

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: October 12, 2022

CASE: 2022-00238N

Citation: Friedlander v. York Condominium Corporation No. 427, 2022 ONCAT 110

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

Member: Mary Ann Spencer, Member

The Applicant,

Olga Friedlander

Represented by Victor Yee, Counsel

The Respondent,

York Condominium Corporation No. 427

Represented by Athina Ionita, Counsel

The Intervenor,

Paritosh Mehta

Represented by Ava Naraghi, Counsel

Hearing: Written Online Hearing – April 26, 2022 to September 9, 2022

REASONS FOR DECISION

A. INTRODUCTION

[3] Olga Friedlander (the “Applicant”) is the owner of a unit of York Condominium Corporation No. 427 (“YCC 427”). Ms. Friedlander alleges that she has been experiencing unreasonable noise from the unit above hers since its renovation in 2020 by Paritosh Mehta (the “Intervenor”). She further alleges that YCC 427 failed to enforce its 2011 renovation rule which required that replacement flooring meet specific impact insulation and sound transmission standards. She is requesting the Tribunal order YCC 427 and the Intervenor to take remedial measures, as recommended by an acoustical expert of her choice, to address the noise emanating from the Intervenor’s unit. She is also requesting the Tribunal award her \$25,000 as compensation for damages.

[4] YCC 427’s position is that Ms. Friedlander’s application should be dismissed because there is no evidence that she is experiencing unreasonable noise. YCC 427 submits that it acted reasonably to investigate Ms. Friedlander’s complaints up to and including the retention of an acoustical expert to conduct testing and that it

has met its duty to balance the interests of the Applicant and the Intervenor. YCC 427 further submits that the flooring installed in the Intervenor's unit meets the noise transmission standards set out in its current flooring rule which was revised in 2022 after consultation with an acoustical expert. YCC 427 submits that the 2022 rule applies retroactively.

- [5] The Intervenor's position is also that Ms. Friedlander's application should be dismissed on the basis that there is no evidence that the occupants of his unit are creating unreasonable noise. He submits that he has fully co-operated with YCC 427's investigative efforts and, at his own expense, has taken all reasonable steps to mitigate sources of noise which may be disturbing Ms. Friedlander.
- [6] All parties requested their costs in this matter.
- [7] For the reasons set out below, I dismiss Ms. Friedlander's application and award no costs in this matter.

B. BACKGROUND

- [8] This has been a lengthy proceeding. Ms. Friedlander submitted her application to the Tribunal on January 1, 2022. The Stage 3 - Decision proceeding began on March 17, 2022 under case number 2022-00002N. Ms. Friedlander's application was for an order requiring YCC 427 to enforce its 2011 rule "Governing Flooring and Noise"; she alleged that the owners of the unit above hers failed to comply with that rule when renovating their unit. Paritosh Mehta was not originally named as a party in this matter and the Respondent filed a motion to add him. On April 5, 2022, I ordered that he be added to the matter as an Intervenor. As a result, case number 2022-00002N was closed and re-opened as the current case on April 26, 2022. I note that because Mr. Mehta was not originally named as a party in this matter that he did not have the opportunity to participate in Stage 2 – Mediation.
- [9] Ms. Friedlander has lived in her unit at YCC 427 since 2014. Her testimony is that she heard no noise disturbances from the unit above hers until it was renovated in early 2020 when she began to hear plumbing and other noises. She testified that she now hears noises which interfere with her ability to sleep.
- [10] Mr. Mehta testified that he co-owns the unit above Ms. Friedlander's with his 87-year-old parents who are the unit's residents. He testified that the unit had been empty for approximately a year before they purchased it. Before moving into the unit, the Mehtas lived in another unit on the same floor for 12 years, which was renovated by the same contractor who renovated their current unit. Mr. Mehta's testimony is that his parents do not create excessive noise and there were no complaints about noise when they lived in the previous unit.

[11] On February 18, 2020, Mr. Mehta submitted a renovation request to YCC 427 which was approved by Sheila Fletcher, YCC 427's assistant condominium manager with Principle Property Management, the corporation's former condominium management provider. The request indicated he would be installing laminate flooring, renovating the kitchen and bathroom, and installing custom cabinetry in the closets.

[12] YCC 427's 2011 rule "Governing Flooring and Noise" states, in part:

4. The Board of Directors regards it as the owners sole responsibility to ensure that the finished bare floor has a field impact insulation coefficient (FIIC) and field sound transmission class (FSTC) of 65db or greater. As such, you must see to the following:
 - a) The finished hard surface flooring must be floated and separated from the sub-floor with a resilient material. It is very important that there be no solid contact between the floating floor and the sub-floor.
 - b) You must provide proof to the board, in the form of a copy of the invoice, that the resilient underlay is a material with significantly high sound attenuating properties. Note that the FIIC and FSTC claims of underlay manufacturers are the combined value of the underlay with additional building materials tested under controlled laboratory conditions. These materials and conditions may not be representative of those in your unit. You are strongly urged to seek the advice of a building professional when selecting a suitable underlay.

