

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: November 18, 2024

CASE: 2023-00726N,

Citation: Kegel v. Merritt, 2024 ONCAT 167

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

Member: Brian Cook, Member

The Applicant,

Fraser Kegel,

Self-Represented

The Respondent,

Amberley Merritt,

Represented by Erik Savas, Counsel

The Intervenor,

Toronto Standard Condominium Corporation No. 2493,

Represented by Victor Yee, Counsel

Hearing: Written Online Hearing – June 20, 2024, to October 25, 2024

REASONS FOR DECISION

A. INTRODUCTION

[1] Fraser Kegel and Amberley Merritt are owners and occupants of their respective units in Toronto Standard Condominium Corporation No. 2493 (TSCC 2493). The units are across the hallway from each other. Ms. Merritt is a smoker and Mr. Kegel is not.

[2] In this application, Mr. Kegel alleges that Ms. Merritt allows cigarette smoke to migrate from her unit into his unit. He says that this is an unreasonable nuisance that adversely affects his health with symptoms that include nausea and headaches.

[3] Ms. Merritt agrees that she smokes but says that she takes measures to minimize the effect on others, including running two air purifiers, using her exhaust fans and

putting a towel at the bottom of her door.

- [4] TSCC 2493 has adopted a rule prohibiting smoking with a “grandfathering” or legacy exemption for people like Ms. Merritt who were smokers at the time the rule was adopted.
- [5] TSCC 2493 submits that both the Applicant and the Respondent have been belligerent in their communications about the smoking issue, though neither party agrees with this assessment.
- [6] In May 2024, TSCC 2493 commissioned an odour migration assessment that was done by Safetech.

B. ISSUES

- [7] The issues in this case are as follows:
 1. Are odours from smoking coming from Ms. Merritt’s unit?
 2. If so, are they unreasonable and resulting in a nuisance, annoyance or disruption?
 3. If so, what are the appropriate remedies?

C. ANALYSIS

The Safetech report

- [8] The Safetech assessment included visual inspection and the use of a “fog” machine. Fog, simulating smoke, was produced in Ms. Merritt’s unit, a unit adjacent to Mr. Kegel’s unit, two units on the floor above, and in the hallway between the parties’ units.
- [9] During the testing, concentrations of total volatile organic compounds were measured. Volatile organic compounds (“VOCs”) are found in cigarette smoke and create significant health risks for smokers or people exposed to smoke. The report notes that there are a great many types of volatile organic components. It is not practical to measure each one separately, and that is why total volatile organic compounds (“TVOCs”) are measured. According to the report, TVOC readings of less than 90 ppb are considered to produce no irritation or discomfort.
- [10] A deficiency of the report is that it does not explain the correlation between the presence of TVOCs, which can be measured, and the experience of odour which is difficult to objectively quantify.

- [11] Testing was done in Mr. Kegel's unit. Fog was introduced in the other units and the hallway. Three measurements were taken in Mr. Kegel's unit; before the fog was introduced in the other areas, after the fog was introduced, and after exhaust fans were turned on in the units.
- [12] The production of fog in the units tested other than Ms. Merritt's unit resulted in no significant increase in concentrations in Mr. Kegel's unit. The report indicates that odours from these units were not expected to diffuse into Mr. Kegel's unit.
- [13] In Ms. Merritt's unit, "the majority of the fog was observed to remain within the unit" except in the primary bedroom and the living room. Fog in the primary bedroom's bathroom was almost all gone within five minutes of turning on the exhaust fan in the master bedroom bathroom. Operation of that fan caused the fog to be drawn from the living room.
- [14] It was noted that the exhaust fan in the kitchen was broken and so turning it on had no effect.
- [15] Concentrations of TVOCs in Mr. Kegel's unit were found to increase after fog was produced in Ms. Merritt's unit with an average of 63 ppb in the areas of the unit where measurements were taken. This is less than the 90 ppb concentration that the report indicates is a threshold for people to be affected by TVOC exposure.
- [16] When fog was introduced in the hallway, the reading was 328 ppb in the foyer of Mr. Kegel's unit.
- [17] The Safetech report indicates that the most likely cause of odour transmission from Ms. Merritt's unit to Mr. Kegel's unit is through cracks around their respective entrance doors. Smoking odours transfer from Ms. Merritt's unit to the hallway and then into Mr. Kegel's unit. There could also be transmission through the ventilation system.

