

## CONDOMINIUM AUTHORITY TRIBUNAL

**DATE:** March 17, 2023

**CASE:** 2022-00324N

**Citation:** Zachepylenko v. Toronto Standard Condominium Corporation No. 2680 et al., 2023 ONCAT 42

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

**Member:** Patricia McQuaid, Vice-Chair

**The Applicants,**

Yuriy and Luydmyla Zachepylenko  
Represented by Yulia Pesin, Counsel

**The Respondents,**

Toronto Standard Condominium Corporation No. 2680  
Represented by Natalia Polis, Counsel

Robert Rushlow  
Represented by Andrew Ostrom, Counsel

**The Intervenor,**

Roger Bobak  
Self-Represented

**Hearing:** Written Online Hearing – September 30, 2022 to February 23, 2023

### **REASONS FOR DECISION**

#### **A. INTRODUCTION**

[1] Yuriy and Luydmyla Zachepylenko (the “Applicants”) are the owners of a unit in Toronto Standard Condominium Corporation No. 2680 (“TSCC 2680”) which is a townhouse condominium. The Applicants live adjacent to Robert Rushlow. Mr. Rushlow owns the unit and lives there with his wife and Roger Bobak, his tenant. The Applicants allege that since they moved into their unit in November 2020 they have been severely and negatively impacted by smoke and odour migration into their unit from the Rushlow unit which has interfered with their quiet use and enjoyment of their property and that this is contrary to TSCC 2680’s declaration and rules and constitutes a nuisance. The Applicants also allege that despite their letters of complaint and numerous emails, TSCC 2680 has failed to fulfill its obligations under the *Condominium Act, 1998* (the “Act”) to ensure compliance with the declaration by Mr. Rushlow.

- [2] Mr. Rushlow, his wife, and Mr. Bobak (referred to together as the “Rushlow residents” ) all smoke tobacco and / or cannabis. Mr. Rushlow provided documentation indicating that he smokes cannabis for medical reasons. Smoking is not prohibited by TSCC 2680’s governing documents.
- [3] The Applicants seek an order prohibiting the Rushlow residents from continuing to smoke inside and immediately outside their unit on their exclusive use common elements. As against TSCC 2680, the Applicants seek an order for TSCC 2680 to comply with its obligations under the Act and its governing documents to enforce compliance against the Rushlow residents and to ensure that the Rushlow residents discontinue smoking inside and immediately outside their unit. In addition, the Applicants seek indemnification for their legal costs in this matter in the amount of \$42089.89.

## **B. BACKGROUND**

- [4] It was clear through the evidence that there is considerable animosity between the Applicants and Mr. Rushlow. Any semblance of cordial neighbourly relations disappeared by January 2021 about two months after the Applicants moved in. That animosity has manifested itself through inflammatory language and aggressiveness, with each accusing the other of uncivil conduct. In reviewing the evidence, I have paid little regard to their comments directed to each other, except to note how regrettable it is that they have become so consumed by this dispute; this is particularly true of Mr. Zachepylenko.
- [5] Some context for the Applicants’ persistence in pursuing this case was provided through their counsel’s submission that the Applicants are non-smokers who “detest the pungent stench of cannabis and cigarette smoke”. Unfortunately, they did not review TSCC 2680’s rules about smoking before taking possession of the unit, but made an assumption that people could not smoke inside their home, similar to municipal non-smoking by-laws that prohibit smoking in public places. That misplaced assumption proved problematic given that Ms. Zachepylenko has multiple allergies and asthma, conditions which are aggravated by cigarette and marijuana smoke.
- [6] The fact that there was smoke and odour migration between the units is not in dispute. What is disputed is whether TSCC 2680 properly investigated the issue and complied with its obligations to enforce the Act and governing documents to ensure that smoke or odour that may be a nuisance, annoyance or disruption is not being transmitted to the Applicants’ unit and whether there is now a nuisance, given measures that have been taken by Mr. Rushlow, and/or any unreasonable interference with the Applicants’ quiet enjoyment.<sup>1</sup> For the reasons that follow, I

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<sup>1</sup> S. 117(2) (b) of the Act, read with s. 26 of Regulation 48/01 indicate that no person shall carry on an activity or permit an activity to be carried on in a unit if the activity results in the creation or continuation of a prescribed nuisance, annoyance or disruption. Smoke and odour are prescribed, if they are **unreasonable**.

find that TSCC 2680 has complied with its obligations and that the Rushlow residents are not creating or continuing a nuisance arising from smoke and odour migration. The application is dismissed without costs to or against any party.