Both "IIC" and "STC" are measures of soundproofing. O. Reg 332/12, the Building Code (the "OBC"), defines STC as "a single number rating of the airborne sound attenuation of a building assembly separating two adjoining spaces, taking into account only the direct sound transmission path". IIC is not defined in the OBC but refers to a rating of the soundproofing of a floor assembly and measures structure-borne noise. "FSTC" and "FIIC" refer to field or on-site ratings as opposed to laboratory ratings.

[13] With his renovation request, Mr. Mehta included a photograph of the flooring underlay to be used in his unit. The product packaging indicates ratings of 73 IIC and 72 STC. The renovation began on February 26, 2020 and was substantially completed by the end of March.

[14] In June, 2020, Ms. Friedlander made inquiries to Ms. Fletcher about the type of underlay required for flooring replacement and indicated she was hearing plumbing noises which she had never heard before. Ms. Friedlander testified that she waited to make inquiries until she believed the renovation in the unit above

hers was complete. On July 22, 2022, Ms. Friedlander sent a letter to Ms. Fletcher to follow up on their previous conversations. She stated she could still hear plumbing sounds and, in spite of having been told that area rugs were in place in the Mehtas' unit, various impact noises. She asked what could be done to resolve the issues.

- [15] On August 6, 2020, Ms. Fletcher, accompanied by the building superintendent, visited both Ms. Friedlander and Mr. Mehta's units to investigate Ms. Friedlander's concerns. Ms. Friedlander's testimony is that Ms. Fletcher told her the noise was "not bad." The e-mail Ms. Fletcher sent to Mr. Mehta concluded "we did not find much in regards to excessive noise but the lower pipe of your shower was the only part of our testing that produced noise. This was still not something we believe was excessive." Ms. Fletcher requested confirmation of the underlay used in Mr. Mehta's renovation and on August 11, 2020, he sent both an invoice confirming its purchase and a written statement from the contractor indicating it had been installed.
- [16] On September 1, 2020, Ms. Friedlander sent an e-mail to YCC 427's condominium manager Yianni Vassilakakos in which she expressed her concern that the noise issue had not been resolved and requested it be brought to the attention of the corporation's board of directors. Mr. Vassilakakos' September 3, 2020 reply was that YCC 427, having received confirmation that the underlay required by the 2011 flooring rule had been installed, had considered the matter closed but that he would raise the issue with the board. Ms. Friedlander's response indicated that plumbing noise also remained at issue. Mr. Vassilakakos replied that he would like to conduct a further investigation.
- [17] On September 29, 2020, Mr. Vassilakakos, Ms. Fletcher and YCC 427's superintendent conducted testing in Mr. Mehta's unit. On October 3, 2020, Mr. Vassilakakos wrote Ms. Friedlander and advised that they observed area rugs had been laid in high traffic areas in the unit and that "little to no noise" was heard in her unit when someone walked normally above but that sound could be heard when walking with heavy feet or jumping, which he wrote would be "unlikely". In this regard, Mr. Mehta's testimony is that his mother has mobility issues and that his father's mobility is becoming more limited. Mr. Vassilakakos also advised that water running from the lower spout in the shower stall could be heard before it was diverted to the showerhead and that the residents had been asked not to allow the water to run for an extended period of time.
- [18] Ms. Friedlander's concerns were not resolved to her satisfaction and on October 6, 2020, she again wrote Mr. Vassilakakos. She acknowledged that the noise had

been reduced but stated she could hear scraping noises and what she described as a track sliding in the Mehtas' unit in the mornings. She also noted that plumbing noises continued. On October 21, Ms. Fletcher wrote Mr. Mehta, advised him that noise complaints were continuing which the corporation was required to investigate and asked that the residents of the unit be mindful of their activities.

