

## CONDOMINIUM AUTHORITY TRIBUNAL

**DATE:** September 30, 2024

**CASE:** 2023-00594N

**Citation:** Kovalenko v. Romanino et al., 2024 ONCAT 151

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

**Member:** Nicole Aylwin, Member

**The Applicant,**

Anton Kovalenko

Self-Represented

**The Respondents,**

Vanessa Romanino

Self-Represented

York Condominium Corporation No. 272

Represented by Vadim Koyen, Agent

**Hearing:** Written Online Hearing – June 3, 2024 to September 24, 2024

### **REASONS FOR DECISION**

**A. INTRODUCTION**

[1] The Applicant, Anton Kovalenko, is the owner of a unit of York Condominium Corporation No. 272 (“YCC 272”). He alleges that when the Respondent, Vanessa Romanino, smokes on her porch smoke migrates into his unit causing smoke and odour that are a nuisance to him and his family. He further argues that YCC 272 has failed to respond to his complaints and has permitted Ms. Romanino to carry on an activity that causes a nuisance. Mr. Kovalenko has asked the Tribunal to make several orders including prohibiting Ms. Romanino (and any other occupiers or guests to her unit) from smoking on her porch.

[2] Ms. Romanino denies Mr. Kovalenko’s claims, which she says are frivolous and vexatious. She submits that given that smoking is allowed in the building (including on balconies and terraces) it is reasonable that some smoke and odour may be experienced by other unit owners, including Mr. Kovalenko. She submits that her smoking does not generate any more smoke or odour than might reasonably be

expected in a building that allows smoking. She asserts that Mr. Kovalenko has harassed her with his complaints and has aggressively surveilled her unit and invaded her privacy by taking photos and videos of her.

- [3] YCC 272 was largely silent on the issues in dispute. Despite participating at the outset of the hearing and submitting an opening statement that claimed that smoking was allowed in the building and not a nuisance, after YCC 272's representative was changed from a board member to the condominium manager its position also changed. YCC 272 then asserted, in messages on the CAT-ODR platform, that the smoke was a nuisance. However, YCC 272, despite being given ample opportunity to provide evidence and submission in support of its changed position, they did not do so.
- [4] To say that the relationship Mr. Kovalenko and Ms. Romanino is acrimonious would be an understatement. Both parties have accused the other of insolence, making defamatory statements and harassment. While the evidence shows that this dysfunctional relationship has impacted how the parties have approached the dispute over smoking, as explained to the parties at several times during the hearing, the issue of whether there has been harassment by either party, would not be addressed. This is because the application was about smoke, not about alleged other nuisances and compliance with provisions of the governing documents that may deal with other nuisances. The basis of this application was a smoking dispute, and thus the hearing was limited to the following issues:
1. Is the Respondent, Ms. Romanino, engaging in an activity (i.e. smoking) that is causing a nuisance, annoyance or disruption in the form of smoke and odour? If so, what is the appropriate remedy?
  2. Has YCC 272 failed to properly investigate the Applicant's claims of smoke and failed to enforce section 117(2) of the *Condominium Act, 1998* (the "Act") and its Rule 8?
  3. Is any party entitled to costs? If so, in what amount?
- [5] Despite my direction, both parties made multiple submissions on the behavior and alleged harassment of the other. However, in making my decision, I have considered and only refer to the evidence that is directly relevant to the issues I must decide. I make no decision on the merits of any claims of harassment. Similarly, while I have reviewed all of the evidence, submissions and case law provided to me. I refer only to what is necessary to make my decision.

## **B. PRELIMINARY ISSUES**

- [6] At the outset of the hearing, Ms. Romanino made two motion requests. The first was that this case be dismissed as she believed it was outside of the Tribunal's jurisdiction. The second was a request for a confidentiality order.
- [7] To properly respond to these motions the parties would need to address the substance of the dispute and I would need to see the evidence and submissions provided. Thus, it was more efficient to receive specific written submissions from the parties on the merits of the case and the motion orders simultaneously. I therefore directed the parties to present their arguments in relation to these motions in the context of their submissions, with the motions to be decided sequentially at the outset of the decision.

**Motion No. 1: Should this case be dismissed because it falls under section 117(1) of the Act, which deals with an activity that is likely to cause injury or illness to an individual and, thus, is outside the jurisdiction of the Tribunal?**

- [8] Ms. Romanino requested the Tribunal dismiss the case under Rule 19 of the CAT Rules of Practice because she asserts that the dispute about smoking triggers section 117 (1) of the Act over which the Tribunal does not have jurisdiction.
- [9] Section 1.42 (1) of the Act states that the Tribunal has exclusive jurisdiction to exercise the powers conferred on it under this Act and to determine all questions of fact or law that arise in any proceeding before it.
- [10] Section 1(1) (c.1) of Ontario Regulation 179/17 ("O.Reg 179/17") provides that subject to subsection 1(3) of O. Reg 179/17, the Tribunal has jurisdiction over disputes that fall under s. 117(2) of the Act or section 26 of Ontario Regulation 48/01. These are disputes include disputes over other prescribed nuisances including smoke and odour as outlined in s. 26 of Ontario Regulation 48/01 ("O.Reg 48/01").
- [11] Section 1(3) of O. Reg 179/17 provides that "Clauses (1) (c.1) and (d) do not apply to a dispute that is also with respect to subsection 117(1) of the Act....". Section 117 (1) of the Act provides,
- No person shall permit a condition to exist or carry on an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or cause injury to an individual.
- [12] According to Ms. Romanino, Mr. Kovalenko has been harassing her because she smokes on her porch. She asserts he takes video and photographs of her, engaged in verbal abuse, and has engaged in other behavior, such as pounding aggressively on his unit's floor (her ceiling) when he believes she is smoking,

which could cause injury to her and/or her property. As such, she submits that Mr. Kovalenko is engaging in an activity that is likely to cause an injury or illness to an individual. Therefore, she argues that this dispute falls not only within s. 117 (2) of the Act but also s. 117 (1) of the Act and thus the Tribunal loses jurisdiction.