[7] Before my review and analysis of the evidence, I do want to clearly state what this case was **not** about. Though Applicants' counsel submits that the partition wall between the two units "is replete with extensive construction deficiencies", the Applicants acknowledge that issues about repair and maintenance are outside the Tribunal's jurisdiction. Further, although the Applicants in their communications with TSCC 2680, refer to the science about the health risks of second-hand smoke which they suggest is "slowly killing [their] family", this is not a case about an activity likely to cause damage to property or injury and illness to an individual as per s. 117(1) of the Act, over which the Tribunal has no jurisdiction. Finally, this case does not relate to s. 135 of the Act, over which the Tribunal also has no jurisdiction, though that provision in respect of TSCC 2680's alleged failure to "promptly abate the smoke transmission" resulting in a "complete and blatant disregard for the [Applicants'] interest, their health and wellbeing" was also referred to in communications between the parties.

[8] I will therefore only address the evidence and submission relevant to my analysis and the issues to be decided by me. Those issues are:

1. Whether TSCC 2680 has enforced compliance, as against Robert Rushlow, with its governing documents, specifically related to smoke and odour migration which may be creating a nuisance or annoyance or an unreasonable interference with the quiet enjoyment of the Applicants?
2. If there is a nuisance and there has been a failure to enforce compliance, what is the appropriate remedy?
3. Is any party entitled to their costs?

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

**ISSUE: Has TSCC 2680 enforced compliance as against Robert Rushlow with its governing documents, specifically related to smoke and odour migration which may be creating a nuisance or annoyance or an unreasonable interference with the quiet enjoyment of the Applicants?**

[9] As noted above, the Applicants purchased their unit in November 2020. Before moving in they replaced flooring and painted the walls throughout the unit. Their contractor reported to them that there was a "constant and a very potent smell of cigarette and cannabis smoke" inside the home. It was, in the contractor's view, noticeable and strong enough to make it an uncomfortable atmosphere for living. Shortly after they moved in, the Applicants sent their first letter of complaint, dated November 20, 2020, to TSCC 2680. I note here that communications with TSCC 2680 and Mr. Rushlow were virtually all from Mr. Zachepylenko. The evidence indicates that there were many emails and letters sent to TSCC 2680 and Mr.

Rushlow over the following months.

- [10] The Applicants did try to mitigate the smoke migration into their unit. They installed spray foam insulation along the joists in the basement (including in Mr. Rushlow's basement) where accessible, and around pipes at various locations to provide a seal. Due to the location of pipes in the basement, spray foam was not applied continuously along the party wall between the two units. They purchased air purifiers with carbon filters and installed carbon filters for their HVAC system. In the Applicants' written testimony, they stated that nothing has helped so far.
- [11] As noted above, the evidence shows that there were many letters and emails sent by the Applicants to Mr. Rushlow and TSCC 2680, most notably a great deal of communication to TSCC 2680. On January 13, 2021, the Applicants wrote to Mr. Rushlow and to TSCC 2680 requesting that Mr. Rushlow seal the basement and any other room where they were smoking to ensure smoke did not drift. The Applicants also complained to Toronto Public Health, but were told that since the complaints related to incidents on private property, the City had no jurisdiction. Nevertheless, the Applicants continued to assert that the Rushlow residents, when they smoked outside were in direct violation of the City's by-law because they were smoking within nine meters of other residential units.
- [12] The January 13 letter was followed by letters on January 21 and 30. By February 16, 2021, the Applicants expressed, in an email to TSCC 2680, their disappointment that it was taking so long to resolve their urgent problem, that they were experiencing "clouds of smoke" in their unit. While they also expressed that condominium residents did not have the right to smoke, the dilemma for TSCC 2680 was that, in fact, in this condominium, residents do have that right, subject to any limitations imposed through the condominium's governing documents or the Act. The fact that smoking is not prohibited is not, in and of itself, dispositive of the issue, which is acknowledged by the Respondents.
- [13] TSCC 2680 acknowledged the Applicants' concerns from the outset. The number of emails submitted in evidence by both the Applicants and TSCC 2680 do not support the Applicants' assertion that TSCC 2680 "did nothing more than take a few sluggish, ineffective steps to merely create an appearance of some action being taken." Indeed, in emails, the Applicants expressed appreciation for the help that TSCC 2680 was trying to give. Given the condominium rules do not prohibit smoking, that this issue developed during the pandemic when lockdown restrictions were in place, and that in February 2021, Mr. Rushlow responded with his own complaints of odour migration<sup>2</sup>, this was far from a straightforward matter