- [19] Ms. Friedlander wrote to Mr. Vassilakakos again on October 27, 2020. On November 6, 2020, Mr. Vassilakakos replied that the issue would be brought to the board's attention at its November 24, 2020 meeting. The minutes of the November 24, 2020 meeting state "Management noted it had a duty to investigate any concerns of noise and enforce the rules but did not have the responsibility to determine if the noise was acceptable or excessive. It was confirmed that the duty of the Corporation and the Board had been met for both [Ms. Friedlander's unit] and [redacted] noise issue." On December 9, 2020, Mr. Vassilakakos wrote Ms. Friedlander on behalf of the board. He advised that Mr. Mehta had confirmed the use of the proper flooring underlay, had placed area carpets throughout the unit and added "cushions" below all chair legs. The letter stated that YCC 427 had "diligently investigated your noise complaints and has not determined there is any excessive noise emanating from the unit above."
- [20] After receipt of a further noise complaint from Ms. Friedlander, Mr. Vassilakakos wrote Mr. Mehta and asked him to put sound absorbent carpet pads under the area rugs in his unit. On January 28, 2021, Mr. Mehta confirmed this was done, sending pictures of the rugs with the installed underpadding to YCC 427.
- [21] Ms. Friedlander testified that she retained counsel in January, 2021 after receiving an e-mail from Mr. Vassilakakos in which he advised that YCC 427 would be taking no further action. On January 19, 2021, Ms. Friedlander's counsel wrote YCC 427 and requested that the corporation retain a professional acoustical engineer to investigate and report on the noise disturbances Ms. Friedlander was reporting.
- [22] On February 22, 2021, YCC 427's plumbing contractor, Coldstream Plumbing, investigated the plumbing in Mr. Mehta's unit. It is Ms. Friedlander's testimony that the plumber advised her that the clicking and whistling sounds she was hearing were from the pipes but that these could not be investigated because they were "boxed in." In a February 26, 2021 e-mail to Ms. Fletcher, the plumber stated that noise was due to the water volume of the lower shower spout and recommended three options: that the spout be replaced with a flow restrictor, that it be capped behind the wall, or that the walls be opened to insulate the water lines. Mr. Mehta advised the corporation on March 17, 2021 that the lower spout had been capped.

He also advised that area rugs with underpadding had been laid covering 92% of the living and dining room areas.

- [23] Coldstream conducted follow-up testing of the plumbing. In an April 19, 2021 e-mail to Ms. Fletcher, they advised they had run all fixtures both individually and simultaneously in both bathrooms of the Mehtas' unit and that no abnormal plumbing sounds were heard. Coldstream did note that a slight noise could be heard when the toilets were flushed but stated this was "normal for any condo building." Ms. Friedlander was present during the follow-up testing and her testimony is that she advised the plumber that the sounds produced during the tests were not the same noises which she was hearing regularly.
- [24] From March to May, 2021, there was back and forth correspondence between Ms. Friedlander's counsel and David Thiel, YCC 427's counsel at that time. Ms. Friedlander's counsel again requested an acoustical expert be retained to investigate. Agreement was reached to split the cost of an expert and, after the parties agreed to the terms of reference for the investigation, acoustical consultant Thornton Tomasetti conducted testing for both plumbing and floor impact noise on August 12, 2021.
- [25] I note that none of the acoustical consultants retained by either YCC 427 or Ms. Friedlander testified at this hearing. Therefore, I rely on their written reports.
- [26] Thornton Tomasetti's report dated August 31, 2021 indicates that it measured the FIIC of the floor/ceiling assembly between the units at 57 and notes that this exceeds the recommendations in the OBC. The report also concludes that the plumbing noise emanating from the Mehtas' unit was considered normal. No STC rating was addressed in the report.
- [27] On September 8, 2021, Ms. Friedlander's counsel wrote to YCC 427's former counsel, noted that the FIIC rating of 57 was not in compliance with YCC 427's 2011 renovation rule which states that replacement flooring must meet an FIIC rating of 65, and requested that YCC 427 enforce the rule. Ms. Friedlander's testimony is that YCC 427's counsel's reply was that the 2011 flooring rule no longer formed part of the corporation's status certificates. Counsel for the Applicant also requested that the parties mediate the matter, which YCC 427's counsel rejected as "premature."
- [28] Milos Tomic, the senior manager of Principle Property Management, testified that YCC 427's board was concerned about the "workability" of the 2011 rule and commissioned a review of that rule by Valcoustics Canada Ltd. In its report dated November 23, 2021, Valcoustics concluded that the sound transmission standards

set out in the rule were “extremely stringent” and “generally not practicable” because they exceeded the OBC recommendations. It noted that IIC and STC ratings on underlay packaging are misleading because they reflect laboratory testing of the product. The report noted that “floor covering in the form of carpet or rugs and underpad can be extremely effective and essentially eliminate the problem of impact sound (achieving about IIC 70).”

- [29] Ms. Friedlander retained acoustical consulting firm Soft dB to assess both the August 31, 2021 Thornton Tomasetti and the November 23, 2021 Valcoustics reports. Included among the observations in Soft dB’s March 23, 2022 report is that a properly installed underlay product laboratory tested at IIC 72 would be expected to perform better than the FIIC 57 reported by Thornton Tomasetti and that typical degrading would be expected to be in the range of 5 points. It also noted that the Thornton Tomasetti report includes no sound transmission class (STC) results.
- [30] On April 18, 2022, YCC 427 notified its owners of the amendment of its “Rules Governing Flooring” to be effective May 19, 2022. The amendment changed the required standard for replacement hard surface flooring from “ensuring the finished bare floor has a field impact insulation coefficient (FIIC) and field sound transmission class (FSTC) of 65db or greater” to “meets or exceeds the recommendations and requirements of the Ontario Building Code”:

Where a hard surface floor finish is installed, the Owner shall ensure it meets or exceeds the recommendations and requirements of the Ontario Building Code at the time of installation and that an adequate sound attenuation barrier is installed beneath the finishing flooring so that adjoining units are not disturbed by sound transmission.”

