

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: September 25, 2024

CASE: 2024-00078N

Citation: Carleton Condominium Corporation No. 105 v. Aubé et al. 2024 ONCAT 148.

Order under section 1.47 of the *Condominium Act, 1998*.

Member: Jennifer Webster, Member

The Applicant,

Carleton Condominium Corporation No. 105

Represented by Dominique Mesina, Counsel

The Respondents,

Lucien Aubé

Represented by Alexandre Martel, Counsel

Michel Gauthier

Represented by Alexandre Martel, Counsel

REASONS FOR DECISION

A. INTRODUCTION

[1] Carleton Condominium Corporation No. 105 (the Applicant or “CCC 105”) initiated this application against Mr. Lucien Aubé and Mr. Michel Gauthier (the Respondents) in order to obtain their compliance with its rule 28 that prohibits smoking in its units and on its common elements. Mr. Aubé is the resident owner of a unit in CCC 105, and Mr. Gauthier is Mr. Aubé’s spouse and also a resident of the unit.

[2] In the Condominium Authority Tribunal’s (the “CAT” or the “Tribunal”) online dispute resolution system, the parties agreed to settle the substantive issues in this case during Stage 2 – Mediation through a consent order. The terms of the consent order included a direction that the Respondents not smoke in their unit or on the common elements. In addition, the parties recognized that there was no admission of liability by the Respondents.

- [3] The parties further agreed that the issue of costs would be determined by me as the Stage 2 Member through mediation-adjudication pursuant to Rule 44 of the Tribunal's Rules of Practice (the "Rules of Practice"). They also agreed that I would incorporate the terms of the consent order into the decision on costs.
- [4] Therefore, the issue to be addressed in this decision is whether the Tribunal should direct either party to pay costs to the other party. The Applicant seeks an order that the Respondents pay the amount of \$15,790.78 as full indemnification of its legal costs related to seeking their compliance with its no-smoking rule. These costs involved costs incurred prior to the filing of the application with the Tribunal and the costs incurred during Stage 1 – Negotiation and Stage 2 – Mediation of the Tribunal's process. The Respondents argue that they should not be responsible for any of the Applicant's legal costs, and they seek an order requiring the Applicant to pay their legal costs of \$16,000.
- [5] For the reasons set out below, I order the Respondents to pay the total amount of \$4,696.50 in costs to the Applicant within 60 days of this decision. With respect to the Respondents' request for costs, I decline to make an order for the Applicant to pay their costs. In accordance with the parties' agreement for a consent order, I also order that the Respondents comply with the Applicant's rule 28 and refrain from smoking in their unit and on the common elements of CCC 105.

B. BACKGROUND

- [6] Although this decision is only focused on the issue of costs, I will set out the factual and procedural background of this dispute to provide context for my consideration of the parties' claims for costs.
- [7] CCC 105 adopted rule 28 in 2018. Under this rule, no smoking is permitted in the units and on or around any part of the common elements, including all exclusive-use common elements. The rule expressly provided an opportunity for residents to register as legacy smokers which enabled them to continue to smoke in their units. Legacy smokers were required to take reasonable steps to ensure that smoke did not migrate to common elements or to other units, and they were responsible for all costs incurred by CCC 105 to prevent migration of smoke or odours from their unit. Neither of the Respondents is registered as a legacy smoker.
- [8] On July 28, 2023, CCC 105 sent a letter to Mr. Aubé to advise that other owners had complained about Mr. Gauthier smoking on the balcony of the Respondents' unit. In this letter, CCC 105 reminded Mr. Aubé that, according to rule 28, the building was a no-smoking building which meant that smoking was not permitted in units, on balconies or any common areas.