Security Investigations

- [18] Mr. Kegel has provided 41 incident reports from the TSCC 2493 security staff covering a period between December 2020 and April 2024. The complaints were of a strong smoking odour coming from Ms. Merritt's unit.
- [19] The majority of the reports indicate that the security person did not notice smoking odours. The reports note that the smoking odours might have dissipated by the time they were investigated. On several occasions, there was a strong smell that the security person felt was from air freshener, possibly sprayed in the hallway. This odour was concentrated around the door to Ms. Merritt's unit. Sometimes this

odour was mixed with smoking odours. On a few occasions, smoke or vape odours from cannabis were noted but it was not determined where this was coming from.

- [20] On four occasions, a strong smoking smell was confirmed, especially near Ms. Merritt's unit. On a few occasions, the security person entered Mr. Kegel's unit and confirmed that there were noticeable smoking odours – on one occasion described as "foul odour".

Is Ms. Merritt's unit the source of the odours?

- [21] Ms. Merritt disputes that her unit is the source of odours coming into Mr. Kegel's unit. She notes that she received a notice from TSCC 2493 that indicated that complaints were received on September 22 and 23, 2023, but she was out of town and not in her unit on those dates.
- [22] In answers to questions from Ms. Merritt, TSCC 2493 clarified that the September 22, 2023, incident report indicated that no "strong" smell of cigarette smoke was detected by the security guard around the Applicant's unit. The September 23, 2023, incident report indicated that the security guard "did not smell" smoking on the 2nd floor.
- [23] As discussed above, investigation by security personnel often failed to corroborate the complaint of smoking odours. However, there was corroboration on some occasions and on those occasions, the security person identified Ms. Merritt's unit as the likely source.
- [24] The possibility that smoking odours were coming from a main floor restaurant, or a designated smoking area was also considered. On this point, TSCC 2493 advised that the restaurant has been closed since February 2024. When it was in operation, smoking was not permitted on the patio; and no smoking took place inside the restaurant. The designated smoking area is over 70 feet to the south-east of the Applicant's unit and is outdoors on or immediately adjacent to a different building. It is also not part of the condominium complex.
- [25] Ms. Merritt further submits that the Safetech report did not conclusively establish that any odours coming into Mr. Kegel's unit are from her unit. While this is correct, the test in this case is not whether the source of any smoking odours has been conclusively established, but rather whether it is more probable than not that Ms. Merritt's unit is the source of smoking odours.
- [26] Although there were in the past other legacy smoking units, TSCC 2493 advises

that currently Ms. Merritt is the only legacy smoker on the floor. There may be legacy smokers on the floor above, but the Safetech report ruled them out as a probable source.

[27] I find that it is more probable than not that Ms. Merritt's unit is the primary source of smoking odours that migrate to Mr. Kegel's unit. As noted, the most likely way the odours are transmitted appears to be through cracks around the entrance doors of their respective units.

The Smoking Rule

[28] TSCC 2493 adopted a Smoking Rule in July 2018. The rule prohibits smoking or vaping in units, the common elements and exclusive use common elements of the corporation. It creates a "grandfather" or legacy exemption for any owner or resident of a unit who was a smoker at the time the Rule took effect, subject to conditions which include those in sections 6 and 7 of the Rules:

6. Notwithstanding Rule 4 herein, the Grandfathered Individual shall be subject to and must comply with all applicable legislation and the Declaration, By-laws and Rules of the Corporation, including but not limited to, those with respect to causing a nuisance or hazard to another person and unreasonably interfering with the rights of another person to use and enjoy the units, common elements or exclusive use common elements.