On May 31, 2022, following a review of the amended rule by Valcoustics, YCC 427 gave owners notice of further amendments. I note that the notice states the revised rule will be effective June 1, 2022. Given the notice refers to the requirements of section 58 of the *Condominium Act, 1998* (the “Act”), which states that a rule becomes effective 30 days after notice is given to owners unless owners requisition a meeting, I assume this was an error and should read July 1, 2022. The revision adds the wording italicized below to the April rule:

Where a hard surface floor finish is installed, the Owner shall ensure it meets or exceeds the recommendations and requirements of the Ontario Building Code at the time of installation and that an adequate sound attenuation barrier is installed beneath the finishing flooring *in accordance with the YCC 427 Flooring Policy* so that adjoining units are not disturbed by sound transmission.”

The Flooring Policy was also sent to owners. One of its provisions is that the finished flooring assembly must meet an IIC/FIIC rating of 55. Under “C. Implementation Policy,” paragraph 5 states:

The resilient underlayment, together with the rest of the finished floor system, comprised of finished floor layer; subfloor, if any; setting bed, if any; etc.; and concrete slab shall have a minimum IIC rating as determined in the lab or a minimum FIIC rating as determined in the field, of 55.

- [31] After she had submitted her written witness testimony in this matter and while the Respondent was preparing its witness statements, the Applicant submitted a motion to file a late document. On June 17, 2022, I issued my decision to allow a further report from Soft dB dated June 2, 2022 to be filed. I subsequently granted the Respondent’s request for an adjournment to allow it to consider and respond to that report. As a result, witness testimony and cross-examination were not completed until August 18, 2022.
- [32] Soft dB’s June 2, 2022 report sets out the results of its measurement of sounds in Ms. Friedlander’s bedroom over a 24-hour period, assesses those against three guidelines/standards and concludes that two were not met. The report notes that the sounds “seemingly originate, in large part, from activity in the unit above.” Soft dB notes that in order to make recommendations for improvement, simultaneous measurements would need to be taken in both Ms. Friedlander and Mr. Mehta’s units.
- [33] The Respondent filed a peer review of the Soft dB report prepared by Thornton Tomasetti dated July 18, 2022. This review notes that Soft dB’s report does not identify the origin and source of the sounds it recorded. It also challenges the guidelines/standards Soft dB referenced in that report and states that one of the guidelines Soft dB indicates was not met was incorrectly applied.

C. ISSUES & ANALYSIS

- [34] The issues to be addressed in this proceeding were identified in the March 16, 2022 Stage 2 Summary and Order prepared by the mediator in this matter as (1) whether YCC 427’s 2011 amendment to its “Rules Governing Flooring and Noise” was properly enacted, (2) whether the 2011 rule was valid and enforceable, and (3) whether YCC 427 had fulfilled its obligations to enforce compliance. These issues related to the fact that, as set out in Thornton Tomasetti’s August 31, 2021 report, its testing found the FIIC rating of the flooring assembly installed in the Mehtas’ unit after its renovation to be 57, below the 65 FIIC level set out in the 2011 rule. YCC 427 had also received Valcoustics’ November 23, 2021 report in

which it provided its opinion that the 2011 rule was “generally not practicable.”

[35] The issues in this matter have evolved since the mediation. Mr. Mehta has been added as a party and, while this hearing was in progress, YCC 427 amended its 2011 flooring rule with the result that flooring assemblies must now meet a standard of 55 IIC/FIIC when new hard surface flooring is installed. Testing indicated the Mehtas’ flooring assembly meets this current standard. As raised and acknowledged by Counsel for the Applicant, I note that whether YCC 427’s conduct in changing the rule while this proceeding was underway gives rise to an oppression remedy is outside of the jurisdiction of this Tribunal.

[36] An underlying assumption in this case appears to be that enforcement of the 65 FIIC rating set out in YCC 427’s 2011 flooring rule would resolve Ms. Friedlander’s concerns. I acknowledge that the evidence in this case is that the tested FIIC level of the flooring assembly in the Mehtas’ unit is not in compliance with the 2011 rule which was in effect when it was installed. However, the underlying issue in this matter is not whether the flooring assembly in the unit above Ms. Friedlander’s meets a specific IIC rating but rather whether she is experiencing unreasonable noise.

