

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: November 11, 2022

CASE: 2022-00180N

Citation: Ottawa-Carleton Standard Condominium Corporation No. 656 v. Denize, 2022 ONCAT 124

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

Member: Laurie Sanford, Member

The Applicant,

Ottawa-Carleton Standard Condominium Corporation No. 656
Represented by Gaya Foneska, Paralegal

The Respondent,

Sébastien Denize
Represented by Victoria Boddy, Counsel

Hearing: Written Online Hearing – June 6, 2022 to October 24, 2022

REASONS FOR DECISION

A. INTRODUCTION

[1] Ottawa-Carleton Standard Condominium Corporation No. 656 (“OCSCC 656”) alleges that Mr. Sebastien Denize, a unit owner, is in persistent violation of its governing documents which prohibit the creation of smoke and odours that disturb other owners. OCSCC 656 introduced evidence from two other unit owners attesting to second-hand smoke odours penetrating their units. Both these witnesses are cancer survivors who are particularly vulnerable to the effects of second-hand smoke. Their evidence is that the smell of smoke coincided with Mr. Denize moving into his unit. Since then, their testimony is that the smoke smell increases when Mr. Denize is at home and disappears when he is not. They testified that the odour of the smoke is heavy and causes health effects for each of them. OCSCC 656 wants a “cease and desist” order against Mr. Denize. It also wants to recover its costs in this matter.

[2] Mr. Denize concedes that some guests in his unit did smoke on one occasion shortly after he took occupancy of his unit in October 2021. He testified that he was unaware of the no-smoking rule at that time. Since being notified of the rules by OCSCC 656 in November 2021, he testified, no one has smoked in his unit or on the balcony. Mr. Denize testified that he does not smoke tobacco and does not smoke in the unit or on the property. His roommate also gave evidence. The roommate testified that he does not smoke. Both men testified that they were not

in town and that the unit was unoccupied on some of the dates identified in various complaints made about smoke odours. They provided receipts supporting their evidence. Mr. Denize testified that he had been willing to cooperate with OCSCC 656 in its investigation, including inviting representatives from OCSCC 656 to enter his unit and satisfy themselves that there was no smoking. Mr. Denize testified that OCSCC 656 refused his offer. He contends that OCSCC 656 conducted no investigation into the source of the smoke odours, preferring to rely solely on the complaints of other unit owners. He requests that this application be dismissed and that he be awarded his costs.

[3] For the reasons set out below, I conclude that OCSCC 656 has not established that Mr. Denize is in violation of its no smoking rules and related governing documents. I am dismissing this application. OCSCC 656 was unreasonable in persisting in its accusations about Mr. Denize smoking without conducting an independent investigation and in the face of his repeated denials. I am awarding Mr. Denize \$4,000 in legal costs.

B. ISSUES & ANALYSIS

[4] The issues in this case may be summarised as follows:

1. Is Mr. Denize in violation of OCSCC 656's governing documents which prohibit the creation of smoke and odours?
2. If so, should an order issue requiring Mr. Denize to comply with the non-smoking provisions in the governing documents?
3. What costs, if any, should be awarded?

Issue 1 – Is Mr. Denize in violation of OCSCC 656's governing documents which prohibit the creation of smoke and odours?

[5] OCSCC 656 has provisions in its Declaration requiring unit owners to comply with the *Condominium Act, 1998* (the "Act"), including the sections which prohibit the creation of specified nuisances, such as odours. Effective as of July 2, 2021, OCSCC 656 enacted a set of no-smoking rules which prohibit smoking of tobacco or cannabis in a unit or in the common elements, including the exclusive-use common elements such as the balconies attached to the units. Mr. Denize acknowledges that he is subject to these rules as well as to the provisions of the Declaration and the Act that OCSCC 656 is relying on in these proceedings.

[6] Mr. Denize moved into his unit in October 2021. Since then, OCSCC 656 alleges that Mr. Denize has smoked cigarettes or cannabis on the balcony which is attached to his unit or on other surrounding common elements of the property. OCSCC 656 also alleges that Mr. Denize has permitted other people to smoke cigarettes or cannabis on his balcony or on surrounding common elements. The effect of this, in OCSCC 656's submission, is that Mr. Denize is responsible for the transmission of smoke and odour to other units, including other balconies. OCSCC

656, while not apparently directly alleging that Mr. Denize is smoking tobacco or cannabis inside his unit, maintains that Mr. Denize is causing smoke to emanate from his unit and that this may impact the health of his neighbours and disturb their comfort and enjoyment of their units.