- [9] On November 27, 2023, CCC 105 received a complaint from the resident of the unit next to the Respondents' unit about smoke migration. That same day, CCC 105 notified Mr. Aubé of the complaint and advised him that smoking violations would result in fines and possible legal action, at his expense.
- [10] In response to further complaints about smoke odours in and around the Respondents' unit, CCC 105 wrote to Mr. Aubé on December 12, 2023. Ms. Ann Vigneux, CCC 105's office administrator, described in the letter that she had investigated the complaints and had observed smoke in the hallway in front of the Respondents' unit and smoke migrating from their unit in the neighbouring unit. CCC 105 charged Mr. Aubé a fee of \$75 in relation to this letter, and he paid the fee later that same day.
- [11] On January 3, 2024, CCC 105's counsel sent a letter to Mr. Aubé about the continued complaints of smoking in the Respondents' unit, as well as about other issues related to the Respondents' interactions with CCC 105's employees. In this letter, CCC 105's counsel outlined the expectations that Mr. Aubé and Mr. Gauthier comply with the provisions of the *Condominium Act, 1998* (the "Act") and the governing documents, as well as the potential legal and cost consequences if they failed to comply.
- [12] Ms. Vigneux wrote to Mr. Aubé again on January 15, 2024, about complaints of smoke coming from his unit. In this letter, she advised that, due to the number of complaints, CCC 105 was referring the issue to their counsel.
- [13] CCC 105 filed this application with the Tribunal on February 2, 2024, and provided notice of the application to the Respondents on February 8, 2024.
- [14] Applications with the Tribunal start in Stage 1 – Negotiation. In this stage, parties have an opportunity to work together to discuss and resolve the issues. If a case is not resolved in Stage 1 – Negotiation, an applicant can move the case to Stage 2 – Mediation, where the parties work with a Tribunal Member to resolve the issues. This case moved to Stage 2 – Mediation on April 11, 2024, and a Stage 2 Member was assigned to work with the parties as a mediator.
- [15] On April 26, 2024, the Respondents' representative requested that a bilingual mediator be assigned to the case. He also requested an adjournment of 30 days due to one of the Respondent's medical issues. On April 30, 2024, I was assigned as the Stage 2 Member in response to the request for a bilingual mediator. Although I communicated with the parties throughout the Stage 2 – Mediation in English and French, both representatives communicated with me exclusively in English. Therefore, I am writing this decision in English only.

- [16] After I was assigned, I granted a two-week adjournment and scheduled a videoconference meeting for May 23, 2024, to discuss the issues in this case. The parties exchanged a series of settlement proposals in June 2024, without reaching a resolution, and, on July 5, 2024, I allowed the application to move to Stage 3 for a hearing and decision. The Applicant had 15 days from July 5, 2024, to pay the fee to move the case to Stage 3.
- [17] The Respondents' counsel delivered a final offer of settlement to the Applicant outside the Tribunal's online dispute resolution system on July 5, 2024.
- [18] On July 15, 2024, the Applicant formally accepted the Respondents' final offer of settlement which includes the agreement for a consent order and the adjudication of costs. The Respondents' counsel did not respond to the Applicant's acceptance. I asked the Applicant's counsel to contact the Respondents' counsel outside of the Tribunal's system about the settlement and the adjudication of costs. The Applicant's counsel confirmed to me on July 22, 2024, that she had received an email response from Respondents' counsel in which he advised that he was out of the country on vacation and would be returning the following week.
- [19] I provided the parties with a mediation-adjudication agreement for the adjudication of costs, and I set a schedule for written submissions, outlining that their submissions could include written argument, evidence, and case law. The Respondents' counsel requested two extensions of his deadline for the cost submissions for personal reasons. I granted both extensions, and the schedule for submissions concluded on August 29, 2024, with the Applicant's reply and submissions.

C. ISSUE & ANALYSIS

- [20] The issue in this decision is what orders, if any, the Tribunal should make about costs.
- [21] Both parties are seeking their costs related to this case. The Applicant seeks full indemnification of its pre-CAT costs, its Tribunal fees and its legal costs and disbursements incurred during Stage 1 and Stage 2 of the CAT process. The Respondents opposed the Applicant's request on the basis that the parties have concluded a settlement that included no admission of liability.
- [22] The Respondents are asking for their legal costs of \$16,000. They argue that the Applicant brought this application based on vexatious and unfounded allegations and that the Applicant targeted them as a same-sex couple which amounted to discrimination contrary to the *Ontario Human Rights Code*. The Respondents also

state that they were unfairly denied legacy status when rule 28 was introduced.

The Applicant's Costs

Pre-CAT costs

[23] The Applicant claims full recovery of \$3,442.82 in costs based on the indemnification provisions found in its Declaration and in rule 28. These indemnification provisions read as follows:

1. Article X of the Declaration states:

Each owner shall indemnify and save harmless the corporation from and against any loss, costs, damage, injury or liability whatsoever which the corporation may suffer or incur resulting from or caused by an act or omission of such owner, his family or any member thereof, any other resident of his unit or guests, invitees or licensees of such owner or resident to or with respect to the common elements and / or all other units, except for any loss, costs, damages, injury or liability caused by an insured (a defined in any policy or policies of insurance) and insured against, by the corporation.

All payments pursuant to this clause are deemed to be additional contributions toward the common expenses and recoverable as such.

2. Section 3.1 of rule 28 states:

Any losses, costs or damages incurred by the Corporation by reason of a breach of these Rules by any Owner, his or her family, guests, servants, agents, tenants or occupants of his or her unit shall be borne by such Owner and may be recovered by the Corporation against such Owner in the same manner as common expenses in accordance with the provisions of the Declaration. Without limiting the generality of the foregoing, such losses, costs or damages shall include, but shall not necessarily be limited to, the following:

(a) All legal costs incurred by the Corporation in order to enforce, or in attempting to enforce, the Act, Declaration, By-laws or Rules;

(b) An administration fee in the amount of \$75.00*, to be payable to the Corporation for any violation that continues after initial notice has been send, and further administration fees of \$75.00* per

month, for each month during which the violation continues or is repeated.