[37] The Tribunal has jurisdiction over disputes relating to s. 117 (2) of the Act which states:

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,

(a) any unreasonable noise that is a nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation;

Therefore, the first issue to be addressed in this matter is whether the noise Ms. Friedlander indicates she is hearing is unreasonable and constitutes a nuisance.

[38] Section 1 (1) (d) (iii.1) of Ontario Regulation 179/17 (“O. Reg. 179/17”) establishes the jurisdiction of the Tribunal over disputes relating to the provisions of a corporation’s governing documents that “prohibit, restrict or otherwise govern the activities described in subsection 117(2) of the Act...” Therefore, the second issue to be addressed is which of YCC 427’s 2011 or 2022 rules applies in this case and whether the applicable rule has been breached.

[39] If I find that there is unreasonable noise and/or that there has been a violation of YCC 427’s rule, the issues to be addressed are what remedy the Tribunal should

order, and whether YCC 427 or the Intervenor is responsible for the implementation of the ordered remedy. The final issue to be addressed is whether any award of damages and/or costs should be ordered.

Is Ms. Friedlander experiencing unreasonable noise that is a nuisance, annoyance or disruption?

[40] Ms. Friedlander's testified that she is hearing both plumbing and other sounds which she believes are emanating from the Mehtas' unit. She submitted a diary into evidence in which she recorded and described the sounds as, among others, water running, pipes whistling, banging, tapping, scraping, thumping and drawers and doors clicking closed. She indicated that the diary was only a partial record of what she hears and that she focused on early morning and late evening sounds. The diary spans intermittent dates from November, 2020 to May, 2022. The May 2, 2022 record is illustrative:

- 6:12 AM hard object sound - 2 objects wood hitting?
- 6:14 AM humming pipes - soft humming hear from bed
- 6:16 AM scrape sound
- 6:48 AM humming pipes and click but only hear in bathroom
- 7:00 AM creak/movement
- 7:10 AM quiet humming of pipes - quiet but loud enough to hear from bed
- 7:20 AM soft bang
- 7:38 AM hard object drops and bumping
- 7:45 AM cupboard clicks shut
- 7:45 AM thump near bathroom
- 7:47 AM thud
- 7:57 AM 2 hard knocks
- 8:01 AM hard objects knock
- 8:50 AM bumping about

Ms. Friedlander testified that as a condominium resident for over 30 years, she is "aware of the reasonable noise that one is expected to hear in such an environment" but stated what she is hearing is excessive and is interfering with her quiet enjoyment of her unit, and, in particular, is disturbing her ability to sleep. She further testified that she has no medical condition that makes her overly sensitive to noise.

[41] Neither the Act nor YCC 427's rules define 'nuisance'. 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.

While the frequency of the sounds recorded by Ms. Friedlander in her noise diary suggests that they might constitute a nuisance, I note that Soft dB, in its June 2, 2022 report writes that whether noise is perceived to be annoying is dependent on multiple factors:

Annoyance is a subjective response dependent on not only the type of noise (level and spectra content relative to the background noise), but also on the occupant's sensitivity (including their mood), health profile (including age, hearing loss), circumstance (including past experiences and expectations) and perception of the noise (e.g. is the neighbour being unreasonable vis-à-vis time of day) and level of control over the noise (e.g. responsive neighbour).

[42] As Soft dB points out, individual reaction to noise is subjective. That an individual may find noise to be annoying does not necessarily mean that the noise is unreasonable or that a corporation must intervene to address it. Outside of a documented need of an individual for accommodation under the *Human Rights Code*, multi-residential condominiums cannot be expected to address individual owners' preferences which may often be conflicting. Rather, corporations make rules, as section 58 (1) (b) of the Act states, "to prevent unreasonable interference with the use and enjoyment of the units, the common elements or the assets, if any, of the corporation." In YCC 427's case, its 2011 and 2022 rules, with their requirements that flooring meet specific sound transmission levels, is clearly designed to address the potential for noise transference and annoyance. Both rules also contain provisions to address unreasonably disruptive noise.

[43] In some cases, the evidence of unreasonable noise is clear. For example, in *Toronto Standard Condominium Corporation No. 2370 v. Chong et al., 2021 ONCAT (CanLII)*, there were 48 documented noise complaints from multiple residents living on different floors about the prolonged barking of a specific dog. In that case, the extent of and the consistency among the complaints was sufficient to persuade the Tribunal to order the removal of the dog. In this case, there are multiple and conflicting subjective assessments. Ms. Friedlander testified that she has spoken to other residents of YCC 427 who told her they do not hear the type of sounds she reports hearing. She lives alone and no other witness was called to testify that they have heard the sounds within her unit. Mr. Mehta testified that his parents do not make excessive noise. However, notwithstanding his testimony that he visits them daily, he does not reside in the unit. And, when YCC 427's former condominium managers conducted their testing, they determined there was no

excessive noise other than the sound of water running from a lower shower spout.