7. Notwithstanding Rule 4 herein, no smoke, vapour or odour, including second-hand smoke, which is an annoyance, nuisance or disruption to other owners or residents or to the Corporation's service providers, agents and/or employees, shall be permitted to be transmitted from a unit or the exclusive use common elements to any other unit or portion of the common elements, including the exclusive use common elements. If the Board determines, in its sole and exclusive discretion, that any smoke, vape or odour is being [transmitted] to another unit or to the common elements including any exclusive use common elements, and that such smoke, vape or odour is an annoyance or a nuisance or disruptive, then the owner or resident of such unit shall, at their expense, take such steps as shall be necessary to abate such smoke, vape or odour to the satisfaction of the Board. Without limiting the generality of the foregoing, these steps could include installing adequate ventilation in their unit and/or the common elements, if necessary, to stop the migration of smoke, vape or odour and in the case of a common element alteration, the owner of the unit shall be required to enter into an alteration agreement with the Corporation. If the owner and/or resident of such unit fails to abate the smoke, vape or odour, the Board may take such steps as it deems necessary to abate the smoke, vape or odour and the owner of the unit shall be liable to the Corporation for all expenses incurred in abating the smoke, vape or odour (including legal fees).

[29] Ms. Merritt submits that she has complied with the Rules. In particular, she has taken steps to minimize the impact of her smoking on others by taking steps to try to limit the transmission of smoke and odours from her unit. These include operating air purifiers, turning on the exhaust fans, and putting a towel under the entrance door.

[30] Ms. Merritt further notes that when Mr. Kegel purchased his unit, the Smoking Rule was in place, including the legacy status of smokers like her. Mr. Kegel agrees that he was aware of the Rule. He accordingly knew that he might have a smoker as a neighbour. However, he submits that he understood from the Rule that smoking that resulted in a nuisance, annoyance or disruption would not be tolerated.

Is the odour coming from Ms. Merritt's unit unreasonable?

[31] I accept Mr. Kegel's uncontradicted evidence that he is adversely affected by smoking odours. I accept that he experiences physical symptoms. As noted, the presence of noticeable smoking odours in Mr. Kegel's unit was confirmed on a few occasions by the security personnel. The presence of smoking odours in the hallway were also confirmed, although not consistently.

[32] Mr. Kegel concedes that he was aware of the Smoking Rule including the legacy provisions. In my view, Mr. Kegel should have anticipated that he might encounter smoking odours in the building, especially around legacy units such as Ms. Merritt's and in hallways.

[33] However, because of the Smoking Rule, he could reasonably expect that he would not be subjected to significant smoking odours in his own unit. Mr. Kegel's evidence, which I accept, is that in addition to episodes of particularly noticeable smoking odours, the smoking odours permeate his unit.

[34] I find that Mr. Kegel is experiencing unreasonable smoking odours that originate in Ms. Merritt's unit, and that result in a nuisance or annoyance.

TSCC 2493 Response to the complaints

[35] Mr. Kegel submits that TSCC 2493 did not provide an adequate response to his complaints. TSCC 2493 says that after sending warnings to Ms. Merritt, the Board invited Mr. Kegel to attend a meeting in December 2023. Mr. Kegel's partner attended the meeting. According to the minutes of the meeting, the Board suggested that she keep a log to record incidents of odour migration. Counsel for TSCC 2493 advises that the Board did not receive a log. Instead, Mr. Kegel filed this Application.

[36] In May 2024, TSCC 2493 arranged for the Safetech study. It has fully cooperated with the adjudication of the case. I find that TSCC 2493 responded reasonably to the situation.

D. CONCLUSIONS

[37] The TSCC 2493 Smoking Rule seeks to create a non-smoking building, while respecting the rights of people like Ms. Merritt who were smokers at the time the Rule was adopted, subject to certain conditions. The Rule allows the board to determine if the smoking-related odours from a unit are resulting in a nuisance, annoyance or disruption. If that is the case, the Rule requires the owner of the legacy unit to take various measures to abate the migration of odours from the unit.

