

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: December 17, 2024

CASE: 2024-00539N

Citation: Niagara North Standard Condominium Corporation No. 283 v. Robinson, 2024 ONCAT 189

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

Member: Brian Cook, Member

The Applicant,

Niagara North Standard Condominium Corporation No. 283
Represented by Natalia Polis, Counsel

The Respondent,

Diana Robinson
Not participating

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

REASONS FOR DECISION

A. INTRODUCTION

- [1] Diana Robinson is the owner and occupier of a unit in Niagara North Standard Condominium Corporation No. 283 (“NNSCC 283”). Ms. Robinson smokes. In this application, NNSCC 283 alleges that Ms. Robinson permits cigarette smoke to migrate from her unit or balcony and that this results in unreasonable odours which are a nuisance to other occupants. NNSCC 283 seeks an order directing Ms. Robinson to ensure that smoking odours do not create a nuisance for others.
- [2] Ms. Robinson did not participate in the Tribunal’s process, so the case proceeded as a “default hearing”. This means that Ms. Robinson waived her right to challenge the evidence from NNSCC 283.
- [3] For the reasons that follow, I find that Ms. Robinson’s smoking results in unreasonable odours that are a nuisance to other residents.

B. NOTICE OF THE HEARING

- [4] The application was accepted by the Tribunal on September 4, 2024. On that date, counsel for NNSCC 283 delivered the First Notice of Case by regular mail and email to Ms. Robinson. The Second Notice was sent on September 16, and the Notice of Default Proceeding was sent on October 2, 2024, also by regular mail and email. The email address was the one provided to NNSCC 283 by Ms. Robinson, and none of the messages were returned as not deliverable. The address used for regular mail delivery incorrectly indicated that the city was Toronto, although the correct postal code was used. The regular mail letters were not returned. According to the condominium manager's statement, the Notice of Default Hearing was also hand delivered to Ms. Robinson. Ms. Robinson has not joined the case or otherwise communicated with the Tribunal.
- [5] I am satisfied that Ms. Robinson has received notice of this proceeding.

C. EVIDENCE AND ANALYSIS

Applicable legislation

- [6] Section 117(2) of the *Condominium Act 1998* (the "Act") provides as follows:

No person shall carry on an activity or permit an activity to be carried on in a unit, the common elements or the assets, if any, of the corporation if the activity results in the creation of or continuation of,

(a) any unreasonable noise that is a nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation; or

(b) any other prescribed nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation.

- [7] Section 26 of Regulation 48/01 lists smoke and odour as prescribed sources of a nuisance, annoyance or disruption, if they are unreasonable.

NNSCC 283 Declaration and Rules

- [8] Section 3.1 of the NNSCC 283's Declaration provides as follows:

Subject to the provisions of the Act, this Declaration, the by-laws and the rules, each owner has the full use, occupancy and enjoyment of the whole or any part of the common elements, except as herein otherwise provided. However, no condition shall be permitted to exist and no activity shall be carried on in the common elements that is likely to damage the property or that will unreasonably interfere with the use or enjoyment by other unit owners

of the common elements or the other units, or that results in cancellation of any policy of insurance referred to in this Declaration.

[9] Section VII of the NNSCC 283 Rules includes the following:

No person shall carry on an activity or permit an activity to be carried on in a Unit, the Common Elements or the assets, if any, of the Corporation if the activity results in the creation of or continuation of:

6. Any unreasonable noise or smell that is a nuisance, annoyance or disruption to an individual in a Unit, the Common Elements or the assets, if any, of the Corporation...

[10] In 2018, NNSCC 283 adopted Rules regarding smoking tobacco and cannabis. The Rules that pertain to smoking tobacco are as follows:

2. Smoking is strictly prohibited within the Units and the Common Elements, including the exclusive use Common Elements.

5. This Rule, as it relates to tobacco, shall apply to all new Owners and Residents that own and/or reside in a Unit at the Corporation after the date on which this Rule comes into force.

6. All Owners and Residents that own and/or reside in a Unit as of the date on which this Rule comes into force may continue smoking tobacco subject to advising and registering with the Corporation that they smoke tobacco, the failure of which may result in the Board of Director's deeming that such Owner or Resident has abandoned their right to smoke tobacco.