- [44] To substantiate her belief that the sound she is hearing is excessive, Ms. Friedlander retained acoustical consultant Soft dB to measure the sounds in her unit. In its June 2, 2022 report, Soft dB sets out the objectives of its study were “to establish by measurements whether any sound in the condominium represents a noise nuisance and to establish routes of transmission into the affected condominium.”
- [45] Soft dB recorded 135 sound events in Ms. Friedlander’s master bedroom during the 24-hour period from 11:00 p.m. on May 6, 2022 to 11:00 p.m. on May 7, 2022 with a duration of 1 hour and 11 minutes. The report states “total noise levels over 1-hr time intervals were as high as 31 dBA and 45 dBC” where dBA is the decibel level weighted to correspond to approximately the hearing response of humans and dBC is weighted to measure the effect of low frequency sound.
- [46] Soft dB’s report assesses the recorded sounds against three standards; (1) the values recommended as upper limits to prevent sleep disturbance in dwellings contained in the World Health Organization’s (“WHO”) 1999 *Guidelines for Community Noise*, (2) the recommended level of noise produced by the operation of shared mechanical and electrical equipment in multi-family buildings set out in the Canada Mortgage and Housing Corporation (“CMHC”) *Qualification of the Degree of Acoustic Comfort Provided by Multi-Family Buildings—Phase II* Technical Series 03–116, (2003), and (3) the noise criteria recommendations in the American Society for Heating, Refrigerating & Air-Conditioning (ASHRAE) Handbook3.
- [47] Soft dB notes that “low-frequency sounds that appear inaudible or insignificant to one person, may be both clear and prominent to an older resident.” It concludes that “due to the presence of low-frequency noise, the overall noise inside the condominium exceeds the WHO recommended sound levels required for sleep protection. The noise levels also exceed the more-conservative CMHC recommendations. However, the results are below the limits recommended for HVAC systems by ASHRAE.” I note that Soft dB states in its report that there is no WHO recommended sound level standard for low-frequency noise.
- [48] In its July 18, 2022, responding report commissioned by YCC 427, Thornton Tomasetti observes that Soft dB’s report does not identify the source of the 135 recorded sound events and expresses its opinion that it is not possible to identify sources of sound transmission from audio recordings. The report challenges Soft dB’s conclusion that the noise levels it recorded exceed the WHO guideline, noting that the guideline should apply over an 8-hour nighttime period and that Soft dB’s

results are presented on an hourly basis. It further notes that the report does not refer to WHO's guideline (45 dB) for the maximum level of an individual noise event and notes that only three of the 135 recorded events exceed that limit. It also challenges the use of the CMHC standard which it states significantly exceeds industry standards and "is almost always unattainable in urban areas." The report suggests the less stringent standard contained in Section "C3.2.3 Indoor Sound Level Limits" of the Ontario Ministry of the Environment's ("MOE") document *NPC-300: Environmental Noise Guideline - Stationary and Transportation Sources - Approval and Planning* is more appropriate.

- [49] I do not find the data in Soft dB's report demonstrates that Ms. Friedlander is experiencing unreasonable noise. The dBA or dBA-equivalent levels recommended by WHO, CMHC, ASHRAE, and MOE are 30, 25, 35 and 40, respectively. While none of these standards are referenced in any of YCC 427's governing documents, they provide a measurable proxy for the determination of unreasonable noise, particularly in the circumstance where the only witness testifying that noise is excessive is the Applicant. Thornton Tomasetti does not question the use of the WHO guideline, which is the one most relevant to Ms. Friedlander's stated concern about sleep disturbance, but rather the way it has been applied. The graph prepared by Soft dB which sets out the results on an hourly basis indicates that the recorded level exceeded WHO's nighttime recommendation of 30 only once and that was in mid-afternoon. The three occurrences which exceed WHO's 45 dB guideline for single event occurrences, occurred at 8 a.m., 3 p.m. and 4 p.m. I accept Thornton Tomasetti conclusion that "it is our opinion that the sound levels are in substantial compliance with the WHO nighttime equivalent average noise limit of 30 dBA."
- [50] As set out above in paragraph 41, the requirement for substantial interference can incorporate a component of frequency and duration of the interference. The 135 sound events with a combined duration of 1 hour and 11 minutes recorded by Soft dB appears to be high. However, there is no basis provided in Soft dB's report on which to assess whether this number is atypical for a unit in a multi-residential building. I note that one of those events, described by Soft dB as a "thump and tap" beginning at approximately 6:15 a.m., is recorded as lasting almost 30 minutes, suggesting it may be anomalous or perhaps an error given the only other event described as "tap and thump" recorded with any duration lasts 6 seconds. Further, the other recorded events with durations expressed in minutes rather than seconds are described as "plumbing noise," the longest of which, at 10 a.m., is approximately 10 minutes.
- [51] With respect to plumbing, Thornton Tomasetti's August 31, 2021 report states that