- [7] In addition to evidence from the condominium manager, OCSCC 656 introduced testimony from two owners of other units. Both witnesses are cancer survivors who testified that they are particularly prone to the effects of exposure to second-hand smoke. Both witnesses testified that Mr. Denize's predecessor in the unit was a smoker and that this did create some smoke. However, their testimony was that, after being notified of the problem, the previous owner made an effort to smoke on the balcony. After the new non-smoking rules came into force, the first witness testified that she hoped for an end to the smoking odours. Both witnesses testified that the smoking odours increased markedly after Mr. Denize moved in and were absent when he was not in residence. The first witness testified that the odours were both tobacco and cannabis and that the tobacco odour invaded more parts of her home after Mr. Denize's roommate moved in on March 12, 2022. Her testimony was that when Mr. Denize opened his door, she could distinctly smell smoke from his unit. The first witness also said that the smoke which has come into her unit over time was so pervasive that it penetrated the soft furnishings in some rooms of her home.
- [8] In addition to the testimony of the two witnesses, OCSCC 656 introduced 24 emails or sets of emails complaining of smoke smells coming from Mr. Denize's unit. Twelve of these emails were sent by the two witnesses. The remaining 12 emails have the names and identifying details of the complainants redacted. OCSCC 656 did not identify any of the email complaints as being duplicates. However, nine of the redacted emails are identical in wording to those identified as sent by one or the other of the two witnesses. The remaining three emails are similar in wording to complaints sent by them but are sufficiently generic in their language that it is not possible to determine who sent them. I conclude that it is more probable than not that at least 21 of the 24 complaints disclosed by OCSCC 656 were made by one or the other of the two witnesses and at least nine of these are duplicate complaints.
- [9] Some complaints made by the two witnesses for OCSCC 656 to specific dates when one or the other of them smelled smoke. Most of these dates were days in which Mr. Denize or his roommate or both were at home. Included in these complaints were complaints by the first witness of "pretty continuous" smells of both tobacco and cannabis during the last few days of December 2021 into January 1, 2022. The first witness also complained of odours coming in from April 1 to 13 and April 22 to 24, 2022. The first witness complained that on March 12, 2022, when Mr. Denize's roommate moved in, the door to Mr. Denize's unit was open and the smoke odour "wafted out".
- [10] Mr. Denize and his roommate also testified. Mr. Denize testified that some guests smoked marijuana in his unit on one occasion shortly after he moved in. At that

time, he said he was not aware of the no-smoking rules. He testified that he does not smoke tobacco. After a warning from OCSCC 656 on November 16, 2021, his testimony is that he stopped smoking any product in his unit or on the property and has stopped his guests from smoking. Mr. Denize's roommate also gave evidence. He testified that he does not smoke any product and that Mr. Denize does not smoke in the unit or on the balcony. The roommate's testimony is that he moved into Mr. Denize's unit on March 12, 2022, on a day when Mr. Denize was out of town. Some of his family members helped him move into the unit. His testimony was that his family is devoutly religious and does not condone smoking. The roommate said that no one was smoking in the unit on March 12, contrary to what the first witness for OCSCC 656 had complained of.

- [11] None of OCSCC 656's witnesses testified that they had witnessed Mr. Denize smoking on his balcony, despite OCSCC 656's allegation that he was smoking there. In fact, the condominium corporation was unable to produce any witness who had seen anyone smoking on the balcony of Mr. Denize's unit. Mr. Denize testified to seeing multiple other people smoking on their balconies or in the parking lot nearby.
- [12] Mr. Denize testified that he was out of town from December 27, 2021 to January 1, 2022, some of the dates specifically mentioned by OCSCC 656's first witness in one of her complaints. Mr. Denize produced travel receipts to support his testimony. Both Mr. Denize and his roommate testified that they were in Montreal on April 22nd, another date specified in one of the first witness' complaints. They produced receipts to corroborate their evidence. The fact that the first witness complained of smoke while Mr. Denize was away from the unit undermines her evidence that there was no smoke when Mr. Denize was not there. It also calls into question her assertion that Mr. Denize is the source of the smoke odour.
- [13] Mr. Denize challenged the testimony of the first witness that she shared a wall with him. His submission was that both witnesses had units which connect diagonally with his. That is, they shared a corner, not a wall. Both the units of the first and second witnesses are diagonally above his unit, in Mr. Denize's submission, and the second witness' unit is in a separate unit block from his.
- [14] Mr. Denize received repeated notices from OCSCC 656 accusing him of smoking or permitting smoking in violation of the rules. He repeatedly denied smoking on the property or permitting smoking and expressed his growing frustration that his denials were being ignored. He requested that OCSCC 656 investigate the source of the odour. At one point, he invited representatives of OCSCC 656 to visit his unit and satisfy themselves that there was no smoking in the unit. In view of the first OCSCC 656 witness' testimony that even second-hand smoke was penetrating her soft furnishings and that smoke was wafting from Mr. Denize's unit, one would expect such a visit to produce evidence of second-hand or lingering smoke in the unit if Mr. Denize were indeed smoking there. However, OCSCC 656 refused Mr. Denize's invitation to inspect his unit.

