

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: February 11, 2025

CASE: 2024-00136N

Citation: Branco v. Toronto Standard Condominium Corporation No. 1930, Cappuccitti, 2025 ONCAT 23

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

Member: Nicole Aylwin, Member

The Applicant,
Michael Branco
Self-Represented

The Respondents,
Toronto Standard Condominium Corporation No. 1930
Represented by Francesco Deo, Counsel and Rohina Hashimi, Counsel

James Cappuccitti
Represented by Ruby Cappuccitti, Agent

Hearing: Written Online Hearing – September 5, 2024 to January 13, 2025

REASONS FOR DECISION

A. INTRODUCTION

- [1] The Applicant, Michael Branco (Mr. Branco or the “Applicant”), is the owner of a unit of the Respondent, Toronto Standard Condominium Corporation No. 1930 (“TSCC 1930”). Mr. Branco alleges that the Respondent unit owner, James Cappuccitti allowed his tenants to carry on activities that created a nuisance in the form of smoke, odour and noise and failed to ensure his tenants complied with TSCC 1930 parking rules. Mr. Branco further takes the position that TSCC 1930 failed to take reasonable steps to respond to his complaints and to ensure that Mr. Cappuccitti, and by extension his tenants, complied with the *Condominium Act, 1998* (the “Act”) and its governing documents.

- [2] TSCC 1930 asks that Mr. Branco's case be dismissed without costs. It argues that TSCC 1930 took all reasonable steps to respond to Mr. Branco's complaints, including independently investigating these complaints and taking reasonable actions based on its findings.
- [3] Mr. Cappuccitti disputes the allegations. He argues that there are no rules that prohibit smoking in the building and that the smoke alleged by Mr. Branco could have come from other units. He further argues that there is no evidence that it was his tenants parking in the fire route. Finally, he asserts that he was unaware of the smoking, noise and parking issues, as he was away from the property undergoing medical treatment and did not receive TSCC 1930's compliance letters and/or emails. He notes however that upon learning of the issues he has attempted to cooperate with Mr. Branco and TSCC 1930, by asking his tenants to vacate his unit (which they did on or about June 2024).
- [4] For the reasons set out below, I find that Mr. Cappuccitti did fail to ensure that his tenants complied with the Act regarding the noise and parking provisions of TSCC 1930's governing documents and the Act. I do not find that the evidence supports the conclusion that the smoke and odour experienced by Mr. Branco caused a nuisance and thus, I cannot conclude that Mr. Cappuccitti was negligent in his obligation to enforce provisions of the Act and governing documents related to smoke and odour. Finally, I find, to date, TSCC 1930 has taken all reasonable steps to enforce compliance with its governing documents and the Act. I award no damages, however I find Mr. Branco is entitled to costs in the amount of \$200, to be paid by Mr. Cappuccitti.
- [5] I have reviewed all the evidence and submissions provided to me. I refer only to those necessary to make my decision.

B. ISSUES & ANALYSIS

Issue No. 1: Did the Respondent, James Cappuccitti fail to meet his obligation to ensure that his tenants complied with the *Condominium Act, 1998* and the provisions in TSCC 1930's governing documents related to smoke, odours, noise, and parking?

- [6] Section 119 (2) of the Act requires that the owner of a unit 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."
- [7] TSCC 1930 also has a similar provision in its declaration requiring an owner to ensure any tenants comply with the Act and the governing documents of the

corporation.¹

- [8] According to Mr. Branco, Mr. Cappuccitti's tenants began causing smoke, odour and noise issues and violating TSCC 1930's parking provisions in February 2022.
- [9] He submits that Mr. Cappuccitti's tenants continually smoked cigarettes and marijuana in the unit, and that the smoke and odour regularly migrated into the unit causing a nuisance. He further submits that the same tenants regularly caused unreasonable noise by hosting loud parties that lasted until 3 am or 4 am, slamming doors and arguing on frequent occasions. And, finally, he alleges that Mr. Cappuccitti's tenants regularly broke TSCC 1930 parking rules by illegally parking in the fire route and parking in parking spaces designated for visitors.
- [10] Although Mr. Branco confirmed at the outset of the proceeding that the acts of non-compliance had ceased prior to the commencement of the hearing, he asserts that for over two years Mr. Cappuccitti failed to take reasonable steps to ensure that his tenants complied with provisions of the Act and the provisions in TSCC 1930's governing documents which prohibit nuisances in the form of unreasonable noise, smoke and odour and those related to parking.

Smoke, Odour and Noise and Nuisance

- [11] Section 117(2) of the Act prohibits activities that create a nuisance, annoyance or disruption in the form of noise, smoke, odour, vapour, light and vibration. It reads:

(2) 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. 2015, c. 28, Sched. 1, s. 102.

