

## CONDOMINIUM AUTHORITY TRIBUNAL

**DATE:** August 31, 2023

**CASE:** 2022-00651N

**Citation:** York Condominium Corporation No. 50 v. Overholt, 2023 ONCAT 123

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

**Member:** Brian Cook, Member

### **The Applicant,**

York Condominium Corporation No. 50,  
Represented by Matthew Varao, Paralegal

### **The Respondent,**

Tammie Overholt,  
Represented by Zeeshan Rahman, Paralegal

**Hearing:** Written Online Hearing – April 13, 2023 to August 13, 2023

## **REASONS FOR DECISION**

### **A. INTRODUCTION**

- [1] York Condominium Corporation No. 50 (YCC 50) adopted a smoke free environment rule in July 2018 by resolution of the owners. Existing residents who were smokers were permitted to continue to smoke in their units under a legacy provision. Under the rule, YCC 50 can revoke the legacy status of the smokers in certain circumstances.
- [2] Tammie Overholt is an owner of a unit in YCC 50. She does not smoke but resides in the unit with her two sons, both of whom are smokers. Ms. Overholt applied for and was granted legacy status under the smoke free environment rule.
- [3] YCC 50 seeks an order that Ms. Overholt is in violation of the smoke free environment rule and for payment of costs associated with efforts to seek compliance.
- [4] For the reasons below, I find that Ms. Overholt has not violated the smoke free environment rule and that charges of costs associated with efforts to seek compliance must be reversed.

## **B. THE HEARING**

- [5] The parties participated in mediation in Stage 2 of the Tribunal's process. A settlement was not reached but the parties indicated to the Stage 2 mediator that they would like to continue settlement discussions in Stage 3 using a mediation/adjudication process.
- [6] A conference call was held with the parties on May 24, 2023, to clarify some of the facts of the case and to discuss how settlement discussions might occur. No offers to settle were made at that time. It was agreed that the parties would file written offers to settle. After an exchange of such offers, I determined that settlement was not likely to occur in a timely manner and directed the parties to provide evidence and submissions.

## **C. ANALYSIS**

### **The smoke free environment rule**

- [7] The rule states that apart from "grandfathering" provisions, smoking is not allowed in the units or in the common areas. In this decision I have referred to these as "legacy" provisions. The legacy provisions require the owner to provide a written request for legacy status and include the names of all individuals for whom the exemption is sought.
- [8] There is now no dispute that Ms. Overholt made the written request within the timeframe required, listing herself and her two sons. There is also now no dispute that legacy status was granted by the board.
- [9] The rule provides that the legacy status may be revoked:

5.03 The Board may revoke a Grandfathered Unit exemption with written notice to the subject owner if the Grandfathered Smoking or Vaping use is deemed to be a nuisance by the Board or manager in their discretion, acting reasonably.

### **Events leading up to the Application**

- [10] The events leading up to the Application are described in the following terms by YCC 50:

On or about June 15 and 28, 2022 a unit owner of YCC 50 complained about the smell of smoke and that it was affecting the reasonable enjoyment of their unit, however, at that time the source of the smoke was unknown.

On August 25, 2022, the same unit owner made another complaint to management about the smell of smoke and believed that the smoke was emanating from [Ms. Overholt's unit]. Though Ms. Overholt does not smoke, her sons, William Kinsey and Paul Kinsey, reside in [the unit] with her and are smokers.

On August 26, 2022, Mr. Overholt was sent a letter from YCC 50's property manager indicating that several complaints had been made with respect to the smell of smoke emanating from [Ms. Overholt's unit] and causing a nuisance...

On September 21, 2022, a letter was sent from YCC 50's lawyers, Rutherford and Mathews PC, noting the continuing smoking nuisance that was coming from Unit 1804 and seeking Ms. Overholt's compliance with YCC 50's governing documents. The letter requested that Ms. Overholt address the smoking nuisance coming from her unit and that due to the involvement of YCC 50's lawyers, she would be charged back the cost of the letter pursuant to Section 69 of YCC 50's Rules...

On March 1, 2023, a unit owner sent a letter to YCC 50 property management indicating that they could smell cigarette smoke in their unit and that they believed the smoke was coming from [Ms. Overholt's unit]. The complaining unit owner also took a picture of [Ms. Overholt's unit] balcony, which shows a man smoking on the exclusive use common element.

