CONDOMINIUM AUTHORITY TRIBUNAL

DATE: September 9, 2022
CASE: 2022-00108N
Citation: Carleton Condominium Corporation No.132 v. Evans, 2022 ONCAT 97

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

Member: Patricia McQuaid, Vice-Chair

The Applicant,
Carleton Condominium Corporation No.132
Represented by David Lu, Counsel

The Respondent,
Ross Evans

Hearing: Written Online Hearing – June 7, 2022 to August 10, 2022

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, Carleton Condominium Corporation No. 132 ("CCC132"), brought this application to the Tribunal in response to alleged 'inappropriate conduct" by the Respondent Ross Evans, a unit owner. CCC132 alleges that the Respondent's conduct constitutes a breach of provisions in its declaration and rules related to parking and nuisance. CCC132 seeks an order requiring the Respondent to comply with these provisions and indemnification of its costs incurred in seeking compliance.

[2] The Respondent did not participate in this proceeding. On March 21, 2022, he requested an adjournment for two months for medical reasons. The adjournment request was considered by the Tribunal Chair and was denied by order dated April 29, 2022.[1] The Respondent was advised by Tribunal staff on June 2, 2022, that the case would proceed whether or not he joined the case.

[3] The issues for me to decide in this hearing are as follows:

1. Has the Respondent failed to comply with provisions in the governing

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documents related to parking; specifically, Rules 16 and 18?

2. Does the Respondent's behavior constitute a nuisance, in violation of the declaration and rules?

3. Is the Applicant entitled to orders for compliance and indemnification for costs incurred in seeking compliance, including the costs of this proceeding?

B. RESULT

[4] For the reasons set out below, I find that the Respondent's actions in December 2021 and January 2022 did constitute a nuisance contrary to Article IV of the declaration. I do not find that there has been a breach of the rules. The Respondent shall reimburse CCC132, as compensation, the amounts of $3390 and $621.50 as well as costs pursuant to Rule 48 of the Tribunal's Rules of Practice in the amount of $1250.

C. BACKGROUND

[5] CCC132 is an approximately 43 year-old complex made up of 78 townhouse units. The Respondent has been a unit owner since December 2016. Each unit has a parking space which is a short driveway in front of an attached garage. The parking space is described as part of the exclusive use common element for each specific unit. The Respondent's unit is at the end of a row of townhouses and is adjacent to a grassy area which, in winter, has been the snow storage site for the CCC132's snow removal service. Because the roads within CCC132 are private roads, CCC132 is responsible for plowing the snow and for snow removal. It has a contract with Sunshine Snow Services Inc. ("Sunshine") for this work.

[6] While CCC132 cites several incidents which it alleges constitute nuisance behavior (which will be discussed later in this decision), the apparent catalyst for this application is the Respondent's conduct in relation to the snow removal operations. As revealed through emails between the Respondent and CCC132, filed as documents by CCC132 in this case, the Respondent first raised concerns about the snow plowing and snow storage in March 2021. He cited safety issues and concerns about possible damage to his vehicle when parked in his driveway, demanding that the area next to his unit no longer be used as the snow storage area. He stated that it was time to think about an alternate snow storage area.

[7] The Respondent also expressed concerns about the impact of snow accumulation adjacent to his foundation and retained a structural engineer to investigate. That engineer concluded that the snow pile in proximity to the Respondent's foundation wall increased the water content in the soil which accelerated the settlement of the

unit resulting in cracking and sloping throughout the unit, including in the garage concrete slab. CCC132 then retained Keller Engineering (“Keller”) to investigate the issue. The Respondent’s engineer’s report was not in evidence before me, but its conclusions were referred to in the Keller report.

[8] Keller attended at the property in July and September 2021 to assess the overall condition of the Respondent’s unit, including the concrete foundation and the garage concrete slab, for signs of distress. They concluded that the cracking observed was considered minor and likely the result of minor building movement which occurs throughout the course of the year. In his testimony, Matt Michaluk, the author of the Keller report (dated October 4, 2021), stated that the location of the snow pile is likely not affecting the unit in a negative way.

