from the unit above his shortly after he moved into his unit in May 2022. The noise complaints relate to the unit owner and her two sons moving about in their unit.
- [6] In addition to complaining to the corporation, Mr. Latyshko began pounding and hitting the walls in his unit during the day and night and shouting and swearing at the owner of the unit above and her sons from his unit and from his car. She complained to the corporation and asked that they make Mr. Latyshko stop.
- [7] The owner of the unit above testified that she has lived there since 2004, and raised her two sons there, without any complaints from the previous owners of Mr. Latyshko’s unit. Her younger son is now 16 years old and still lives with her. The older son, now 25 years old, moved out because of the conflict. The corporation’s manager, Mr. Marshall, confirmed that the corporation has no record of any complaints about noise from the unit before Mr. Latyshko moved into the condominium.

- [8] The corporation took a proactive approach to the dispute between owners. Mr. Marshall went to the unit above Mr. Latyshko's to investigate. He observed that while he was there, walking normally in the unit without shoes, he heard pounding noises from Mr. Latyshko's unit below.
- [9] The corporation then commissioned GTA Environmental ("GTA") to carry out a sound test in the two units to determine the level of sound transmission between the units. GTA's November 8, 2022, report determined that the walking noise from the above unit could be easily heard in Mr. Latyshko's unit in the living room, but that it was below the 45-decibel municipal noise by-law in both units, and that the intensity of the walking noise in the unit was considered normal and consistent with regular everyday activities. The report concluded that the floor/ceiling construction was "not substantial in regard to controlling noise transmission," because, unlike modern condominium units where the ceiling is 6 inches of concrete, MTCC 736's building was a simple wood construction similar to a house.
- [10] The corporation decided to take a "holistic," and, I find, an even-handed approach to resolve the noise dispute between the owners. It provided both owners with the GTA report and on December 15, 2022, sent each of them a legal compliance letter. Considering the nature of the building's construction, they asked the owner of the unit above to be considerate and required her to take reasonable measures to reduce the sounds associated with moving about in her unit. This she did. In turn, the corporation informed Mr. Latyshko of this, and that they expected him to accept a certain level of noise coming from day-to-day activities above explaining that "... within a condominium context, unit owners are expected to tolerate a certain level of noise that is inherent in living in tight quarters within a multi-unit building."
- [11] MTCC 736 also told Mr. Latyshko that he and his son must permanently cease banging on walls or making other excessive noise, as well as cease yelling at the residents of the unit above, and that the corporation would take matters further if he did not comply. Mr. Latyshko's behaviour continued despite a second warning letter from MTCC 736 a year later in December 2023.
- [12] Having gone as far as they could to get Mr. Latyshko to stop creating noise disturbances, MTCC 736 filed this application.

### **C. ISSUES & ANALYSIS**

**Issue No. 1: Is the Respondent causing unreasonable noise that is a nuisance, annoyance or disruption?**

[13] A number of provisions of the Act and MTCC 736's Declaration, By-laws and Rules deal specifically with the issue of noise in a condominium, and what the corporation and owners must do to curb unreasonable noise:

1. Section 117(2) of the Act provides in part that no person shall carry on an activity or permit an activity to be carried on in a unit, the common elements or the assets, if any, of the corporation, if the activity results in the creation of or continuation of any unreasonable noise that is a nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets of the corporation.
2. Section 119(1) of the Act requires condominiums, unit owners and occupiers to comply with the Act, as well as the Declaration, By-laws, and Rules of the corporation.
3. Under sections 17(1) and (3) of the Act, a condominium corporation has a duty to manage the property on behalf of the owners, and to take all reasonable steps to ensure that all owners comply with the Act, the Declaration, the By-laws, and the Rules of the corporation.
4. Subsection 12(a) of the corporation's Declaration prohibits any activity on the common elements which unreasonably interferes with the use or enjoyment by the owners of the common elements.
5. Article VI, Section 3 of MTCC 736's Rules provides that no owner shall create or permit the creation of, or continuation of, any noise or nuisance which, in the opinion of the manager, superintendent or board of directors, may or does disturb the comfort and quiet enjoyment of the units and the common elements by the owners.

[14] Whether noise created by human activity rises to the level of nuisance, annoyance or disruption that is prohibited by the Act or a corporation's governing documents is a question of degree. Jurisprudence on the law of nuisance is well-established. To support a claim of nuisance, the interference must be substantial and unreasonable and can be measured by the frequency and duration of the interference<sup>1</sup>.