[11] Ms. Robinson registered as a smoker in accordance with the Rule.

[12] The Rules do not have a specific provision for what should happen if there are subsequent complaints about smoking concerning a person who registered as a smoker. However, section XVII of the Rules sets out a process for enforcement of the Rules generally. That process requires the condominium manager to contact the person who is in violation of the Rules. If that is not effective, the matter is referred to the board which may direct the condominium's lawyer to write to the person, "the cost of which shall be added to the Owner's common expenses."

Complaints

[13] According to the condominium manager's statement, several complaints about smoke and odour coming from Ms. Robinson's unit or balcony have been received. NNSCC 283 has provided redacted emails from occupants in the building, particularly Ms. Robinson's immediate neighbours. These indicate that

smoke and odour migrate from Ms. Robinson's unit, particularly when she smokes on her balcony. Smoke and odour drift from her balcony to neighbouring balconies and may enter neighbouring units through open doors or windows. The emails indicate that residents are adversely affected by the smoke and odours, making it impossible for them to have full enjoyment of their units and balconies. A statement from a board member says that he investigated the complaints and found that the smoke migration was "extremely bad". The condominium manager states that verbal complaints from the occupants of neighbouring units indicate that they were subject to smoke and odours on a daily basis and that this was affecting the health of some of the occupants.

- [14] An email from February 2022 indicates that Ms. Robinson was observed smoking in the common hallway.

D. CONCLUSIONS

- [15] As noted, by not joining the case, Ms. Robinson lost the opportunity to contest the evidence from NNSCC 283. That evidence is that people in units near Ms. Robinson's have complained of smoke and odour coming from her unit. The complaints have been verified by the condominium manager and a board member. The complaints are predominantly made in the warmer weather when Ms. Robinson smokes on her balcony, and when neighbours are also using their balconies.

- [16] I find that NNSCC 283 has established that when Ms. Robinson smokes on her balcony, smoke and odour migrate to other units and balconies.

Is the smoke and odour unreasonable?

- [17] The smoking rule adopted by NNSCC 283 allows people like Ms. Robinson who were smokers at the time the Rule was adopted to continue smoking. While the Rule does not limit the right of smokers to smoke in their unit, as noted above, section 117(2)(b) of the Act prohibits smoking and odours if they are unreasonable and result in a nuisance, annoyance or disruption.

- [18] The Tribunal's case law has established that the determination of whether smoke or odour is unreasonable is an objective standard which can be established with reference to the expectations of a reasonable person living in the same condominium. Rules that are adopted by the condominium are relevant as they can reflect the reasonable expectations of the community. Other relevant considerations are how often smoking in one unit affects those in other units and the intensity of the problem.

- [19] NNSCC 283 has established Rules regarding smoking which indicate that that the condominium community wishes to limit the impact of smoking on the ability of others to freely enjoy their living space, while at the same time allowing people who were smokers at the time the Rule was established to continue smoking. A “reasonable occupant” of a unit in NNSCC 283 might, therefore, expect to encounter some smoking-related odours, but not to the extent that it significantly interferes with the quiet enjoyment of their unit and balcony.
- [20] NNSCC 283 has provided evidence that establishes that smoke-related odours migrate to the balconies of adjacent units on a frequent basis, often many times a day, when Ms. Robinson smokes on her balcony. The available evidence indicates smoking-related odours are sufficiently strong that neighbours are unable to enjoy the use of their balconies. The odours were described by the board member as “extremely bad”. I conclude that a reasonable resident in NNSCC 283 would find the smoking odours to be unreasonable.
- [21] I find that when Ms. Robinson smokes on her balcony it results in unreasonable odours that migrate to the balconies of other units. This is contrary to section 117(2)(b) of the Act and section VII of the NNSCC 283 Rules.
- [22] The unreasonable smoke transmission from smoking on Ms. Robinson’s balcony is a nuisance for the neighbouring units when they wish to be on their balcony or when they have their windows and/or patio door open. These conditions are less likely to happen in the colder months of the year.
- [23] Balancing the competing rights in this case, as between Ms. Robinson’s right to smoke pursuant to the Rules and the right of her neighbours to not be subject to unreasonable odours, I order Ms. Robinson to not smoke on her balcony between March 1 and November 30 of each year.
- [24] One email from a neighbouring unit suggests that smoke may also migrate from inside Ms. Robinson’s unit to other units if both units have their doors and windows open. From the evidence before me, it is not clear how often this may happen or what the impact smoke from that method of transmission may be.
- [25] I am therefore reluctant to order Ms. Robinson to never open her windows and balcony door. An order directing Ms. Robinson to stop smoking is even more intrusive. According to communications from Ms. Robinson to NNSCC 283, she takes measures to limit smoke and odours inside her unit, including air purifiers.
- [26] It is clear that the most significant cause of unreasonable smoke and odour is when Ms. Robinson smokes on her balcony. I think it is reasonable for the