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<sup>2</sup> Regarding Mr. Rushlow's complaints, there was little evidence, but based on the testimony, it would appear to have been an attempt to retaliate as the wording of the complaint mirrored that of the Applicants, and indeed there was little action taken on it by TSCC 2680 or Mr. Rushlow subsequent to him sending the complaint. More than anything, it demonstrates the escalating acrimony, and pettiness, between neighbours. Unfortunately, it escalated to the point where police were called on at least one occasion.

with an immediate solution.

- [14] TSCC 2680 stated to the Applicants in early February 2021 that having Mr. Rushlow remove pipes to complete further spray foam insulation to facilitate a better seal between the units could have structural implications and impact plumbing and electrical systems. Further TSCC 2680 stated to the Applicants that any such work would require board approval and a permit from the City, and that Mr. Rushlow might not be in a position to do the work requested by the Applicants. TSCC 2680 did, however, write to Mr. Rushlow in February 2021, citing s. 4.2(d) of the declaration which states:

*“In the event the Board determines, in its sole discretion, acting reasonably, that any noise, odor of offensive action is being transmitted to another Unit and that such noise, odour of offensive action is an annoyance and/or a nuisance and/or disruptive (regardless of whether that Unit adjacent to or wherever situated in relation to the offending Unit), then the Owner of such Unit shall at his/her own expense take such steps as shall be necessary to abate such noise, odor or offensive action to the satisfaction of the Board. In the event the Owner of such Unit fails to abate the noise, odor or offensive action, the Board shall take such steps as shall be necessary to abate the noise, odour or offensive action and the Owner shall be liable to the Corporation for all expenses incurred by the Corporation in abating the noise, odour or offensive action, which expenses are to include reasonable solicitor’s fee on a solicitor and his/her own client basis.”*

TSCC 2680 noted in this letter that Mr. Rushlow had taken some steps to try and mitigate the smoke migration, but that the smoke odour persisted. TSCC 2680 asked that they smoke outside or seal any areas where smoke may be seeping through.

- [15] In early April, TSCC 2680 stated that they were trying to arrange an inspection by their engineer. While the Applicants responded that they were glad the matter was moving forward, from the Applicants’ perspective, the situation remained a problem, and they described it as a “tsunami of smoke and stench”. On April 15, 2021, they wrote to TSCC 2680 that when the Rushlow residents are home in the afternoon, they “smell every puff”.
- [16] Jim Rammos, an engineer with Criterium Engineers attended at both units on May 10, 2021. He noted several areas in Mr. Rushlow’s unfinished basement that needed to be sealed, around joists and ducts, as well as spaces behind electrical receptacles in the Applicants’ unit.<sup>3</sup> As a result of the engineer’s inspection, TSCC 2680 retained contractors to install more insulation around basement ducts and to close any gaps in the basement between the two units. The work was completed by June 17, 2021.

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<sup>3</sup> Mr. Rammos’ photos with notes are found at Exhibit 18.