[15] In this case, I find that the uncontested evidence submitted by MTCC 736 clearly establishes that the noise disturbance created by Mr. Latyshko is substantial and unreasonable. The GTA noise test report, the December 15, 2022, letters to the

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<sup>1</sup> *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 (CanLII), at paragraphs 19 and 26.

unit owners and the corporation's second letter dated December 15, 2023, to Mr. Latyshko are comprehensive and internally consistent, and are consistent with the detailed testimony of Mr. Marshall and the owner of the unit above, who also submitted an incident log. I find the evidence submitted by MTCC 736 more likely than not to be true.

- [16] The owner of the unit above testified that Mr. Latyshko's banging on the walls and ceiling of his unit and shouting at her and her sons would occur during the day and at night when she was asleep, or trying to sleep, leading her to believe that the behaviour was calculated to annoy and harass her family and make living in their unit intolerable and anxiety ridden.
- [17] She began to keep a log of the disturbances in December 2023 and provided excerpts that describe in detail incidents that took place on 23 occasions between December 16, 2023, and June 30, 2024. The loud banging on the walls and ceiling of Mr. Latyshko's unit occurred at multiple and various times of each day and night, including the middle of the night or early morning when the owner of the unit above and her son were sleeping. To cite just two examples, on Thursday, January 11, 2024, she and her son were in bed and heard banging at 20:40, 20:44, 20:59, 21:03, 21:04, 21:08 and 21:12. On Sunday, January 14, 2024, the log states that she heard almost continuous banging noises during the night that continued until early morning, at 04:25, 04:35, 04:36, 04:45; 05:09, 05:15, 05:21, 05:35, and 05:37.
- [18] The log also describes multiple occasions when Mr. Latyshko yelled loudly out of his unit window, using foul language, and calling the owner of the unit above derogatory names.
- [19] The owner of the unit above testified that Mr. Latyshko's behaviour has been going on for two years and has intensified. She called the police four times but was told she needed to get the corporation involved because Mr. Latyshko refused to apologize or to stop his behaviour. During the hearing, the owner of the unit above testified that Mr. Latyshko continued to bang on his walls and yell at her and her son and had taken to spitting on their vehicles. I accept her evidence that Mr. Latyshko's son has also engaged in behaviour similar to that of his father.
- [20] I note that Mr. Latyshko continued his noisemaking and yelling after the corporation sent him the letters in December 2022 and December 2023 specifically requiring him to stop.
- [21] I accept the above uncontested testimony and find it compelling. I find Mr. Latyshko's noisemaking over the course of more than two years has been

deliberate, persistent, and completely unreasonable, even egregious, and most certainly meets the definition of a nuisance. He must stop this behaviour immediately and comply with the Act and MTCC 736's governing documents.

- [22] The only substantive issue in this hearing is Mr. Latyshko's nuisance behaviour, which he must stop. However, so that Mr. Latyshko fully understands the situation, I will emphasize that the facts presented in this hearing by the corporation indicate, and I find, that they and the owner of the unit above have taken reasonable measures to curb the sounds that occur when she or her son move about in their unit. Mr. Latyshko must understand that the sounds from normal activities of every day living are part of condominium living and he must accept them. If Mr. Latyshko wishes to make further complaints about noise coming from the unit above, he must make these complaints directly to the condominium manager in a respectful manner.

#### **Issue No. 2: Is MTCC 736 entitled to an award of fees or costs?**

- [23] Under Rule 48.1 of the Condominium Authority Tribunal's Rules of Practice, the successful party will usually be entitled to the reimbursement of the filing fees paid to the Tribunal. I will direct Mr. Latyshko to pay to MTCC 736 the amount of \$200 on account of the filing fees it paid to the Tribunal.

- [24] MTCC 736 is also claiming its legal costs of \$12,279.93 on a partial indemnity basis. Section 1.44(1)4 of the Act states that the Tribunal may make "an order directing another party to the proceeding to pay the costs of another party to the proceeding." Section 1.44(2) of the Act states that an order for costs "shall be determined ... in accordance with the rules of the Tribunal."

- [25] The relevant cost-related rule in this case is Rule 48.2:

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.

- [26] The Tribunal's "Practice Direction: Approach to Ordering Costs" ("Practice Direction") sets out some of the factors that may be considered in deciding whether to award costs. Among the factors to be considered are:

1. whether a party or representative's conduct was unreasonable, for an improper purpose, or caused a delay or expense;

2. whether the case was filed in bad faith or for an improper purpose;
3. the conduct of all parties and representatives;
4. the potential impact an order for costs would have on the parties;
5. whether the parties attempted to resolve the issues in dispute before the CAT case was filed;
6. the indemnification provisions in a corporation's governing documents;
7. any other factors the CAT considers relevant.