- [15] Mr. Denize submits that OCSCC 656 conducted no independent investigation of the source of the odours. OCSCC 656 does not contest this. It appears that OCSCC 656 was content to rely on the complaints received primarily if not exclusively from the two witnesses who testified on its behalf. These two witnesses testified to having spoken to a number of their neighbours in an effort to determine where the smoke was coming from. Neither witness asked Mr. Denize if he was smoking despite their belief that he was the source of the odour.
- [16] Both the OCSCC 656 witnesses testified that the smoking odour increased after Mr. Denize moved in. However, correlation is not causation. It is possible that what the witnesses experienced was driven by a change in the seasons. It might be, for example, that immediately after the no-smoking rules were introduced in July 2021, it was easy for smokers to smoke outside, away from the building. As the weather cooled, smokers might have been more tempted to smoke closer to the building, on their balconies or in the near-by parking area. This is consistent with Mr. Denize's testimony that he has seen people smoking in both these places.
- [17] Mr. Denize introduced a document called "[A Directors' Guide to Smoking and Cannabis in Condos](#)" published by Lash Condo Law. While this is not an expert opinion, and does not contain binding statements of law, it is a document that OCSCC 656 might have had access to, given that Lash Condo Law is representing it in this matter. The guide is designed to be of use to Condominium Boards of Directors in dealing with issues of smoking in condominiums. In a section entitled "What to do about Smoking-Related Complaints", the guide states, "First, the corporation has to determine where the smoke is coming from and the reason the smoke is migrating. Sometimes, this can be as easy as walking up next to a unit door and smelling the smoke. Other times it may be more difficult and will require expert advice, as it involves smoke travelling through ducts or common elements."
- [18] In this case, OCSCC 656 had an opportunity to easily determine whether Mr. Denize's unit was the source of the smoke simply by accepting Mr. Denize's invitation to come into the unit itself. Given the statements of the two witnesses called by OCSCC 656 that the second-hand smoke odour was strong and pervasive, it is likely that it would have been easy to detect smoke in the unit. OCSCC 656 chose not to do this. Despite Mr. Denize's repeated denials that he was smoking in the unit, OCSCC 656 preferred to rely on the complaints about the smell of smoke as proof that he was the source of the odour. OCSCC 656 persisted in its belief that Mr. Denize was the source of the smoke despite the fact that no one had seen him, or anyone, smoking on the balcony of his unit. It is not clear that OCSCC 656 investigated Mr. Denize's statements that he had seen other people smoking on their balconies: there is no evidence before me that these claims were investigated. I conclude that OCSCC 656 has chosen not to investigate the source of the smoke odours experienced by its two witnesses.
- [19] Neither of the OCSCC 656 witnesses nor any other person testified to having seen Mr. Denize, or anyone, smoking on his balcony. OCSCC 656 specifically alleges

that Mr. Denize has been smoking there. The first witness' testimony that the smoking odours stopped when Mr. Denize is away is undermined by her complaints about smoke on some dates when Mr. Denize was not there. The second witness also testified that the smoking odours stopped when Mr. Denize was away but she did not provide any specific dates when she believed he was not there so it is difficult to assess the reliability of that testimony. The OCSCC 656 witnesses' assumption that Mr. Denize was the source of the smoke odours is directly contradicted by the testimony of Mr. Denize and his roommate. For these reasons, I am not persuaded that the testimony of the two witnesses for OCSCC 656 establishes, on a balance of probabilities, that Mr. Denize's conduct is the source or cause of the smoke odours penetrating their units.