[9] In November 2021, the Respondent emailed Anne Burgoon, described as the property manager for CCC132, to ask if the snow storage area was being moved. Ms. Burgoon responded that it was not. On December 15, 2021, the Respondent stated in an email to Ms. Burgoon that the snow equipment was dangerously close to his vehicle and he would continue to “protect his vehicle”. In her email to the Respondent on December 15, 2021, Ms. Burgoon stated that the driveway was a common element which the corporation owns and maintains and that he uses as owner of the unit. She went on to state that if he had concerns about his vehicle, he should park it in his garage.

[10] Not surprisingly, tensions about this issue escalated when the winter weather of 2021-2022 arrived. According to CCC132, the Respondent made it increasingly difficult for Sunshine to plow and store the snow, harassing Sunshine employees as they tried to do their work. This was confirmed through the testimony of Vince Marquardt, Sunshine’s Chief Operating Officer. Mr. Marquardt testified that they have been storing snow in the same area for several years and in prior years, the Respondent would move his vehicle when they needed to store snow in the area next to his unit. However, in January 2022, he would park his vehicle in his driveway as far as possible to the right side of his driveway, impeding their ability to store the snow in that location. In emails to the Respondent in mid January, Ms. Burgoon asked him to move his vehicle to the left of where he had parked it. If he did not and CCC132 incurred costs as a result, she stated that they would be seeking reimbursement.

[11] Dan Milne, an employee of a company which provides property management services to CCC132 took photographs of the Respondent’s vehicle in his driveway in January 2022. He described the vehicle as parked “well past the end of the brick façade of his unit”. After reviewing the photographs submitted, I asked Mr. Milne to

clarify how far past. He responded that it was at least six inches.

[12] On January 27, 2022, CCC 132's legal counsel (at that time, Ms. Houle) wrote to the Respondent pointing out that he was parking his vehicle inappropriately in the designated driveway and obstructing access to the snow storage site in an apparent attempt to prevent snow removal and referred to the harassment of Sunshine's employees. Ms. Houle gave a specific direction to the Respondent regarding the proper way to park the vehicle, stating: "You are required to park your vehicle so that the far edge of your vehicle (and side mirror) is in line with the area where the garage door meets the brick wall, which is the proper way to use the parking space…" Ms. Houle referred the Respondent to CCC132's rules and provisions in the declaration, including the indemnification provision, advising that legal costs of $621.50 had been incurred to date.

[13] In an email to Ms. Burgoon on January 27, 2022, Mr. Marquardt asked whether she could reach out to the CCC132 board to allow Sunshine to put snow elsewhere and "stop doing this to this individual". Ultimately, an alternate storage area was located offsite, but at an additional cost to CCC132 of $3390. Ms. Burgoon testified that there was no other location on CCC132 property which could accommodate snow storage. As Mr. Marquardt noted, in previous years, the Respondent did not object to Sunshine using the area adjacent to his unit.

D. ISSUES & ANALYSIS

Issue 1: Has the Respondent failed to comply with provisions in the governing documents related to parking; specifically, Rules 16 and 18?

[14] The Tribunal has jurisdiction to decide a dispute with respect to provisions in the declaration, by-laws or rules that prohibit, restrict or otherwise govern the parking of items in a unit or any part of a unit or the common elements that is intended for parking.[2] CCC132 submits that Rules 16 and 18 pertain to this dispute. These rules state:

> 16. No owner shall obstruct or use for any purpose other than ingress and egress to his respective unit, the sidewalks, entry, walkways and driveways used in common by the owners.
>
> 18. No motor vehicle other than a private passenger vehicle shall be kept on any part of the property...No motor vehicle shall be driven on any part of the common elements other than the driveway or parking space…..