- [17] The Applicants kept a log of their observations, from July-December 2021 which suggests that, for them, the insulation work did not solve the problem. They note incidents of smoke transmission both inside and out. In the summer of 2021, there are several notations where they state that it was impossible for them to open their windows because the smoke and stench was migrating into their home as a result of the Rushlow residents smoking too close to the Applicants' unit.<sup>4</sup> In contrast to this evidence, Sandra Wendt, a board director of TSCC 2680 who testified on its behalf, stated that she visited the Applicants' unit approximately five times and only on the first occasion, in the spring of 2021, did she detect a smoke odour.
- [18] In November 2021, the TSCC 2680 board retained Edison Engineering ("Edison") to investigate the smoke migration issues. Edison's report dated February 14, 2022,<sup>5</sup> documents their interviews with both the Applicants and Mr. Rushlow, their observations and testing results. This is the only expert report submitted in this case.<sup>6</sup> Given the independence of Edison in the context of a dispute in which the evidence was at times heated and provocative, I give their observations considerable weight.
- [19] Edison noted that Mr. Rushlow stated that he smoked only in the basement, though in Mr. Rushlow's testimony he stated that he only smoked outdoors from October or November 2021 onward. (Whether or not the Rushlow residents always smoked outside, based on the evidence, I accept that they were attempting to smoke outdoors on a more consistent basis in response to the concerns raised by the Applicants and TSCC 2680.) Edison also noted that when they attended in the Applicants' unit, there was no noticeable odour upon arrival and during testing, which is consistent with Ms. Wendt's evidence. Edison did note penetration of smoke and odour at seven various electrical outlets, at a central vacuum outlet on the ground floor and at an unsealed bathroom plumbing penetration below a bathroom sink on the second floor. All these were in the Applicants' unit. Several areas in the Rushlow unfinished basement were missing seals below sill plates and joists, which was similar to the findings of Mr. Rammos. The overall assessment was that air sealing deficiencies would need to be addressed to rectify the unit-to-unit smoke migration and that this would require extensive repairs to the interior finishes of both units.
- [20] In the spring of 2022, Mr. Rushlow hired a contractor to finish his basement. TSCC 2680 had Mr. Rammos attend to review the renovation work in August 2022. His conclusion was that the area had been sealed properly and he indicated that the contractor was in the process of completing the work to include an insulation and

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<sup>4</sup> Exhibit 25. On July 15, 2021, the Applicants noted that the Rushlow residents were "defiantly" outside in the common areas.

<sup>5</sup> Exhibit 6

<sup>6</sup> In reply submissions, Applicants' counsel referenced a brief report from a consulting engineer retained to review the Edison report. This was not in evidence before me and I have therefore disregarded the submission related to it.

vapour barrier.

- [21] While there is no evidence of whether the Applicants completed the work highlighted by Edison by sealing those points in their unit, the evidence from the cross examinations (conducted by videoconference) of the Applicants' family supports the conclusion that the situation has improved. Their daughter testified that there was no drastic improvement until the summer of 2022. While smoke migration can still be bothersome, she stated it was a lot less. Ms. Zachepylenko testified that "to be honest with you, it is improving, mostly after the summer when they finished the basement." Mr. Zachepylenko is the only member of the family who says the smell is the same as in November 2020, though he stated it is no longer an explosion of smoke, but a slow release. He did concede that the smoke is less intense.
- [22] The evidence before me, as set out above, does support a finding that the Applicants did experience smoke migration into their unit. It was unpleasant for them and clearly not a situation that they anticipated at the time of their purchase of the unit. And there is no question that the Rushlow residents are heavy smokers. However, significant measures have been taken by both the Applicants (early in the history of this dispute) and Mr. Rushlow (smoking outside, purchasing air filters, consuming marijuana edibles to reduce his smoking) to mitigate the issue, some of which has been done at considerable expense to both of them. The smoke and odour migration has substantially abated. TSCC 2680 has acted reasonably to balance both the Applicants' issues and the fact that smoking is not prohibited, and has been responsive to the Applicants' concerns from the outset. They urged Mr. Rushlow to smoke outside until remedial measures to abate any smoke and odour migration could be taken. They have fulfilled their obligations under the Act and declaration, including retaining engineers on two occasions, and they also undertook some remedial work in the units in May 2021. The responses may not have been as timely as the Applicants thought appropriate, which led to their frustration, but that does not diminish the fact that TSCC 2680 did properly investigate and consistently communicate with the Applicants.
- [23] I accept the Applicants' evidence that a complete absence of smoke and a perfect seal has not been achieved. In this condominium that may never be the case. They may wish it to be otherwise, but it is not reasonable for them to expect a complete absence of smoke living in this condominium. It is disturbing to them, most particularly to Mr. Zachepylenko. I sympathize with the Applicants – they have found themselves in a condominium where smoking is not prohibited.<sup>7</sup> They may wish it to be otherwise. However, the evidence, viewed as a whole, does not