[38] The Safetech report identifies some relatively simple and low-cost solutions to this situation. The report indicates that the most likely mode of transfer of smoking odours from Ms. Merritt is through cracks around her entrance doorway. Smoke odour is transferred in this way into the hallway and then enters Mr. Kegel's unit through cracks around his entrance door. The report suggests that caulking or sealing of parts of the ventilation system of both units could also help reduce transmission.

[39] This solution was discussed at times during the hearing and was also addressed in closing submissions. Both parties agree that it would be reasonable for the cracks around the two doors to be professionally sealed. At my request, TSCC 2493 obtained a quote from a contractor. The quote included installation of weather stripping around both doors, sealing openings around the furnaces in both units, and sealing the bulkhead over Ms. Merritt's unit. The cost was \$910.

[40] While both parties agreed that these measures should be taken, they could not agree on who should pay. Mr. Kegel said that Ms. Merritt should pay the full cost. Ms. Merritt said she was prepared to pay only half.

[41] Under the No Smoking Rule, the owner of the legacy unit is required to take steps to stop the migration of smoke or odour from their unit. I accept that Ms. Merritt has taken steps to reduce the impact of her smoking. However, it is apparent that odours still migrate from her unit into the hallway. The Safetech report identifies measures to further reduce the transmission, including improving the seal around her door, applying caulking around the bulkhead of her unit, and sealing cracks around her furnace.

[42] The report suggests that migration into Mr. Kegel's unit can be reduced by

improving the sealing around his entrance door and sealing cracks around his furnace.

- [43] I find that to comply with the Rule, Ms. Merritt should bear the cost of the work on her unit to reduce transmission into the hallway.
- [44] As noted earlier, Mr. Kegel should have anticipated the possibility that he would encounter smoking odours in the building in areas such as hallways because of the legacy provisions. I find that it is appropriate for Mr. Kegel to bear the cost of sealing his own doorway and furnace as recommended by the Safetech report if he decides that he would like to proceed with that work.
- [45] TSCC 2493 is directed to facilitate this work. The work on Ms. Merritt's unit should be completed within 45 days of the date of this decision. If Ms. Merritt does not agree to proceed with the work on her unit, pursuant to the Smoking Rule, TSCC 2493 shall arrange for the work on her unit to be done and charge the costs, not exceeding the amount provided in the quotation obtained by TSCC 2493, to Ms. Merritt's common expenses.
- [46] If Mr. Kegel agrees to proceed with the improvements recommended by Safetech, it would be sensible if the work was done at the same time as the work on Ms. Merritt's unit.

E. COSTS

- [47] The Tribunal's Rule 48 provides in part:

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. Reimbursement of Legal Costs and Disbursements at any stage

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

- [48] Mr. Kegel has been successful. Ms. Merritt is ordered to pay his Tribunal filing fees of \$200. Payment is to be made within 30 days of the date of this decision.
- [49] Mr. Kegel has not requested other costs, and he was self-represented.

[50] Ms. Merritt requested costs, but she is not the successful party. TSCC 2493 did not request costs.

F. ORDER

[51] Pursuant to section 1.44 of the *Condominium Act, 1998*, the Tribunal Orders that:

1. Ms. Merritt shall proceed with the improvements to her unit recommended in the Safetech report within 45 days of the date of this decision. Specifically, these include improving the seal around her door, applying caulking around the bulkhead of her unit, and sealing cracks around her furnace. This work to be done by a professional contractor.
2. If Ms. Merritt does not agree to have this work done, TSCC 2493 shall arrange for the work to be done and charge the costs to Ms. Merritt's common expenses. The charge shall not exceed the amount identified in the quotation obtained by TSCC 2493 for the work on her unit.
3. If Mr. Kegel decides to proceed with the measures recommended in the Safetech report for his unit, it shall be at his own cost.
4. Within 30 days of the date of this decision, Ms. Merritt shall reimburse Mr. Kegel in the amount of \$200, representing the Tribunal fees he has paid.

Brian Cook
Member, Condominium Authority Tribunal

Released on: November 18, 2024