it measured the plumbing noises from the Mehtas' two bathrooms as meeting the ASHRAE NC standard. The report notes that because the toilets and showers are in direct contact with the floor slab that the noise levels were considered normal. Ms. Friedlander's testimony is that the noises produced in testing were not those she was complaining about. However, the fact that Thornton Tomasetti could not replicate the noise that concerns Ms. Friedlander suggests that noise might not originate in the Mehtas' suite, contrary to her contention that its renovation was its proximate cause. Further, Mr. Mehta's testimony is that no plumbing was changed other than under one bathroom vanity when Coldstream identified it as non-compliant to Code during its inspection.

[52] Nor can I conclude that other sounds which were recorded by Soft dB are in fact emanating from the Mehtas' unit as Ms. Friedlander contends. Soft dB's report does not unequivocally state the source of the recorded sounds: "Since the bedroom where measurements was located at the corner of the building, the prospects for sound transmission from adjoining suites on the same floor is minimized. Intrusive sounds all had a transient characteristic to them and seemingly originate, in large part, from activity in the unit above." While the report also states, "any conversational noise, or extraneous sounds such as traffic, were filtered out from the subsequent sound level analysis," Soft dB does not explain its choice of the wording "seemingly" or "in large part."

[53] For the reasons set out in the preceding four paragraphs, I find that the evidence does not support a finding that the noise Ms. Friedlander is experiencing is unreasonable.

Has there been a violation of YCC 427's Rules?

[54] Although I have found that Ms. Friedlander is not experiencing unreasonable noise, that does not preclude the possibility that the requirements in YCC 427's rules have been contravened. Before I can make this determination, I must decide whether the 2011 "Rules Governing Flooring and Noise", in place when the Mehtas' replaced their flooring, or the current 2022 "Rule Governing Flooring" applies in this case.

[55] Counsel for YCC 427 submits that the 2011 rule is not valid and enforceable because it is not reasonable as required by s. 58 (2) of the Act which states "The rules shall be reasonable and consistent with this Act, the declaration and the by-laws." Counsel relies on Valcoustics' November 23, 2021 report which states, in summary, that the STC and FIIC ratings set out in the rule are "not workable or realistic in practice. They are much too stringent and typically will not be attained." She also submits that the 2022 rule applies retroactively because it states that it

“replaces and supersedes any previous rule addressing flooring and in the event of conflict takes precedent.”

[56] I find that the 2011 rule is the one which applies in this case. I reject Counsel for YCC 427’s arguments. The Valcoustics report does not categorically state that the ratings contained in the rule cannot be achieved. And the fact that a rule replaces or supersedes a former rule does not mean it applies retroactively. Arguably, a rule which did apply retroactively would itself be found to be unreasonable. The 2011 rule is the one which was in place when the Mehtas renovated their unit in 2020, when YCC 427’s former condominium management staff conducted their various investigations which included requesting evidence that the underpadding used in the Mehtas’ renovation met the requirements specified in the rule, and when, at its November 24, 2020 meeting, YCC 427’s board of directors determined that it had met its duty with respect to Ms. Friedlander’s noise complaints.

[57] As its name indicates, YCC 427’s 2011 “Rules Governing Flooring and Noise” address both flooring and noise. There are provisions that set out specific requirements for the way in which replacement flooring is to be installed including the type of sound attenuation barrier that must be used and the FIIC rating which the flooring must obtain. However, the Tribunal’s jurisdiction is only with respect to disputes about noise; that jurisdiction does not extend to disputes about flooring. The provisions in the rule which address noise are:

4) d) If after installation of the flooring, residents of adjoining suites complain of the transmission of noises or foot steps, the condominium corporation will insist that additional sound absorbing covering be put down on the floor to provide greater sound attenuation.

5) If the Property Manager or Board of Directors reasonably determines that noise is being transmitted from a unit with hard surface flooring so as to be a nuisance or disruptive, then the Owner of the unit from which the noise is transmitted shall, at his/her expense, take such steps as to abate the noise as directed by the Property Manager or Board of Directors. Such steps may include:

a) covering at least 60% of the surface area not already covered by furnishings with area rugs, and

b) ensuring that high traffic areas (e.g. hallways) and areas where furnishings are subject to frequent movement (e.g. under chairs) are sufficiently covered, and

c) the installation of further sound attenuating material beneath the hard surfaced floor finish of the unit.