- [12] Section 26 of Ontario Regulation 48/01 ("O.Reg 48/01") defines the "other" prescribed nuisances as: odour, smoke, vapour, light and vibration.

¹ Article IV s. 20(b)

- [13] Articles III, s. 14(a) and (c) of TSCC 1930's declaration also prohibit any condition or activity which unreasonably interferes with owners use and enjoyment of their units or the common elements.
- [14] According to Mr. Branco, he and his wife, Sarah Dos Santos (who is co-owner of the unit) regularly experienced the migration of cigarette and cannabis smoke and odour into their unit (particularly their front entrance way) from Mr. Cappuccitti's unit which is directly below them.
- [15] Mr. Cappuccitti denies that his tenants were causing unreasonable smoke and odour that was a nuisance. He notes that smoking is permitted in the building and that there is no evidence to suggest that the smoking in his unit was substantially interfering with Mr. Branco's enjoyment of his unit.
- [16] The evidence shows that the first complaint made by Ms. Dos Santos was received by TSCC 1930 in April 2022. It was nearly a year before any subsequent complaints were made. However, in April of 2023, the complaints from Ms. Dos Santos began in earnest until approximately June 2024, when the smoke and odour ceased.
- [17] Dharmaraj Iyer, who was TSCC 1930's condominium manager from September 2012 to May 2023, testified that in April 2023 upon receiving Ms. Dos Santos complaint he requested she contact Jhun Pasoquin, the on-site superintendent for TSCC 1930, directly about her complaints by either phone or text. This way he could immediately attend the unit and verify the complaint.
- [18] According to Mr. Pasoquin, Ms. Dos Santos contacted him to investigate complaints on only three occasions: in April of 2022, on October 19, 2023, and April 22, 2024. On each of these occasions, Mr. Pasoquin visited Mr. Branco's unit to investigate. Mr. Pasoquin submits that he did not smell any smoke when he attended Mr. Branco's unit in April of 2022; that he did smell smoke when he attended the unit in October 19, 2023, and that when investigating the complaint made on April 22, 2024 he could identify "the smell of cigarette smoke near the entrance of the Applicant's unit, but could not identify where the smoke was coming from." Mr. Pasoquin also testified that when he attended Mr. Branco's unit in December 2023 to address a cold draft complaint, he did not smell any smoke in the unit.
- [19] Mr. Branco challenged the credibility of Mr. Pasoquin's testimony, however, I find Mr. Pasoquin's testimony detailed, specific and credible. It is also consistent with an email from the condominium manager to Ms. Dos Santos that confirms in writing that Mr. Pasoquin did not smell smoke in April 2022 when visiting the

Applicant's unit.

- [20] In May 2023 Ileana Torres assumed the role of condominium manager. She testified that between May and June of 2024 she received multiple written complaints from Ms. Dos Santos about smoke and odour. However, there is no evidence that these written complaints were verified.
- [21] In support of his claims, Mr. Branco also provided written affidavits from two neighbours who indicated that they had also experienced issues with the migration of smoke into their units and had complained about the same. However, no specifics or evidence of these complaints was provided.
- [22] In determining whether smoke and odour are a nuisance, it must be determined that the smoke is substantially and unreasonably interfering with an owner's use and enjoyment of their property. As outlined in several of the Tribunal's decisions, in determining what is unreasonable, criteria such as frequency of the interference, the duration of the interference, and the distinct aspects of the condominium community and building are all things to be considered. It is recognized that some interferences may be acceptable and must be accepted as a part of life in a multi-unit residential complex. Not every undesirable interference will result in a successful claim of nuisance. It is also well recognized that the test for what constitutes an unreasonable interference is objective. This means it is measured with reference to a reasonable person occupying the premises, not the subjective expectations of a single person.
- [23] I accept that there was some smoke and odour migrating into Mr. Branco's unit. I also accept that he and his wife were bothered by it, particularly given Ms. Dos Santos testimony that she is sensitive to smoke. I also understand that Mr. Branco and his wife feel that any amount of smoke and odour is unreasonable. However, a person's individual sensitivity to smoke and odour is not the criteria on which unreasonableness is determined. As noted by TSCC 1930, when Mr. Branco purchased his unit, he knew, or ought to have known that smoking was not prohibited, and thus some smoke and odour was to be expected.
- [24] In this case, there is little objective evidence that the duration or intensity of the smoke migrating into Mr. Branco's unit was beyond what would be considered reasonable in a building that does not prohibit smoking. Smoke was verified as migrating into Mr. Branco's unit on only two occasions, and on one of those Mr. Pasquoin testified he could not verify that the smoke was coming from Mr. Cappuccitti's unit. Additionally, while both Ms. Dos Santos and the affidavits from Mr. Branco's neighbours indicate the smoke was frequent, there is little evidence to support that the smoke had migrated at a frequency that would be considered

unreasonable in building where smoking is not prohibited. In one email complaint from Ms. Dos Santos, for instance, she cites having experienced smoke twice on the same day in the morning and afternoon. I do not find this to be unreasonable in a building that allows smoking.