[20] I conclude that OSCC 656 has not demonstrated that Mr. Denize or any other person is smoking in his unit or on his balcony. It has not demonstrated that Mr. Denize is the source or cause of the smoke odours penetrating other units. In light of this conclusion, it is not necessary to consider the issue of whether an order directing compliance with the no-smoking rules should issue.

Issue 3 – What costs, if any, should be awarded?

[21] There are two categories of costs being claimed in this case. OCSCC 656 claims its costs of enforcing compliance with its governing documents against Mr. Denize, particularly with those rules that relate to smoking. Specifically, OCSCC 656 claims a reimbursement of the costs of the written notices to Mr. Denize advising him of his infraction of the non-smoking provisions of its governing documents. Both parties claim their costs of this proceeding.

[22] OCSCC 656 has not demonstrated that Mr. Denize has been in non-compliance with the no-smoking rules at any time since its first notice to him on November 16, 2021. Therefore, I am denying OCSCC 656's claims for its compliance costs. Similarly, given that this application is being dismissed, I am denying OCSCC 656's claim for its legal costs in this proceeding and its claim for filing fees paid to bring this application.

[23] Mr. Denize claims his legal costs in this matter. Reimbursement of legal costs and disbursements in applications before this Tribunal is governed by Rule 48.2 of the Condominium Authority Tribunal Rules of Practice, effective January 1, 2022. The rule 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.

[24] The threshold for making an exception to this general rule is a high one. The costs must be "directly related" to, in this case, behaviour by OCSCC 656 that was

“unreasonable, undertaken for an improper purpose or that caused a delay or additional expense.” Even when costs are awarded, the Tribunal considers the quantum of costs which may be appropriate. Factors considered in this determination include whether the costs themselves are reasonable and proportional to the complexity of the case and when there was a good reason to incur them.

- [25] In this case, Mr. Denize incurred legal costs because OCSCC 656 refused to reasonably consider his denials that he was smoking or permitting smoking in his unit or on the property. OCSCC 656 continued to accuse him of smoking and refused to conduct the investigation he requested. OCSCC 656 refused even to come into his unit and satisfy themselves that he was or was not smoking there. Mr. Denize repeatedly and respectfully denied the accusations and expressed his growing frustration that he was clearly being disbelieved. Apart from the complaints of two other unit owners, OCSCC 656 had no reason to believe that Mr. Denize was smoking. No one had seen him smoke. Mr. Denize suggested a number of other ways that the smoke might be getting into other units but OCSCC 656 declined to investigate. Mr. Denize first attempted to represent himself in these proceedings but decided that the stakes for him were too high and he retained counsel.
- [26] While OCSCC 656 was justified in approaching Mr. Denize in November 2021, the repeated targeting of Mr. Denize despite his repeated and consistent denials became increasingly unjustifiable. Although OCSCC 656 continued to receive complaints from the two other unit owners, Mr. Denize’s denials should have prompted an investigation into where the smoke odour was originating. Instead, OCSCC 656 continued to accept the complaints of the two other unit holders as proof that Mr. Denize was causing the smoke odour. At some point, OCSCC 656’s persistence in its accusations became unreasonable. It is appropriate in all the circumstances of this case that OCSCC 656 should pay some part of the legal costs incurred by Mr. Denize in this matter.
- [27] Mr. Denize has incurred a total of \$6,271.63 in legal costs and disbursements in this hearing. I find that that cost is reasonable and proportionate to the complexity of the issues. Given the persistence of OCSCC 656 in ignoring Mr. Denize’s protestations of innocence and its refusal to conduct even the most basic investigation into the matter, it is appropriate to award Mr. Denize the amount of \$4,000 for his legal costs in this matter.

C. ORDER

[28] The Tribunal Orders that:

1. This application is dismissed.
2. OCSCC 656 will, within 30 days of the date of this order, pay Mr. Denize the amount of \$4,000 on account of the legal costs he has incurred in this matter.

To ensure that Mr. Denize does not pay any portion of the amount awarded in this Order, Mr. Denize will be given a credit towards the common expenses attributable to his unit equivalent to its proportionate share of the amounts awarded.

Laurie Sanford
Member, Condominium Authority Tribunal

Released on: November 11, 2022