[2] Ontario Regulation 179/17 s.1(1)(d)(iii)

[15] CCC132's counsel submits that the Respondent's "parking conduct" is in breach of these rules because he is not parking the vehicle purely for the purpose of ingress or egress and that he has driven past the designated parking space for his unit. While the Respondent's manner of parking his vehicle in his driveway, at least in the winter of 2022 was problematic for snow removal operations, Rules 16 and 18 do not govern parking per se. The Respondent is parking his vehicle in his driveway (not in a driveway "used in common" by other owners), though perhaps six inches beyond the façade of the unit. There is no evidence that he is obstructing a sidewalk, entry walkway or other driveway as per Rule 16. Though Ms. Houle, in the letter dated January 27, 2022, gave specific instructions as to how the vehicle should be properly parked, which the Respondent may have ignored, this instruction is not part of any rule.

[16] Furthermore, Rule 18 references *driving* the vehicle in areas other than the driveway or parking space, not parking the vehicle, and not parking some six inches beyond the snow-covered asphalt driveway. It is the manner in which the Respondent has been parking his vehicle which is problematic for CCC132. But for the snow removal operation, I query whether the manner in which the Respondent was parking his vehicle would have been considered by CCC132 to be a breach of these rules.

[17] I find that the rules cited by CCC132 (as set out in paragraph 14 above) are not provisions relevant to this case and based on the particular facts before me are not rules over which the Tribunal has jurisdiction.

Issue 2: Does the Respondent's behavior constitute a nuisance in violation of the declaration and rules?

[18] The Tribunal does have jurisdiction to hear disputes related to provisions in a condominium corporation's governing documents that prohibit, restrict or otherwise govern any other nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation.[3] Article IV(1)(e) of CCC132's declaration states:

> No condition shall be permitted to exist and no activity shall be carried on in any unit or the common elements by an owner, family, or guests, that would constitute a nuisance.

Further, Rule 1 states:

> No owner shall do anything or permit anything to be done in his unit or bring or keep

[3] Ontario Regulation 179/17 s. 1(1)(d)(iii.2)

anything there which will:

(a) obstruct or interfere with the rights of other owners to their comfort and quiet enjoyment of their units or the common elements…

[19] In submissions, CC132 states the Respondent's behavior is clearly disruptive to other residents at CCC132 and is an impediment to CCC 132's ability to fulfill its duties of maintenance and repair. Further, CCC132 submits that while the provisions noted above do not specify what constitutes nuisance, the absence of such specificity should not disqualify CCC132 from being able to enforce these provisions; otherwise, an owner could display a certain threshold of behavior without consequence.

[20] Given that, as CCC132 acknowledges in submissions, the Respondent's conduct about which it is complaining does not clearly fall within the prescribed categories of nuisance set out in s. 117 (2) of the *Condominium Act, 1998* (the "Act") and Ontario Regulation 48/01 and there is no definition of nuisance in its declaration and rules, it is instructive to consider the well-established jurisprudence on the law of nuisance. To support a claim of nuisance, the interference must be substantial and unreasonable; the requirement for substantial interference can incorporate a component of frequency and duration of the interference.[4] A 'trivial' interference will not suffice to support a claim in nuisance.

[21] What then is the basis for CCC132's assertion that, contrary to Article IV of the declaration, the Respondent's conduct constitutes a nuisance? As stated in paragraph 6 above, there are several incidents, but I will focus first on the "parking" conduct.

[22] As the evidence summarized above indicates, the Respondent first raised issues about the snow storage site in March 2021, demanding that the area adjacent to his property no longer be used for snow storage. It is noteworthy that prior to this, there were no complaints about the safety of his vehicle nor, it appears any incidents when his vehicle was at risk of damage. Nor had Sunshine encountered any issues. Indeed, the Respondent had previously been cooperative if asked to move his vehicle. In December 2021, the Respondent stated he would not tolerate snow operations close to his vehicle, and as the evidence indicates, began to park his vehicle in such a way to impede snow removal and storage. While CCC132's responses to the Respondent through Ms. Burgoon's emails may be seen to be somewhat abrupt and dismissive, her point that he could park his vehicle in his

[4] Antrim Truck Centre Ltd. V. Ontario (Transportation) 2013 SCC 13 (CanLII), at paragraphs 19 and 26.

garage was valid. I note here too that there is no evidence before me that would support the position that CCC132, by allowing snow to be stored next to his unit, was causing damage to the unit's foundation, which (if it had been true) might have justified the actions taken by the Respondent.

