CONDOMINIUM AUTHORITY TRIBUNAL

DATE: March 30, 2023
CASE: 2022-00029N
Citation: Carleton Condominium Corporation No. 169 v. Buckland, 2023 ONCAT 53

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

Member: Patricia McQuaid, Vice-Chair

The Applicant,
Carleton Condominium Corporation No. 169
Represented by: Emily Deng, Counsel

The Respondent,
David D. Buckland
Self-Represented

Hearing: Written Online Hearing – February 6, 2023 to March 24, 2023

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, Carleton Condominium Corporation No. 169 ("CCC 169"), requests an order from the Tribunal that David D. Buckland, a unit owner, and his tenant Jason Hayes, immediately cease smoking in the unit and on exclusive use common elements, or, alternatively that David D. Buckland take steps necessary to ensure that no smoke or smoke odours migrate into the common elements or other units thereby bringing himself into compliance with CCC 169's rule regarding smoking. Mr. Buckland joined the case in Stage 1 of the Tribunal process, but did not respond to any messages posted by CCC 169. He did not participate in either Stage 2 or 3. Based on the evidence, I was satisfied that Mr. Buckland had notice of the case and therefore the case proceeded in his absence.

B. BACKGROUND

[2] CCC 169's rule regarding smoking (Rule 3.11) came into effect on June 8, 2018. Rule 3.11 prohibits smoking on the common elements and in units. However, the rule contains a legacy provision (referred to as "grandfathering" in Rule 3.11). Pursuant to this provision, any resident who was a smoker of tobacco products

and living in the unit as of June 8, 2018, could apply for an exemption which would allow them to continue to smoke. Mr. Buckland applied for, and received, that exemption. His tenant, Jason Hayes, was not living in the unit with him at that time and is, therefore, not exempt from Rule 3.11. As set out in Rule 3.11, the exemption requires that certain steps be taken, as follows:

> A. Grandfathered residents must take reasonable steps to ensure that the smoke does not migrate to the common elements or to other units (which could cause nuisance, disturbance or harm to other residents of the building, or their guests). Without limiting the generality of the foregoing, the smoker must ensure that:
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> a) all exterior doors are closed when smoking takes place inside the unit;
> b) the unit's exhaust fans are turned on, while anyone is smoking in the unit; and
> c) appropriate air filtering and/or purifying is installed to prevent second-hand smoke from entering neighbouring units or the common elements.

Rule 3.11 also states:

> B. Grandfathered residents are responsible for all costs incurred by the corporation to prevent migration of smoke or odours from the resident's unit to other units or the common elements.

[3] Several residents living in units on the same floor as Mr. Buckland's began to complain to CCC 169 in March 2021 about smoke and odour migration. This led to investigation and discussions between CCC 169 and Mr. Buckland about abatement measures. However, given that complaints continued, CCC 169 filed an application with the Tribunal, initially in January 2022, but it was held in abeyance by CCC 169 until October 2022.

[4] I note that in closing submissions, CCC 169's counsel advised that Rule 3.11 has been amended effective December 25, 2022. The amendment means that as of June 30, 2023, previous legacy provisions will be rescinded. After that time, smoking will not be permitted in units, including exclusive use balconies and on the common elements. To a certain extent, this case would potentially become moot in approximately three months as it is Mr. Buckland's smoking, currently permitted by the legacy provision with certain limitations, which is at the core of this matter.

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

1. Has smoke migrated from Mr. Buckland's unit into the common elements or other units?

2. Has Mr. Buckland taken reasonable steps to ensure that no smoke from his unit migrates into the common elements or other units in accordance with Rule 3.11?

3. If smoke is migrating and reasonable steps have not been taken by Mr. Buckland, what is the appropriate remedy?

4. Is CCC 169 entitled to costs?

C. RESULT

[6] For the reasons set out below, I find that Mr. Buckland has breached Rule 3.11 both by allowing his tenant to smoke in the unit and by failing to take reasonable steps to ensure that when he smokes as allowed by the legacy provision, no smoke migrates from his unit. Mr. Buckland shall immediately cease any smoking in the unit and on the exclusive use common areas. Mr. Buckland shall reimburse CCC 169, as compensation, $2500 as well $3200 in costs pursuant to Rule 48 of the Tribunal's Rules of Practice.

D. EVIDENCE AND ANALYSIS

ISSUES 1 and 2: Has smoke migrated from Mr. Buckland's unit into the common elements or other units, and has Mr. Buckland taken reasonable steps to ensure that no smoke from his unit migrates into the common elements or other units in accordance with Rule 3.11?

[7] Given that these two issues are factually intertwined, I will deal with both together. I do note that when a Respondent does not join a case, the Tribunal must decide the case based on the evidence provided by the Applicant, and as in every case, that evidence is weighed on the balance of probabilities.