[11] The August 26, 2022 letter from the condominium manager made no reference to the legacy status that had been granted. It informed Ms. Overholt that the no smoking rule applied to her unit and asked her to comply.

[12] As noted by Ms. Overholt, the indication in the letter that "several complaints" had been received does not appear to be accurate. Rather there was one complaint from someone who "thought" that the source of the smoking odour was Ms. Overholt's unit. Ms. Overholt and her sons deny that the photo which appears to show someone smoking on a balcony is a photo of their balcony. On this point, I note that the photo of the man smoking shows a portion of a man's head taken from above. The photo seems to have been taken from a higher balcony, but it is not clear from how many floors above or how the photo relates to Ms. Overholt's balcony.

[13] There were also some problems with the September 21, 2022 letter from YCC 50's lawyer. The letter indicated that YCC 50 "continues to receive numerous complaints regarding cigarette smoke emanating from the unit into neighbouring units and the common elements". However, there is no record of these further complaints. The letter indicated that although Ms. Overholt had referenced her

unit's legacy status, there was "no documentation on record that supports this." As noted above, YCC 50 now concedes that this was said in error and that the fact that legacy status was requested and approved is not now in dispute.

- [14] The letter from counsel advised Ms. Overholt that she was required to pay \$611 representing the costs of preparing the letter. Ms. Overholt did not pay this because she believed that smoking was allowed in her unit because of its legacy status. YCC 50 then placed a lien on the unit. YCC 50 then advised Ms. Overholt that she now owed a further \$1,330, related to the costs of placing and discharging the lien. By April 11, 2023, the amount owing was said to be \$2,926; however, it is not clear if this was related to legal costs or some unspecified other charge.
- [15] The evidence of Ms. Overholt and her sons is that they have taken measures to try to limit the impact that smoking in the unit may have on others. These include installing air purifiers and foam insulation around the door. They state that YCC 50 replaced the front door of their unit and that the new door may not have been properly installed as there are cracks around the door. Ms. Overholt herself does not smoke. Her sons deny that they ever smoke on the balcony as they know this is not permitted.

#### **D. CONCLUSIONS**

- [16] From the August 26, 2022 letter from the condominium manager and the September 21, 2022 letter from YCC 50's lawyer, it is clear that YCC 50 had lost track of the fact that Ms. Overholt and her sons had been granted legacy status. The letter from the lawyer specifically states that there is no record of legacy status.
- [17] The smoke free environment rule does allow the board to revoke legacy status, with written notice, if smoking in a unit is "deemed to be a nuisance by the Board or manager in their discretion, acting reasonably."
- [18] The board has never provided written notice to Ms. Overholt of an intention to revoke the legacy status. It follows that Ms. Overholt and her sons continue to have legacy status.
- [19] Even if either the August 26 or the September 21 letters are taken as written notice of an intent to remove the legacy status, the rule requires that YCC 50 must "act reasonably". I find that YCC 50 did not act reasonably. First, the allegations from the one resident who complained were not investigated. The person "thought" that smoke odours were coming from the unit, but this was not verified. The first step should have been to investigate the source of the odours and not to assume that

unverified and somewhat vague allegations were true. Secondly, when Ms. Overholt advised that legacy status had been granted, this was wrongly assumed to be false, without an opportunity for clarification.

[20] These problems were then compounded by the threatening letter from the lawyer less than a month later. The letter contained misleading and false information about the underlying complaints. The problems were further compounded by the demand for payment of the costs of preparing the lawyer's letter followed very quickly with placing a lien and demanding more money to cover the costs associated with that activity. Apart from the unreasonable nature of the communications, the Ontario Divisional Court and the Superior Court have found that there is no legal authority for placing a lien in circumstances such as this. In *Peel Standard Condominium Corp. No 779 v Rahman*, 2023 ONSC 3758, the Divisional Court referred with approval to *Amlani v. York Condominium Corporation No. 473*, 2020 ONSC 5090 in which the Court said:

It is one thing to allow the corporation to enforce, by way of lien, common expenses that are applicable to all unit holders and that a majority of unitholders have approved. It is entirely another to allow a condominium corporation the unfettered, unilateral right to impose whatever costs it wants on a unitholder, refer to them as common expenses and thereby acquire the right to sell the unitholders apartment.