- [25] To find that there is a nuisance as per s. 117(2) of the Act or Article III s. 14(c) of TSCC 1930's declaration, I must be persuaded that an objective person, living in a condominium community that does not prohibit smoking, would find the smoke and odour experienced to be substantial and unreasonable interference with the enjoyment of their unit. In this case, I do not find the evidence allows me to draw that conclusion.
- [26] Given the above, there is no basis on which to conclude that Mr. Cappuccitti allowed an activity to continue that caused a nuisance in the form of unreasonable smoke and odour contrary to s. 117(2) of the Act or TSCC 1930 governing documents.
- [27] The evidence about unreasonable noise, however, is more compelling. Here there is evidence that the noise that the Applicant and his wife were complaining about was unreasonable. For example, noise complaints were made by Mr. Branco's wife directly to the superintendent on August 9, 2023, and September 25, 2023, and on both occasions this noise was verified by the superintendent, who spoke directly with the tenants. There is also evidence, in the form of email complaints sent while the noise was being experienced, which demonstrates that noise was occurring during hours that residents would reasonably expect to be quiet hours – such as between 11pm and 4am. Additionally, the evidence provides that noise from parties and gatherings was not limited to weekends but also occurred on weekdays as well.
- [28] In the instance of noise, I find the evidence does support the conclusion that Mr. Cappuccitti's tenants were creating unreasonable noise that was a nuisance.
- [29] Notices were sent to Mr. Cappuccitti from TSCC 1930 alerting him to the noise complaints (as well as the smoking and parking complaints) on November 1, 2023, November 23, 2023, and January 3, 2024. These notices were delivered directly to the unit by hand and sent to the email address TSCC 1930 had on file for Mr. Cappuccitti.
- [30] Mr. Cappuccitti's representative submits that from October of 2022 to present, Mr. Cappuccitti has been institutionalized for health reasons, with only intermittent times of recess during this period. As a result, his representative asserts that Mr. Cappuccitti was largely unaware of any issues, and neither he, nor his power of

attorney were receiving the communications from TSCC 1930. However, when he and/or his power of attorney, became aware of said issues, they took steps to resolve them, including having the tenants vacate the unit.

- [31] While, I am sympathetic to Mr. Cappuccitti's health issues, it is an owner's responsibility to notify the condominium corporation of any change in address for service or any agents that are authorized to receive communications on his behalf. Ignorance of the issues, is not, in this case, an acceptable excuse for failing to take actions in response to the noise complaints. Further, the evidence shows that on January 9, 2024, Mr. Cappuccitti sent TSCC 1930 an email in which he provided TSCC 1930 with a new email address. In response to this email, TSCC 1930 resent him all previous notices, meaning that as of January 2024, Mr. Cappuccitti was aware of the noise complaints. While ultimately the tenants vacated the unit, this was not June 2024. For several months even after he was made aware of the complaints, Mr. Cappuccitti allowed his tenants to create unreasonable noise and took no action to resolve the issue. Thus, in this instance I find he allowed his tenants to continue making unreasonable noise in contravention of 117(2) of the Act and Articles III, s. 14(a) and (c) of TSCC 1930's declaration.

Parking

- [32] Article IV, s.24 of TSCC 1930's declaration restricts the use of 35 of its parking spaces to visitors to the property.
- [33] Mr. Branco submits that on several occasions Mr. Cappuccitti's tenants parked in spots designated for visitors. He further alleges that Mr. Cappuccitti's tenants frequently parked illegally in the fire route where they hosted car rallies during which the tenants and their guests would rev car engines, blast music from their cars, and on at least one occasion engage in sexual intercourse on the hood of a car.
- [34] The evidence supports the claim that Mr. Cappuccitti's tenants were not complying with the parking rules. Mr. Pasoquin testified that he personally witnessed Mr. Cappuccitti's tenants parking in the fire route and in an email that Mr. Cappuccitti sent to TSCC 1930 in January 2024, he appears to confirm that his tenants were, indeed, parking in the visitors' spots but only because they were unaware that they could not do so.
- [35] Again Mr. Cappuccitti relies on the fact that he was unaware of the violations as a reason for failing to address the complaints promptly, noting though that in this instance, once he became aware he did address the non-compliance by speaking

with his tenants.