[*NOTE: This administration fee represents actual costs reasonable estimated to be incurred by the Corporation as a result of a violation of the Act, Declaration, By-laws or Rules; and may be reasonably increased, from time to time, by Board resolution.]

[24] I note that Mr. Aubé was aware of the cost consequences of ongoing breaches of the smoking prohibition. CCC 105 repeatedly advised him of these consequences, and he paid a fee of \$75 to CCC 105 in accordance with section 3.1 of rule 28 after he received the second notice about smoking in his unit on December 12, 2023.

[25] I accept that CCC 105 incurred costs in its efforts to seek the Respondents' compliance with rule 28, and that it made these efforts to fulfill its duty under section 17 of the Act to manage the common elements and to ensure that owners and occupiers comply with the Act and the governing documents. However, I do not accept that the pre-CAT costs claimed by CCC 105 are reasonable and proportionate in this case. Although CCC 105 is claiming \$3,442.82 as its pre-CAT costs, when its counsel sent a letter to Mr. Aubé on January 3, 2024, it claimed legal costs of \$550 plus HST (for a total of \$621.50) as the cost it had incurred up to the delivery of the letter. I find that the costs of \$621.50 are reasonable costs incurred by CCC 105 to seek compliance with rule 28, and I will order the Respondents to pay the amount of \$621.50 to CCC 105.

Costs related to the CAT proceedings

[26] The Applicant also seeks its costs related to the CAT proceedings on a full indemnity basis, of \$12,272.95 and the fee of \$75 that it paid to the Tribunal.

[27] Section 1.44 (1) 4 of the Act 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."

[28] The Tribunal's Rules of Practice include the following rules that are relevant to the issue of costs in this case:

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.

[29] The Tribunal has issued a Practice Direction on January 1, 2022, about its approach to ordering costs, which sets out some of the factors the Tribunal may consider when deciding whether to order costs. These factors include, but are not limited to:

1. Whether a party or representative’s conduct was unreasonable, for an improper purpose, or caused a delay or expense.
2. Whether the case was filed in bad faith or for an improper purpose.
3. The conduct of all parties and representatives, including the party requesting costs.
4. The potential impact an order for costs would have on the parties.
5. Whether the parties attempted to resolve the issue in dispute before the CAT case was filed.
6. Whether a Party has failed to follow or comply with a previous order or direction of the CAT; and
7. The provisions of the condominium corporation’s Declaration, by-laws and rule (collectively referred to as the condominium corporation’s “governing documents”)

[30] CCC 105 was successful in this case in obtaining the Respondents’ compliance with rule 28. Therefore, in accordance with Rule 48.1 of the Rules of Practice, I will order that the Respondents reimburse the \$75 Tribunal fee to CCC 105, which is the sum of the \$25 filing fee and the \$50 fee for Stage 2 – Mediation.

[31] With respect to the Applicant’s claim for \$12,272.95 in legal costs and disbursements related to the CAT proceedings, CCC 105 argues that the factors outlined in the Tribunal’s Practice Direction support its claim for costs. In particular, CCC 105 submits that the Respondents ignored its efforts to resolve the matter prior to the filing of the application with the Tribunal and that it incurred additional costs due to the conduct of the Respondents’ counsel. The Applicant argues that it

is entitled to full indemnity because its actions were necessary to fulfill its statutory duties to ensure compliance with the Act and its governing documents.

[32] I find that the conduct of the Respondents and their counsel contributed to the costs incurred by the Applicant. In particular, I note the following behaviours that caused delays and additional expense:

1. Prior to the filing of the CAT application, the Respondents did not respond to the efforts of CCC 105 to address the complaints;
2. Counsel did not provide timely responses to either CAT member during Stage 2 – Mediation;
3. Counsel missed deadlines set in Stage 2 – Mediation and, when asking for extensions, he made the request shortly before the deadline;
4. There was no participation from counsel for substantial periods of time and I asked Tribunal staff and Applicant's counsel to contact him outside of the CAT's online dispute resolution system; and
5. In particular, counsel was absent for an extended period during the 15 days when the Applicant would need pay the fee to move the application to Stage 3 – Tribunal Decision for a hearing, and counsel did not advise me or the Applicant's counsel that he would be absent.

[33] At the same time, I find that the Applicant engaged fully and in good faith with the CAT's process and that it was pursuing the application for the proper purpose of seeking compliance with the Act and its Rules. It is also clear that the Applicant had communicated the potential cost consequences to the Respondents, and that they understood that the Applicant would be seeking its costs.