[8] Three unit owners, all residing on the same floor as Mr. Buckland, provided affidavits outlining their history of complaints. While the first formal complaints were made to CCC 169 in March 2021, the owners each stated that instances of smoke and odour migration occurred in 2020 and even earlier. At least one owner has maintained a log of those times when they have experienced smoke and odour in their unit. Smoke odour and the presence of second-hand smoke in the hallway are a persistent issue although odour and smoke infiltration into their units is also occurring. Their concerns were such that together they retained legal counsel in December 2021 to communicate with CCC 169 to attempt to resolve the

matter, failing which litigation against CCC 169, for its alleged failure to take reasonable steps to ensure Mr. Buckland's compliance with its governing documents was being contemplated.[1]

[9] CCC 169 investigated these complaints and engaged in discussions with Mr. Buckland through its condominium manager and a board member. In emails provided by CCC 169 in the hearing, Gord Breedyk, a board member, stated to one of the owners that he had spoken to Mr. Buckland who was "desperate to find a way to prevent smoke disturbance" to the neighbours.

[10] CCC 169 sent numerous emails and / or letters to Mr. Buckland in 2021 pointing out that complaints of smoke migration were continuing – at least 15 instances were noted. CCC 169 also pointed out that Mr. Buckland's tenant was not permitted to smoke and that Mr. Buckland was responsible for the tenant's noncompliance with Rule 3.11.

[11] The evidence about the smoke and odour migration is clear and credible and leads me to find that smoke has migrated from Mr. Buckland's unit to the hallways and into other residents' units. The next question is whether reasonable steps were taken to prevent that migration. The fact that the issue persists certainly suggests not.

[12] Counsel for CCC 169 wrote to Mr. Buckland on December 17, 2021, stating that CCC 169 appreciated that he had made previous attempts to resolve the issue by installing two air purifiers in the unit and that he tried to not smoke in the unit. In addition, counsel noted that CCC 169 had taken further measures at the property such as installing weather stripping at Mr. Buckland's front door, professional cleaning of the hallways, replacing patio doors and windows as well as doing an air supply/air balancing assessment. Unfortunately, the measures did not resolve the smoke transfer issue. In this letter, counsel stated: "Grandfathering does not mean an occupant can smoke with impunity. You are required to prevent the smoke transfer."[2]

[13] Counsel also proposed options to Mr. Buckland. He could install a 'personal' smoke cabin in the unit to be used at all times when smoking in the unit with a semi-annual assessment by a consultant hired by CCC 169 to confirm there was

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[1] The affidavits submitted from these three unit owners by CCC 169 were drafted and sworn in March 2022 apparently at a time when they were contemplating action against CCC 169 for its failure to enforce its rules. This timing becomes relevant on the costs issue.

[2] I note that there is no evidence as to whether Mr. Buckland had been keeping exterior doors closed or turning on exhaust fans as required by the legacy provision.

no smoke migration. Alternatively, he could keep all windows and exterior doors to the unit closed at all times when smoking and acquire several effective air purifiers, and agree to the semi annual assessment. Mr. Buckland was directed to provide confirmation of the steps he would be taking by December 24, 2021. Counsel went on to state that CCC 169 would commence legal proceedings if the situation was not corrected, the costs of which would be added to the common expenses of his unit pursuant to Article X of CCC 169's declaration.

[14] With no response from Mr. Buckland by December 24, 2021, and continuing complaints from the three residents about smoke migration, counsel advised Mr. Buckland on January 12, 2022, that CCC 169 intended to commence a CAT application. Subsequently, in mid-February 2022, Mr. Buckland indicated that there would no longer be any smoking inside his unit. However, because of the longstanding complaints, CCC 169 required independent evidence to corroborate that there would be no smoking. Mr. Buckland agreed to the installation of an Aretas smoke detector/monitoring device in his unit, for a 12-month period. This was installed in May 2022 and is still operational. A second Aretas unit is also located in the hallway for the floor. The CAT application was held in abeyance by CCC 169 given this development.

[15] The evidence suggests that there were periods of time when there was no smoking detected within the unit. But in October 2022, counsel wrote to Mr. Buckland advising him that smoke in the unit had been detected on four occasions between May and July. As a result, the CAT application would be continued and the notice of case was provided to Mr. Buckland. A further report from Aretas recorded "smoke events" on October 18 and November 24.

[16] The fact that the monitoring indicates that Mr. Buckland may be smoking in his unit contrary to his agreement in February 2022, does not, in and of itself, put him in violation of Rule 3.11. He (though not his tenant) is allowed to smoke. However, reasonable measures must be taken to ensure that smoke does not migrate to the common elements or other units, thereby creating a nuisance or disturbance to other residents. The residents, and one in particular, have continued to complain of multiple instances of smoke and odour transfer between December 2022 and February 28, 2023.