[23] I find that the Respondent's actions in December 2021 and January 2022 did constitute a nuisance contrary to Article IV of the declaration; they were a substantial and unreasonable interference with CCC132's ability to carry out its maintenance obligations. The Respondent was advised through Ms. Burgoon and legal counsel that there would be consequences if he continued to park his vehicle in a manner that prevented Sunshine to do its work. CCC132 had no option except off site storage. Costs were incurred to have snow removed off site, costs which all owners would be required to share in. This was not a trivial expense.

[24] As noted above, CCC132 also referred to the Respondent's other behaviors which it alleges are a nuisance behavior. For example, in several exchanges with another unit owner (and board member) Carol Ann Armstrong and an incident in which he kicked a pilon on his driveway. Ms. Houle wrote several letters to him about these incidents.

[25] Regarding the kicking of the pilon, I find that this was very much a trivial event. In March 2021, the Respondent emailed Ms. Burgoon to advise that there was a water valve sticking out of his driveway which was a safety issue because it was an obstacle on the driveway. Ms. Burgoon responded that she would look into it. She apparently arranged for the valve to be hammered in by the asphalt contractor and in the meantime, a pilon was placed on it to keep it visible to prevent someone from tripping on it. The Respondent kicked the pilon into the street.

[26] When Ms. Burgoon asked, in an email, why he did that, the Respondent acknowledged that he should have moved it in a way that "aligns more with our Canadian values". Based on the Respondent's email to Ms. Burgoon, his action seemed, in part, to be a reaction to Ms. Armstrong, with whom he appears to have a difficult relationship, stepping onto his driveway.

[27] The kicking of the pilon on his own driveway may have been an over reaction to a situation, but conduct that is nuisance behavior, it is not. It was both trivial and an isolated incident. CCC132 also points to other conduct, which arguably, may suggest a pattern of nuisance, annoyance or disruption. These incidents largely stem from interactions with Ms. Armstrong. Ms. Armstrong testified about the Respondent's "behavioural issues". Specifically, an incident in March 2021 when she was walking her cat. The Respondent came out of his unit but stayed on his driveway. He started talking to her cat and made harassing and threatening

comments to Ms. Armstrong. She reported the incident to police, though she testified that she did not think he would act on his words at that time. Ms. Armstrong also referred to an incident in April 2021 and January 2022. She stated that she does not feel he is a threat to her safety or that of her family, but his conduct does impede her ability to enjoy the common elements. Ms. Burgoon testified that there were intermittent incidents when the Respondent made other owners feel uncomfortable when on the common elements close to his unit, due to the behaviors he exhibits from his unit.

[28] In closing submissions, counsel cited a dictionary definition of nuisance: "annoying, unpleasant or obnoxious". The Respondent's behavior may well be all of that, but in a case before the Tribunal and in the absence of any definitions in the relevant governing documents to establish otherwise, we are called upon to consider nuisance as a legal concept. Unpleasant and obnoxious behaviors may be rampant within condominium communities from time to time, but they are not in themselves a breach of provisions of a declaration or rules such as are before me. Further, these incidents are, as the witnesses testified, intermittent and not a consistent and recurring pattern of conduct. On occasion, has a unit owner's enjoyment of the common elements been negatively affected by the Respondent's behavior as he stands on his driveway? Perhaps. But based on the evidence before me, I do not find that the Respondent has substantially or unreasonably obstructed or interfered with the "rights of other owners to their comfort and quiet enjoyment of the common elements" as set out in Rule 1.