- [36] There is no evidence before me that the parking violations continued after he spoke with his tenants – suggesting that his intervention was successful. Nonetheless, it was Mr. Cappuccitti’s responsibility to ensure his tenants were aware of TSCC 1930’s rules and followed them. Having been notified of the violations as early as November 2023, Mr. Cappuccitti failed to address these complaints for nearly three months. Therefore, I find he failed to ensure his tenants complied with TSCC 1930’s parking rules.

Issue No. 2: What remedy, if any, should follow from these findings?

- [37] Having found that Mr. Cappuccitti allowed the continuation of activities that breached TSCC 1930’s parking provisions and the provisions in the Act and TSCC 1930’s governing documents which prohibit unreasonable noise, I must determine what remedy, if any, is appropriate.
- [38] Aside from awards of costs and/or damages, which I address as separate issues further in this decision, Mr. Branco has requested an order specifically about smoke and odour. He asks that I order that by-laws or rules be put into place that prohibit smoking.
- [39] I have not found that Mr. Branco has proven that the smoke and odour he experienced amounted to a nuisance, but, even if I had, this would not be a remedy available to him. Condominiums are self-governing communities. Each community (within the confines of the Act) has the authority to establish its own rules and by-laws. It would not be appropriate for me to impose a rule or a by-law on the community based on the experience of one person. If Mr. Branco as an owner wishes to change TSCC 1930’s rules or by-laws, s. 58 (5) of the Act provides a way in which he may seek to do so, even if, as discussed below, the board does not take the initiative to implant such changes.
- [40] TSCC 1930 also made a request for a remedy in the form of an order directing Mr. Cappuccitti to take all reasonable steps to ensure that “any occupier” of his unit, together with that person’s “invitees” to his unit complies with the Act and TSCC 1930’s governing documents. In this case, the tenants have now vacated the unit and the activities that were the basis of the non-compliance have ceased. Thus, I need not order that Mr. Cappuccitti take any steps to bring his tenants into compliance. However, Mr. Cappuccitti’s obligation with respect any future tenants or occupiers are set out in the Act and it is not necessary to re-state that obligation in the form of a directive.

Issue No. 3: Has TSCC 1930 met its obligation to enforce the provisions of the Act and its governing documents that relate to smoke, odour, noise and parking?

[41] Under s. 17(3) of the Act, TSCC 1930 has a duty to:

take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws and the rules.

[42] Under s. 119(3) of the Act:

A corporation, an owner and every person having a registered mortgage against a unit and its appurtenant common interest have the right to require that a person who is required to comply with this Act, the declaration, the by-laws and the rules shall do so.

[43] Mr. Branco submits that TSCC 1930 has been operating in breach of these provisions. He asserts that TSCC 1930 took little action to address the parking, noise and smoke and odour issues, “besides sending one or two emails.” He asserts, that in failing to file its own Tribunal case after the first few notices of non-compliance were sent to Mr. Cappuccitti, TSCC 1930 failed to act reasonably. Mr. Branco claims that because of this inaction, he was forced to file this application and incur all the fees to resolve the issues.

[44] TSCC 1930 maintains it took all reasonable steps to enforce its rules and that it was preparing an application for this Tribunal to enforce compliance when it was notified of this case.

[45] The evidence shows that TSCC 1930 took seriously all of Mr. Branco’s complaints. They communicated regularly with his wife Ms. Dos Santos about the complaints and took steps to address them. For instance, when Ms. Dos Santos emailed about parking violations, the evidence provides that TSCC 1930’s management contacted parking enforcement to have the vehicles ticketed. Similarly, when TSCC 1930 received a noise complaint the superintendent would visit the unit and speak to the tenant, which happened on several occasions. TSCC 1930 management would also report back to Ms. Dos Santos the action they had taken and/or were planning on taking.

[46] Regarding the smoke and odour complaints, TSCC 1930 attempted to ensure that they could verify Ms. Dos Santos’ complaints by asking her to contact the superintendent any time she smelled smoke so that it could be immediately

investigated. Of the three occasions that Ms. Dos Santos did so, the evidence shows the superintendent did investigate. While, the results of those investigations may not have been satisfactory to Mr. Branco and his wife, this does not negate the fact that they were undertaken. The evidence also shows that despite not having been able to verify several of the smoking complaints, TSCC 1930 took steps such as installing new weatherstripping to Mr. Branco's door, to attempt to address smoke and odour migration.