[34] The Respondents submit that costs should not be considered because the parties' settlement expressly included a term that there was no admission of liability. That term did not preclude a costs order. Indeed, the terms specifically stated that costs would be determined through mediation-adjudication. It is clear that costs were an issue that the parties contemplated, and I give no weight to the Respondents' argument on this point.

[35] Weighing all of these factors and based on the unique circumstances of this case, I find that it is appropriate to order the Respondents to reimburse the Applicant's costs. However, I do not find that full indemnification, as claimed by the Applicant, is reasonable or proportionate.

- [36] I have considered the cases¹ relied on by CCC 105 in support of its claim for full indemnification. Although in some of these cases, the CAT awarded full indemnity for the legal costs of a condominium corporation, I note that the question of legal costs in those cases was determined after a hearing on the substantive issues. In the present case, the question of costs involved written submissions after the parties reached a settlement in Stage 2 – Mediation, and the parties avoided a full hearing on the merits.
- [37] It is also important to consider the proportionality of the costs. I am not persuaded that the costs incurred are proportional to the nature of the issues in this case. Although I accept that additional effort and time was required due to the conduct of the Respondents and their representative, this should not have caused a substantial increase in costs. CCC 105 argues that the costs are proportional due to the Respondents' persistent denial of smoking and their addition of human rights allegations, which complicated this case. Neither of these issues added to the complexity of the case. In addition, I note that, in enforcing compliance with its rules, a condominium corporation is engaging in an activity that is part of its ordinary business and that this is the kind of activity for which owners contribute to the common expenses. Not all actions taken to enforce compliance will or should result in a condominium being awarded the full or even partial legal costs associated with the ordinary business of enforcing their rules.
- [38] Costs awards are discretionary. In deciding on the appropriate amount of costs, I have considered all the factors outlined above, as well as the impact of a costs award on the Respondents. Therefore, considering the facts of this case, I would award costs in the amount of \$4000 to CCC 105, in accordance with Rule 48.2 of the Rules of Practice. This is approximately 30% of the total costs and disbursements claimed by CCC 105 in relation to Stage 1 and Stage 2 of the CAT proceedings.

The Respondents' Costs

- [39] The Respondents seek their legal costs of \$16,000. They argue that CCC 105 should have granted them legacy status to permit them to smoke in their unit, and that, if they had legacy status, this application would not have proceeded. They also argued that the allegations of non-compliance are vexatious, unfounded and

¹ *Peel Condominium Corporation No. 96 v. Psofimis*, 2021 ONCAT 48 and *York Condominium Corporation No. 229 v. Rockson*, 2022 ONCAT 46.

discriminatory.

[40] The Respondents have provided no evidence that they requested legacy status or that CCC 105 denied such a request. Even if the Respondents had legacy status under rule 28, they would be required to ensure that smoke did not migrate from their unit and to refrain from smoking on or around common elements, which includes their exclusive-use common element balcony. In this case, CCC 105 received complaints that Mr. Gauthier was smoking on the balcony and that smoke was migrating from the Respondents' unit to neighbouring units and the hallway. CCC 105 would have reasonable grounds to seek compliance in response to such complaints, even if the Respondents were registered as legacy smokers.

[41] I am also convinced that CCC 105 acted in good faith and for a proper purpose in taking steps to seek the Respondents' compliance with its rules. CCC 105 acted in response to complaints from other owners and residents and based on the investigation of its employees. Moreover, CCC 105 reviewed the video recordings from its security cameras and confirmed that Mr. Gauthier smoked in and around the common elements in February and March 2024, despite the fact that rule 28 prohibits smoking in these areas. Given the complaints and evidence received by CCC 105, it was reasonable for it to seek compliance from the Respondents, including taking the step of the filing of this application.

[42] I accept that CCC 105 acted reasonably in response to complaints about smoking in the Respondents' unit and by Mr. Gauthier on the common elements. I find no reason to order CCC 105 to pay any of the costs incurred by the Respondents.

D. ORDER

[43] The Tribunal Orders that:

1. Pursuant to the parties' agreement, the Respondents shall immediately comply with rule 28 of CCC 105's Rules and shall refrain from smoking in their unit and on or around the common elements, including on their exclusive-use common element balcony;
2. Within 60 days of this Order, the Respondents shall pay the following amounts to CCC 105:
 - a. Compensation in the amount of \$621.50 under section 1.44 (1) 3 of the Act; and
 - b. Costs in the amount of \$4,075.00, which comprises the Tribunal fee of \$75 and legal costs of \$4,000 under section 1.44 (1) 4 of the Act.

E. COMPLIANCE

[44] If any of the Parties fails to comply with any of the terms of this order, it may be enforced through the Ontario Superior Court of Justice.

Jennifer Webster
Member, Condominium Authority Tribunal

Released on: September 25, 2024