[17] Rule 3.11, as written, implies that there could be some smoke migration from a legacy smoker's unit. However, I find that the reasonable inference from these continuing documented complaints is that Mr. Buckland (and/or his tenant) is smoking and that he has not taken the reasonable steps to remedy the issue. Regarding the 'personal smoke cabin' proposed by counsel, though I have no

evidence before me about the possible cost, it seems to be a potentially onerous measure given the existing wording to Rule 3.11. I do conclude that the continuance of the smoke and odour migration, and the extent of it, is a violation of Rule 3.11.

ISSUE 3: What is the appropriate remedy?

[18] In closing submissions, counsel has reiterated that the appropriate remedy, aside from ceasing smoking, are the measures set out in their December 17, 2021 letter: installation of a 'personal' smoke cabin or keeping all windows and exterior doors to the unit closed at all times and installing effective air purifiers. Again, though there is no evidence before me about the possible cost of a smoke cabin, with the recission of the legacy provision on June 20, 2023, it seems unlikely that Mr. Buckland will incur such an expense. The relatively simple and reasonable remedy of keeping all doors and windows closed and placing effective air purifiers in the unit seems not to have been implemented, or ineffectively so, given the extent to which the smoke migration has persisted.

[19] The section of Rule 3.11 that deals with cannabis smoking contains the statement that if a resident is not in compliance with any provisions of the rule or if the board acting reasonably determines that the cannabis smoking is a nuisance, the smoker, upon written request from the board will immediately stop smoking. This statement is not included in the section that addresses tobacco smoking by a resident with the legacy exemption. The evidence before me supports a finding that the smoking is a nuisance as per the Act given the ongoing and documented complaints of smoke migration since at least 2021, despite steps taken by CCC 169 to resolve the situation. I have therefore concluded that the appropriate remedy is an order that Mr. Buckland cease smoking and, as is his obligation under s. 119(2) of the *Condominium Act, 1998* (the "Act"), that his tenant not smoke in the unit or on the exclusive use common elements.[3] In making this order, I have considered the fact that despite the legacy provision, Mr. Buckland, in February 2022, had indicated that he was prepared to cease smoking in his unit because of the ongoing issues of smoke migration. There is a balance of owners' interests when a legacy provision is in place. The particular facts of a case are important when assessing the reasonable balance. My order that Mr. Buckland cease smoking is also informed by the fact that the legacy provision is, in any event, rescinded as of June 20, 2023.

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[3]S. 119 (2) An owner shall take all reasonable steps to ensure that an occupier of the owner's unit and all invitees, agents and employees of the owner or occupier comply with this Act, the declaration, the by-laws and the rules. 1998, c. 19, s. 119 (2).

ISSUE 4: IS CCC 169 entitled to costs?

[20] CCC 169 seeks its costs in this matter of $19873 (inclusive of HST), on a full indemnity basis. The costs include the costs to enforce compliance prior to this case commencing in October 2022 of approximately $8500 (the “pre-CAT” costs) and from October 2022 to completion of this case of approximately $7500. Also included in the bill of costs submitted is $2572.45 paid by the three residents to a different law firm. CCC 169 submits that these costs were incurred between January and March 2022 by these residents who were directly impacted by Mr. Buckland’s smoking and for the purposes of preparing supporting affidavits in CCC 169’s case, though the case was held in abeyance.

[21] In seeking the pre-CAT costs, CCC 169 relies on Article X of its declaration which states:

> Each owner shall indemnify and save the Corporation harmless from any loss, costs, damage, injury or liability which the Corporation may suffer or incur resulting from an act or omission of such Owner…
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> All payments pursuant to this clause ae deemed to be additional contributions to toward the common expenses and recoverable as such.

In addition, CCC 169 submits that owners are advised through the Residents Handbook which sets out the condominium rules that that they are responsible for any costs incurred by the corporation because of a breach of CCC 169’s rules by an owner. Paragraph 2.5.2 of the rules states that where, in the opinion of the board, the owner ‘causes loss or damage to the common elements or to assets of the Corporation by breach of the rules, then the owner is responsible for all such loss or damage’.

[22] I note that neither Article X in the declaration nor rule 2.5.2 clearly address compliance costs though the underlying intent that unit owners should not be required to pay for the costs the condominium incurs due to noncompliant conduct of another owner or occupant. What is somewhat unusual here is that CCC 169 is not merely seeking the costs of a letter or letters sent by counsel to the owner seeking compliance but **all** of its legal costs incurred, including its discussions with third party counsel who had raised the possibility of legal action against the corporation, review of the affidavits drafted by that counsel, and reviewing the reports of the Aretas monitoring service. Aside from the fact that the provisions relied on by CCC 169 in pursuing compliance costs do not clearly set out the liability for any such costs, these costs are not proportionate to the issue. CCC 169 counsel, in their letter to Mr. Buckland dated December 17, 2021, did advise him

that they had incurred legal costs in excess of $1000 to deal with the matter though it did not intend to “charge you the costs of this letter at this time.”. The bill of costs indicates that approximately $1500 had been incurred at that time.