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<sup>7</sup> Ms. Wendt testified that the board has tried to pass a by-law to amend the rules to prohibit smoking, but was unable to secure the required number of votes to effect a change. I note here that the Tribunal has issued orders that a unit owner cease smoking such as in Metropolitan Toronto Condominium Corporation No, 1177 v. Brunet et al 2022 ONCAT 66 (CanLII) cited by the Applicants. However, in Brunet, there was a rule prohibiting smoking.

support a finding that the smoke migration continues on a substantial and unreasonable basis.

- [24] Having found that TSCC 2680 has taken appropriate compliance measures and that based on the evidence before me, the smoke or odour does not constitute a nuisance, annoyance or disruption as per s. 117(2) of the Act, no remedy is ordered.

**ISSUE: Is any party entitled to its costs?**

- [25] The costs incurred by each of the parties are substantial. The Applicants' counsel has submitted a bill of costs of approximately \$42,000. TSCC 2680's bill of costs is approximately \$16,000 and Mr. Rushlow's is approximately \$10,000.
- [26] Regarding costs claimed in this proceeding, s. 1.44 (1) 4 states that the Tribunal may make "an order directing a party to the proceeding to pay the costs of another party to the proceeding." Section 1.44 (2) 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 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.

- [27] The Applicants have not been successful and are not entitled to reimbursement of their CAT fees.
- [28] Regarding the Applicants' legal costs, as they have not been successful, I see no basis here for an award of costs in their favour, which are, in any event, disproportionate to the issues in dispute. For the Applicants, I realize, this may be a hardship. The fees they face are substantially larger than those incurred by the other parties, but at the same time, the rhetoric that caused this case to escalate in the way that it has lies in no small measure at their feet.
- [29] TSCC 2680, in its submissions about its costs request, has referred me to the Tribunal's Practice Direction: Approach to Ordering Costs. Among the factors to be considered are whether a party or representative's conduct was unreasonable or caused 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. While I have not found in the Applicants' favour and have noted that the acrimonious relationship between Mr. Zachepylenko and Mr. Rushlow is very much at the core of this dispute, I have also noted that the Applicants found themselves, possibly in part due to a lack of due diligence when purchasing their home, in a significant predicament. They desperately sought a resolution though at times were very unrealistic in their expectations. As Ms. Zachepylenko stated in her testimony, the situation began to consume them. Might they have reassessed their situation in the fall of 2022 as this Stage 3 case began, as submitted by TSCC 2680 in their submissions? Possibly; but that is more easily concluded in hindsight. The Applicants have incurred substantial costs already. I am exercising my discretion and will not add to their burden by awarding costs to TSCC 2680.

[30] Finally, Mr. Rushlow is also seeking his costs. As the evidence showed, Mr. Rushlow was at times provocative in his interactions with the Applicants, and this resulted in an escalation of the dispute. His evidence about when he stopped smoking in his home was confusing at times, and like Mr. Zachepylenko, his fervour in maintaining his position that there was minimal smoke migration from his unit in early 2021, but that there was odour migration into his unit, did little to encourage resolution. I will not make an order for costs in Mr. Rushlow's favour.

**D. ORDER**

[31] The Tribunal orders that this application is dismissed without costs.

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Patricia McQuaid  
Vice-Chair, Condominium Authority Tribunal

Released on: March 17, 2023