[29] CCC132's counsel referred me to the Tribunal's decision in *Schnitzler v. Metropolitan Toronto Condominium Corporation No.1321*[5]. This was decision on a motion made in the context of a Stage 2 proceeding about the Tribunal's jurisdiction. As such it did not involve an evidentiary finding that "aggressive verbal altercations" did constitute noise nuisance, but rather that such interactions and using vulgar language in the common area such as a lobby *may* unreasonably interfere with the use and enjoyment of common areas and therefore is a dispute within the Tribunal's jurisdiction. As jurisdiction was not in issue before me, this case has little relevance to this dispute.

[30] In summary, I find that the Respondent's actions in impeding snow removal operations were a nuisance, in violation of Article IV of the declaration. I do not find the Respondent to be in breach of Rule 1.

Issue 3: Is the Applicant entitled to orders for compliance and indemnification for

[5] 2022ONCAT62 (CanLII)

costs incurred in seeking compliance, including the costs of this proceeding?

[31] CCC132 seeks to be indemnified by the Respondent for the costs it incurred in this matter. These are as follows:

1. Costs of $3390 incurred to transport the snow off site.

2. Costs of $1243 resulting from the various compliance letters sent from CCC 132 legal counsel to the Respondent.

3. Legal costs of $7145.32 related to this proceeding.

[32] In seeking these costs, CCC132 relies on Article X of its declaration which 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…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 (as defined in any policy or policies of insurance) and insured against the corporation.
>
> All payments pursuant to this clause are deemed to be additional contributions toward the common expenses and recoverable as such.

[33] I have found the Respondent's actions in relation to the parking of his vehicle and the impact on snow removal operations to be a nuisance and on these facts, indemnification is warranted. As noted above, Ms. Houle wrote to the Respondent on January 27, 2022 advising him of the cost consequences of his actions - CCC132 would be seeking to be reimbursed for the additional snow removal costs and the cost of the compliance letter. This letter followed the emails from CCC132 on January 16 and 22, 2022 informing the Respondent that if the corporation incurred costs as a result of his actions, they would be seeking reimbursement, and specifically noted in the January 22 email that if he did not cooperate, the next correspondence would be from legal counsel and costs associated with their involvement would be billed to him.

[34] Given the finding of nuisance, pursuant to Article X of the declaration, it is fair and appropriate that the Respondent be ordered to reimburse CCC132 the amount of $3390 representing the additional snow removal costs incurred as a result of the actions of the Respondent, as well as $621.50 being the cost of the January 27, 2022 compliance letter.

[35] Regarding the costs of the April 30 and June 14, 2021 compliance letters, these letters pre-date the nuisance issue as found by me. Ms. Houle, in those letters,

refers to several incidents, some of which were in evidence before me and others which were not. Those in evidence relate to incidents which I have found do not constitute a breach of the declaration or rules, though they may have caused some owners distress. Therefore, reimbursement of the costs of these compliance letters is not warranted.

[36] I do, however, want to commend Ms. Houle, as counsel, for aspects of her approach in those letters. While pointing out that CC132 believed the Respondent's actions to be in breach of provisions of the declaration and rules, she did, in both letters, make an inquiry as to whether there were potential medical and/or mental health conditions that may have affected his conduct, in which case they asked that he communicate with them, acknowledging the corporation's duty to accommodate. As an expression of concern about the Respondent's wellbeing, it is indicative of an intention to work together in the best interest of the whole of the condominium community.

[37] The Respondent did not reply to Ms. Houle, but in an email to Ms. Burgoon on April 30, 2021, he did state that he wanted all residents to have a comfortable place to live and would welcome suggestions that would help in that goal. He alluded to having a tough time with a number of significant life changing events in the last year and that he was on an unpaid leave of absence from work.

[38] Regarding the legal costs of $7145.32 related to this proceeding, the Tribunal's authority to make orders is set out in section 1.44 of the Act. Section 1.44 (2) of the Act states that an order for costs "shall be determined…in accordance with the rules of the Tribunal." The cost related rules of the Tribunal's Rules of Practice relevant to this case are:

> 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.