[47] Finally, TSCC 1930 sent several notices and had a telephone call with Mr. Cappuccitti in which they outlined the complaints, the tenant's obligation to comply with the governing documents and Mr. Cappuccitti's responsibility ensure his tenants did so. I also accept, that TSCC 1930 was prepared to file an application with this Tribunal if the non-compliance continued, although I note that filing an application with the Tribunal is not necessarily required to demonstrate that a corporation has taken all reasonable steps to enforce compliance.

[48] The one action that TSCC 1930 did not take, which as evidenced by the submissions, was the one most desired by Mr. Branco and his wife, was to change the rules of the corporation to prohibit smoking. While I appreciate why Mr. Branco and his wife felt that this would resolve the issue, it is not an action that TSCC 1930 was obliged to take. A condominium corporation is entitled to deference in the conduct of its business provided it is acting reasonably and within its authority. The rules of a condominium are enacted for the condominium as a whole. TSCC 1930 was not acting unreasonably by deciding not to propose a rule change in response to the complaints of a single unit. As noted earlier, if Mr. Branco feels there is significant desire in his condominium community to enact a rule that prohibits smoking, the Act provides him with an avenue to pursue such a change regardless of the position of the board.

[49] While not all the actions taken have accorded with Mr. Branco's own view of what should be done, as well as when and how, that is not the standard by which reasonable actions are evaluated. Based on the evidence before me, I cannot conclude that TSCC 1930 did not meet its obligations under the Act. TSCC 1930, took seriously Mr. Branco and his wife's complaints, they investigated them, took, when possible, immediate action to try to enforce the governing documents, and sought to communicate with Mr. Cappuccitti about his obligation to have his tenants comply with the governing document both informally via email and formally through compliance letters.

Issue No 4: Is Mr. Branco entitled to compensation for damages?

[50] Mr. Branco has asked that the Tribunal award him damages in the amount of

\$5000.00. He submits this amount is necessary to cover the costs of having a contractor fix his entry way to stop the smell of smoke and odour coming in and to repair the work that TSCC 1930 did in his doorway because “it looks very bad”. He further submits that he is entitled to damages due to the harm that was caused by the cigarette smoke and odour and the general ill effect of the non-compliance on his physical and mental health.

[51] Section 1.44(1) 3 of the Act states that the Tribunal may make 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.”

[52] There is no basis for an award of damages in this case. I have not found that the smoke and odour experienced by Mr. Branco amounts to a nuisance thus no damages are appropriate in that regard.

[53] Regarding the noise and the parking violations, I accept that the noise made by Mr. Cappuccitti’s tenants took a toll on Mr. Branco, however beyond his claim that he has suffered general harm, Mr. Branco has provided no evidence of specific or measurable damages that resulted from the acts of non-compliance with the provisions regarding noise or parking.

[54] I decline to award damages in this case.

Issue No. 5: Is any party entitled to costs? If so, in what amount?

[55] Mr. Branco has requested his costs in the amount of \$200 for Tribunal fees and unspecified amount of costs for consulting with a lawyer at the outset of this case.

[56] Neither Mr. Cappuccitti nor TSCC 1930 requested costs in this matter.

[57] Section 1.44(1) 4 of the Act states that the Tribunal may make “an order directing another party to the proceeding to pay the costs of another party to the proceeding.”

[58] Section 1.44(2) of the Act states that an order for costs “shall be determined ...in accordance with the rules of the Tribunal”.

[59] Tribunal’s Rule 48.1 states:

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.

[60] I have found that Mr. Cappuccitti allowed the continuation of unreasonable noise and parking violation in contrary to section 117(2) of the Act and TSCC 1930's governing documents. Thus, as Mr. Branco was partially successful in his claims, I will order that Mr. Cappuccitti pay Mr. Branco \$200 to reimburse him for his Tribunal filing fees.

[61] The Tribunal's Rule 48.2 states:

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.

[62] Costs awards are discretionary. In this case, Mr. Branco provided no details on the amount of legal fees he incurred in bringing this application to the Tribunal. Additionally, in this matter, I find that all parties conducted themselves appropriately. No conduct or behaviour of either party gave rise to me considering a costs award. For these reasons, I am denying Mr. Branco's request that the respondents reimburse him for his costs for legal fees.

C. ORDER

[63] The Tribunal Orders that under section 1.44(1) 4 of the Act, within 30 days of the date of this decision, Mr. Cappuccitti pay Mr. Branco \$200 to reimburse him for his Tribunal fees.

Nicole Aylwin
Member, Condominium Authority Tribunal

Released on: February 11, 2025