- [58] The evidence, set out in detail in the “Background” section of this decision, is that in response to Ms. Friedlander’s concerns, YCC 427 took steps to determine if there was unreasonable noise emanating from the Mehtas’ unit. While it is unclear whether YCC 427 staff advised the Mehtas to lay area rugs or whether they had done this themselves, the evidence is that Ms. Friedlander had been told they were in place when she wrote her July 22, 2020 letter asking what would be done to resolve her issues. Testing was conducted by YCC’s condominium management staff on August 6, 2020 and again on September 29, 2020 to assess the level of noise being transmitted to Ms. Friedlander’s unit. Although apparently in response to Ms. Friedlander’s counsel’s request, YCC 427 retained Coldstream Plumbing and Thornton Tomasetti to conduct further testing. While I acknowledge that Ms. Friedlander paid for 50% of the cost of Thornton Tomasetti’s investigation, the 2011 rule does not require YCC 427 to retain outside consultants. I note that the August 31, 2021 Thornton Tomasetti report identified the plumbing noise in the Mehtas’ unit to be normal and the flooring assembly FIIC rating, or sound transmission level, to be above that recommended in the OBC.
- [59] YCC 427 also worked with Mr. Mehta to address the potential sources of noise in his unit. Coldstream Plumbing identified that the lower shower spout in Mr. Mehta’s unit was one of those sources. In response to their recommendation, Mr. Mehta hired a plumber and had the spout capped. The evidence is also that YCC 427 asked Mr. Mehta to install sound absorbent underpadding under his area rugs. Mr. Mehta testified that 92% of the unit flooring is now covered with area rugs with underpadding. He also placed sound absorbent pads under the feet of furniture.
- [60] The 2011 rule requires the corporation to “reasonably” determine if there is noise that is disruptive or a nuisance, and, if it makes that determination, to require an owner to take steps to abate the noise. I note that the steps set out in the rule are listed as ones that YCC 427 “may” direct an owner to take. While YCC 427’s initial determination of the noise level was based only on the experience of its staff and arguably some of its initial recommendations to the Mehtas were somewhat inadequate (for example, the request that they not run water out of the lower spout for an extended time and the general request that they be “mindful” of their activities), I find its reliance on the findings of Thornton Tomasetti to be reasonable. Similarly, YCC worked with Mr. Mehta to mitigate potential sources of noise. Therefore, I find that there has been no violation of the noise provisions of the 2011 rule.
- [61] I have found that the evidence does not support a finding that the noise Ms. Friedlander is experiencing is unreasonable. I have also found that there has been no violation of the provisions of YCC 427’s 2011 “Rules Governing Flooring and

Noise” over which the Tribunal has jurisdiction. Therefore, I do not need to consider the issues of remedy or responsibility for implementation of that remedy.

Should an award of damages and/ or costs be assessed?

[62] Ms. Friedlander requested \$25,000 in damages and her costs in this matter which include legal fees and the cost of retaining acoustical consultants. YCC 427 and Mr. Mehta both requested their costs.

[63] 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 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.

[64] 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.

[65] Because Ms. Friedlander was not successful in this matter, I will not award her costs or damages. I award no costs in this matter to YCC 427 or Mr. Mehta for the following reasons.

[66] The application in this case was clearly filed in good faith by Ms. Friedlander and I do not find that there was any unreasonable conduct by the parties or their representatives.

[67] YCC 427 requested its full costs in this matter because Ms. Friedlander “unnecessarily prolonged” the proceeding by filing a late report from her acoustical consultant. In the alternative, YCC 427 requested its costs directly associated with the delay caused by the filing of that report including the legal and consulting fees paid to obtain its responding report. I acknowledge that the fact that Ms. Friedlander filed a late report caused YCC 427 to incur additional costs. However, Ms. Friedlander’s explanation is that Soft dB’s on-site measurements, and therefore its report, was delayed due to COVID. While there was delay in this matter, I find her conduct was not unreasonable given these circumstances and therefore I award no costs to YCC 427.

[68] Mr. Mehta requests full or partial reimbursement of his legal costs on the basis that he has acted reasonably throughout this process, had no opportunity to participate in the mediation in this matter and has already incurred significant expense to mitigate sources of noise in his unit. While I recognize that the Respondent filed its motion to add Mr. Mehta as a party to this matter after the mediation was completed, and while I have no knowledge of the Stage 2 Mediation in this matter, the Stage 3 – Decision proceeding made it clear that the positions of the Respondent and the Intervenor did not diverge in any significant way. That he acted reasonably or has incurred expense to comply with YCC 427’s rules are not reasons to award legal costs.

D. ORDER

[69] The Tribunal Orders that:

1. The application is dismissed without costs.

Mary Ann Spencer
Member, Condominium Authority Tribunal

Released on: October 12, 2022