[39] The Tribunal's Practice Direction: Approach to Ordering Costs, issued January 1, 2022, provides guidance regarding the awarding of costs. Among the factors to be considered are whether a party or representative's conduct was unreasonable, for an improper purpose, or caused a delay or expense; whether the case was filed in

bad faith or for an improper purpose; the conduct of all parties and representatives; the potential impact an order for costs would have on the parties; and, whether the parties attempted to resolve the issue in dispute before the CAT case was filed. The Tribunal may also consider the provisions of the corporation's governing documents and whether the parties would have had a clear understanding of the potential consequences of a contravention of the declaration and rules.

[40] In accordance with Rule 48.1, I will order that the Respondent reimburse the $150 Tribunal fee. In assessing the legal costs incurred, I note that CCC132 was only partially successful in relation to its allegations in the case. The Respondent did not participate, and I do not attribute any unreasonableness to him. CCC132 did make overtures prior to commencing this application to address the issues as between it and the Respondent, with no success. In considering the potential impact of an order of costs, I note that $7145.32 is not an insignificant amount. The evidence before me suggests that the Respondent is on an unpaid leave from work and is trying to deal with personal challenges. The impact of a $7000 cost award in addition to compliance costs awarded is likely to be substantial.

[41] The condominium's declaration does contain clear indemnification provisions, of which CCC132 made the Respondent aware on several occasions. The courts and this Tribunal have articulated the principle that it can be unfair for other owners to be called upon to subsidize the costs of enforcing compliance against another owner. It is also well established law that an award of costs is discretionary and that condominium corporations must act reasonably and judiciously when incurring legal and compliance costs. It is rare that full indemnity for legal costs is awarded. This was a case in which the Respondent did not participate in the hearing, resulting in a more streamlined process; his actions in the proceeding did not in fact, increase CCC132's costs or the hearing's complexity, but rather his lack of participation served to reduce these. I also note that this was not a case in which the owner had breached a rule over a period of years though I appreciate that by bringing this application now, CCC132 is trying to ensure that the upcoming winter season is not a repetition of last year's in terms of the snow removal issues. While not minimizing CCC 132's concerns for the community, other issues have been intermittent.

[42] I do find that the declaration provisions (including indemnification provisions) have some relevance and it is appropriate in this context to minimize the burden borne by other owners to secure compliance with the declaration and therefore it is not unreasonable that the Respondent bear some of the burden of the legal costs to secure compliance through this hearing. Based on the bill of costs provided by

CCC132, the legal costs of this Stage 3 hearing were approximately $4500. Weighing the various factors noted above, I award costs of $1100.

E. CONCLUSION

[43] In summary, I have concluded that the Respondent's actions in impeding snow removal operations were a nuisance, in violation of Article IV of the CCC132's declaration. In accordance with s. 1.44 (1) 3 of the Act, I am ordering the Respondent to indemnify CCC132 for $621.50 in legal fees and $3390 being the additional snow removal costs incurred, and pursuant to s. 1.44 (1) 4 and Rule 48 of the Tribunal's Rules of Practice, the Respondents shall reimburse CCC132 for the $150 paid for Tribunal fees and legal costs of $1100.

F. ORDER

[44] The Tribunal orders that:

1. The Respondent shall comply with Article IV of the CCC132's declaration and in particular, in relation to the parking of his vehicle in a manner which impacts snow removal which is an activity that constitutes a nuisance.
2. Pursuant to s.1.44 (1) 3 of the Act, within 30 days of the date of this Order, the Respondent shall reimburse CCC132 the amount of $3390.
3. Pursuant to s. 1.44 (1) 3 of the Act, within 30 days of this Order, the Respondent shall pay CCC132 compensation in the amount of $621.50 in respect of legal fees and expenses it incurred.
4. Within 30 days of this Order, in accordance with s. 1.44 (1) 4 of the Act and Rule 48 of the Tribunal's Rules of Practice, the Respondent shall pay $1250 to CCC132 for its costs in this matter.

Patricia McQuaid
Vice-Chair, Condominium Authority Tribunal

Released on: September 9, 2022