[21] The more recent demand for \$2,926 does not explain what this amount represents. There was indication that it might be partly related to unpaid common expenses in addition to legal costs but what these expenses might be was not specified. Ms. Overholt indicated she did not think she was in arrears.

[22] I conclude that the legacy status granted to Ms. Overholt and her sons is still in place. If there are continuing complaints of odour from smoke, they must be properly investigated to clarify the source and severity of the odour and if they are an unreasonable nuisance. If it is determined that smoking related odours are coming from Ms. Overholt's unit, YCC 50 must take reasonable steps to work with Ms. Overholt to see if something can be done to address the issue before providing notice that the legacy status will be revoked. This could include assessment of the unit's front door.

[23] The letter from the lawyer was mistaken in several respects. The evidence now available is clear that Ms. Overholt and her sons had been granted legacy status. It follows that the letter was sent in error and there is no justification for charging costs to Ms. Overholt or registering a lien against her unit. All costs charged to her in respect of the allegations relating to smoking, and all expenses relating to the

lien, are improperly charged to her account and I order YCC 50 to reverse any costs charged to Ms. Overholt for the legal costs and any costs related to the lien and to reimburse Ms. Overholt for costs she incurred in relation to the lien.

## **E. COSTS**

[24] In submissions, Ms. Overholt claims entitlement to legal costs and payment for “pain and suffering”. No details regarding the legal costs or the nature of the pain and suffering are provided. The submissions suggest that an overall award of \$10,000 would be appropriate, representing \$5,000 for legal costs and \$5,000 for compensation for pain and suffering.

[25] Section 1.44(1) 3 and 4 of the *Condominium Act, 1998* (the “Act”) sets out the things the Tribunal may order at the conclusion of hearing, including:

3. An order directing a party to the proceeding to pay compensation for damages incurred by another party to the proceeding as a result of an act of non-compliance up to the greater of \$25,000 or the amount, if any, that is prescribed.

4. An order directing a party to the proceeding to pay the costs of another party to the proceeding.

[26] The Tribunal’s rule 48 deals with costs and provides in part as follows:

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 Tribunal has also adopted a Practice Direction regarding costs which sets out some of the considerations relevant to deciding whether costs should be awarded. One of those considerations is whether “the Case was filed in bad faith or for an improper purpose.” I have concluded that this case should not have been filed at all because the process followed by YCC 50 was fundamentally flawed, starting with the failure to recognize the legacy status, refusing to investigate when Ms. Overholt pointed out that legacy status had been granted, the failure to investigate whether Ms. Overholt’s unit was the source of smoke complained of, providing false or misleading information about the complaints, sending threatening letters from counsel and then placing a lien on Ms. Overholt’s unit, resulting in increased costs for both parties.

[28] Ms. Overholt's representative has not provided any breakdown of the legal costs she has incurred and has instead indicated that they were approximately \$5,000. In the absence of confirmation that the costs incurred were reasonable and proportionate to the work done, compensation for the full \$5,000 claimed is not appropriate. However, I do accept that Ms. Overholt incurred legal costs as a result of the actions of YCC 50, including the filing of this Application. I find that \$2,000 is appropriate.

[29] While I accept that this case has been stressful for Ms. Overholt and her sons, the claim for compensation for pain and suffering does not include particulars of the nature of the pain and suffering. No medical evidence has been provided that might show significant damage or injury. I am not convinced that compensation for unspecified pain and suffering under section 1.44(1)3 of the Act is appropriate in this case.

#### **F. ORDER**

[30] The Tribunal Orders that:

1. YCC 50 shall recognize that the legacy status granted to Ms. Overholt and her sons is still in effect.
2. Within 30 days of the date of this decision, any charges, including for legal costs and any charge related to the lien are to be reversed. Any money paid by Ms. Overholt in relation to the lien is to be reimbursed by YCC 50.
3. Within 30 days of the date of this decision, YCC 50 shall pay Ms. Overholt \$2,000 for legal costs under section 1.44(1)4 of the Act.
4. Any future complaints of smoke related odours alleged to relate to Ms. Overholt's unit must be properly investigated, including consideration of how the odours can be ameliorated, before notice to revoke the legacy status is considered.

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Brian Cook  
Member, Condominium Authority Tribunal

Released on: August 31, 2023