[27] With respect to the second-to-last factor on this list, the Practice Direction provides that,

... While the provisions of the governing documents are not the only consideration or ultimately determinative, the CAT may consider the provisions of the governing documents and whether the parties had clear understanding of their requirements and/or the potential consequences for contravening them.

[28] Applying the above factors to this case, I find that Mr. Latyshko should be required to pay some of MTCC 736's legal costs, for the following reasons.

[29] First, Mr. Latyshko did not participate in the mediation, thereby frustrating the corporation's efforts to arrive at a mutually satisfactory negotiated agreement and forcing it to incur legal costs to bring this application.

[30] Second, I find that Mr. Latyshko was well aware of the corporation's Rules about noise and the consequences of failing to cease his behaviour, because MTCC 736 warned him of these consequences in its December 2022 legal letter to him:

We also wish to warn you that if there are any further incidents of retaliation or harassment against the residents of [redacted] the corporation intends to take legal action against you to make you cease such behaviour. If legal steps are required to be taken, you will be held responsible for all legal costs that would be incurred.

[31] And again, in December 2023, after demanding that he cease his behaviour:

We hereby caution you that if you fail to comply ... the Corporation will have no choice but to take legal steps against you to obtain your compliance. In such case, you will be responsible for all legal costs that may be incurred, and since such costs may amount to \$25,000 or more if contested, we urge you to

take this matter seriously.

- [32] Third, I have considered the potential impact an order for costs would have on the parties. If Mr. Latyshko does not contribute to the corporation's legal costs, then the full cost will be borne by the other unit owners, who are innocent of any wrongdoing. A number of court and Tribunal cases have accepted that this is not fair<sup>2</sup>.
- [33] Finally, MTCC 736's Declaration and Rules contain provisions that allow it to be indemnified for any costs incurred as a result of a breach of the Rules by Mr. Latyshko, and I find the corporation advised Mr. Latyshko of this in its letters to him.
- [34] In deciding how much Mr. Latyshko should contribute to MTCC 736's legal costs, I am guided by the Tribunal's Practice Direction, which states that I may consider whether the costs incurred by the parties are appropriate and proportional to the nature and complexity of the issues in dispute, and whether the costs are reasonable and were reasonably incurred.
- [35] Mr. Latyshko did not participate in this hearing, so the proceeding was straightforward, as were the facts themselves. There were no novel or complicated legal principles. On the other hand, Mr. Latyshko has stubbornly refused to curb his behaviour despite clear warning, and MTCC 736 was compelled by its obligations under the Act and its governing documents to bring this application to the Tribunal for relief.
- [36] As the whole point of MTCC 736's application is to have Mr. Latyshko comply with his obligations under the Act and governing documents and cease his noise-making nuisance, I conclude he should pay \$4,000 towards MTCC 736's legal costs within 30 days after this decision is issued.

#### **D. ORDER**

[37] The Tribunal orders that:

1. Mr. Latyshko shall immediately comply with section 117(2) of the Act and Article VI, Section 3 of the corporation's Rules and shall:

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<sup>2</sup> See for example *Chan v. Toronto Standard Condominium Corporation No. 1834*, 2011 ONSC 108 (CANLII); *Peel Condominium Corporation No. 96 v. Psofimis*, 2021 ONCAT 48.



- a. Immediately and permanently cease making unreasonable noise in his unit, including but not limited to banging on the walls and ceiling and shouting;
  - b. Immediately and permanently cease making any excessive noise on the common elements resulting in noise nuisances for all other owners;
  - c. Immediately and permanently cease making unreasonable noise directed to the residents of the unit above him and shouting at them;
  - d. Ensure that all occupants of his unit also immediately comply with the above requirements.
2. Within 14 days after this decision is issued, Mr. Latyshko shall provide MTCC 736 with written confirmation that he and his son have read the decision and understand their responsibility to comply with the Applicant's governing documents and the Act.
3. If Mr. Latyshko wishes to make a complaint about noise, he shall do so directly to the condominium manager in a respectful manner.
4. Mr. Latyshko shall reimburse MTCC 736 the amount of \$200 for the fees it has paid to the Tribunal in filing this application within 30 days of this decision.
5. Mr. Latyshko shall pay to MTCC 736 the amount of \$4,000 towards its legal fees within 30 days of this decision.

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Susan Sapin  
Member, Condominium Authority Tribunal

Released on: November 28, 2024