applicant to assess the situation once Ms. Robinson complies with the order to not smoke on her balcony between March 1 and November 30. This conclusion does not preclude a new application if there are complaints of unreasonable smoke and odour transfer from inside Ms. Robinson's unit.

E. COSTS AND COMPENSATION

[27] NNSCC 283 asks for compensation from Ms. Robinson in the amount of \$2,319 for legal fees for letters from counsel seeking resolution of the dispute before filing the application with the Tribunal, and \$6,293 for legal fees associated with bringing the application.

[28] Section 1.44(1) of the Act sets out the orders the Tribunal may make at the conclusion of a hearing. Orders potentially relevant in this case include:

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.

[29] Section 48.1 of the Tribunal's Rules reads as follows:

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.

[30] I find that compensation for costs associated with attempts to resolve the nuisance created by Ms. Robinson's smoking is reasonable. Counsel for NNSCC 283 sent four letters to Ms. Robinson in the period between January and July 2024. The first letter indicates that no costs were being sought at that time unless the unreasonable smoke and odour migration continued. The final letter indicates that no cost recovery was being sought at that time in the hopes that Ms. Robinson would stop allowing unreasonable smoke and odour to transfer other units, but that

compensation for these costs would be sought if it was necessary to proceed with an application to the Tribunal. The second and third letters indicate a cost of \$553.70 inclusive of HST and disbursements was billed for each letter. If the costs for each letter were the same, the amount would be \$2,214, slightly less than \$2,319 sought.

- [31] Ms. Robinson was not responsive to these attempts. NNSCC 283 indicates that Ms. Robinson advised that she had a legal right to smoke and would continue to do so. Ms. Robinson appears to have refused to engage in finding solutions to address the complaints made by her neighbours. The lack of engagement is further illustrated by her not joining the case once the application was filed. At the same time, I note again that the NNSCC 283 Rules do not have a provision for what would happen if a smoker with legacy status allowed unreasonable smoke or odour to transfer to other units.
- [32] In the circumstances of this case, I find that compensation at 80% of the costs associated with the legal letters is reasonable. Ms. Robinson is ordered to pay NNSCC 283 the amount of \$1,855 (80% of \$2,319).
- [33] As the successful party, NNSCC 283 is also entitled to reimbursement of the Tribunal filing fees of \$150.
- [34] As indicated in Rule 48.2, the Tribunal does not usually award costs incurred in the course of the hearing. Costs may be awarded if a party's behaviour was unreasonable, undertaken for an improper purpose, or that caused a delay or additional expense. None of these factors apply in this case as Ms. Robinson did not participate in the Tribunal process. I find that there are no factors that warrant an order for these costs in this case.

F. ORDER

[35] The Tribunal Orders that:

1. Pursuant to section 1.44(1) of the Act, Ms. Robinson shall not smoke on her balcony between March 1 and November 30 of each year.
2. Pursuant to section 1.44(1)3 of the Act, Ms. Robinson shall pay NNSCC 283 \$1,855 as compensation for costs associated with efforts to address the smoking issue before the application was filed.
3. Pursuant to Rule 48 of the Tribunal's Rules of Practice, Ms. Robinson shall pay \$150 to NNSCC 283, representing the Tribunal filing fees.

4. These amounts are to be paid within 30 days of the date of this decision.

Brian Cook
Member, Condominium Authority Tribunal

Released on: December 17, 2024