[23] Following upon the comprehensive letter of December 17, 2021, counsel wrote two subsequent letters on January 22 and February 11, 2022. I do find it is fair and appropriate that Mr. Buckland be responsible for the cost incurred by CCC 169 for these letters. The fact that he appeared to be permitting his tenant to smoke, which was clearly in violation of Rule 3.11 is significant. However, I do not accept, based on the evidence, counsel’s submission that Mr. Buckland had complete disregard for the impact of his smoking. That is not supported by the evidence contained in the email exchanges between one of the owners and Mr. Breedyk referenced in paragraph 9 above nor by counsel’s letter to Mr. Buckland in December 2021 in which she acknowledged that he had attempted to take steps to remedy the situation.

[24] I have reviewed the bill of costs and based on the information set out there, I order that Mr. Buckland reimburse CCC 169 the amount of $2500 pursuant to s. 1.44(1)3 of the Act.

[25] Regarding the legal costs of approximately $7500 related to this proceeding, the Tribunal’s authority to make orders is set out in section 1.44 of the Act. Section 1.44 (2) of the Act states that an order for costs “shall be determined…in accordance with the rules of the Tribunal.” The cost related rules of the Tribunal’s Rules of Practice relevant to this case are:

> 48.1 If a Case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful Party will be required to pay the successful Party’s CAT fees unless the CAT member decides otherwise.
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> 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] CCC 169 has been successful and therefore, in accordance with Rule 48.1, I will order that Mr. Buckland reimburse the $200 Tribunal fee.

[27] The Tribunal’s Practice Direction: Approach to Ordering Costs, issued January 1, 2022, provides guidance regarding the awarding of costs. In this Practice

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

[28] As has been previously stated by this Tribunal, the courts and the Tribunal have articulated the principle that it can be unfair for other owners to be called upon to subsidize the costs of enforcing compliance against another owner. It is also well-established law that an award of costs is discretionary and that condominium corporations must act reasonably and judiciously when incurring legal and compliance costs. I do not accept that the legal fees claimed here are proportional to the nature and complexity of the issues in this hearing which were straightforward and uncontested. The fact that Mr. Buckland did not participate resulted in a streamlined process.

[29] The bill of costs indicates that a substantial amount of costs were incurred after January 2023 when CCC 169 knew that the legacy provision, the consequences of which are at the heart of this case, would be rescinded at the end of June, 2023. The amount claimed is very disproportionate to the issues in this hearing. I also note that this fact situation is unlike that in *Peel Condominium No. 96 v. Psofimis* 2021 ONCAT 48 (CanLII) cited by CCC 169 in that the evidence does not support, as indicated in paragraph 23 above, that Mr. Buckland ignored the corporation's efforts to have him put in place measures to meet the requirements of Rule 3.11, even if not successfully so. I do find that the indemnification provisions in the declaration have some relevance as well as the fact that counsel made him aware that he could be responsible for costs arising from a legal proceeding. It is appropriate in this context that Mr. Buckland bear some of the burden of the legal costs to secure compliance through this hearing. Weighing the various factors, I award legal costs of $3000.

[30] Together, the costs under Rule 48 are therefore $3200 (the $200 Tribunal filing fee plus $3000 in legal costs). Regarding the third-party legal costs which CCC 169 recognizes is a "unique issue", these are denied. These are not, pursuant to the wording of Rule 48.2, costs of a party to this proceeding.

E. ORDER

[31] The Tribunal orders:

1. Under section 1.44 (1) 1 of the Act, David Buckland shall comply with section 119 (2) of the Act and Rule 3.11 to ensure that his tenant Jason Hayes immediately ceases smoking in his unit and on the exclusive use common areas.

2. Under s. 1.44(1) of the Act, David Buckland shall immediately cease smoking in his unit and on the exclusive use common areas.

3. Under section 1.44 (1) 3 of the Act, within 30 days of the date of this Order, David Buckland shall pay compensation to Carleton Condominium Corporation No. 169 in the amount of $2500.

4. Under s, 1.44 (1) 4 of the Act and Rule 48 of the Tribunal's Rules of Practice, within 30 days of this Order, David Buckland shall pay $3200 to Carleton Condominium Corporation No. 169 for its costs in this matter.

Patricia McQuaid
Vice-Chair, Condominium Authority Tribunal

Released on: March 30, 2023