[13] On this latter point, she referred me to *MTCC No. 1260 v Singh, 2022 ONSC 1606*. I find this case of limited application as the jurisdictional question addressed was not related to this Tribunal, but to the question of whether a breach of section 117 (1) meant the Court could order the eviction of a tenant in a condominium unit, which is typically the jurisdiction of the Landlord and Tenant Board.

[14] More relevant, is the Tribunal's own decision, *Rahman v. Peel Standard Condominium Corporation No. 779, 2021 ONCAT 1*, wherein the Tribunal found that, it is not enough,

...to assert that risks of or concerns about damage or injury are circumstantially or incidentally connected with a case. Rather, a dispute in a case before this Tribunal should be viewed as "*also with respect to section 117 of the Act*," where the considerations under that section cannot reasonably or easily be divorced from analysis of the dispute in question or, more particularly, where a correct determination of the central issues in dispute cannot be made without also addressing such considerations.

[15] The sole focus of this case is whether Ms. Romanino's smoking is causing a nuisance, which is a dispute over which the Tribunal has exclusive jurisdiction. A determination on the issues in this case can be made without addressing the issue of alleged harassment; an issue more appropriately dealt with elsewhere. Given the divisible nature of these issues, in this case, I find it would be inappropriate and unfair to deny Mr. Kovalenko the right to have the Tribunal hear and consider the actual and substantive bases on which his claim rests simply because Ms. Romanino asserts there is a safety issue related to Mr. Kovalenko's alleged behavior. I find that the case is within the Tribunal's jurisdiction to decide.

**Motion No. 2: Should a confidentiality order be issued ordering that the name and identifying details of Ms. Romanino be anonymized.**

[16] Ms. Romanino also requested a confidentiality order be issued anonymizing her name and other identifying information, claiming that Mr. Kovalenko had made and continues to make untrue, derogatory and defamatory claims about her which can have detrimental effects on her reputation and livelihood as a lawyer.

[17] In accordance with Rule 21.5 of the CAT's Rules of Practice, the Tribunal can take steps, give directions or issue orders to protect the confidentiality of personal

information, and / or restrict public access to an order upon request (i.e. can issue a confidentiality order).

[18] Section 5 of the CAO Access and Privacy Policy deals with access to the adjudicative record of a CAT process. Section 5.1.5 states:

In deciding whether to issue a confidentiality order, the CAT Member will consider several factors including the nature of the information at issue, the interests of affected individuals, and the public interest in the openness of proceedings. For greater specificity, please note that the CAT is guided by the provisions regarding the issuance of confidentiality orders set out in section 2 (2) of the Tribunal Adjudicative Records Act, 2019 – in particular, the CAT may issue a confidentiality order if: (a) matters involving public security may be disclosed; or (b) intimate financial or personal matters or other matters contained in the record are of such a nature that the public interest or the interest of a person served by avoiding disclosure outweighs the desirability of adhering to the principle that the record be available to the public.

[19] In responding to the issue of whether a confidentiality order should be issued, I advised the parties to address these considerations in their submissions.

[20] Neither party provided any evidence or submissions that would justify a confidentiality order. This case does not involve matters of public security and while I understand that Ms. Romanino is upset by the claims and comments made about her and may be concerned about her reputation, there was no evidence provided of the disclosure of information of an such an intimate or personal nature that would justify excluding it from the public record. It is a regrettable fact that many of the parties before the Tribunal feel that the accusations and comments made about them are untrue, defamatory and harm their reputation. This is not reason to deviate from the 'open court' principle. Therefore, I decline to issue an order for confidentiality in this case.

### **C. ISSUES & ANALYSIS**

**Issue No. 1: Is the Respondent, Ms. Romanino, engaging in an activity (i.e. smoking) that is causing a nuisance, annoyance or disruption in the form of smoke and odor? If so, what is the appropriate remedy?**

[21] Section 117 (2) of the Act states that no activity is permitted that creates a nuisance, annoyance, or disruption. It reads:

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.

[22] The other prescribed possible nuisances, annoyances, and disruptions, as noted above, include odour and smoke.

[23] Additionally, YCC 272's Rule 8 prohibits owners, their families, guests and visitors from "creating or permitting the creation or continuation of any noise or nuisance, which in the opinion of the board or manager, may or does disturb the comfort of quiet enjoyment of the property by other owners, their families guest, visitors servants and persons having business with them."

[24] There are no provisions in YCC 272's governing documents which prohibit or regulate smoking. Unit owners are therefore not prohibited from smoking anywhere on the property, including in their units and on their balconies and terraces.

[25] The condominium units in which Mr. Kovalenko and Ms. Romanino live are stacked. Ms. Romanino's unit is on the ground floor of the condominium. Mr. Kovalenko's unit is two stories above Ms. Romanino's. Mr. Kovalenko asserts that when Ms. Romanino smokes on her porch, the smoke and odour migrate up to his unit coming in through his open balcony door and windows. He alleges that Ms. Romanino's smoking is frequent, prolonged, and that the amount of smoke and odour he experiences is unreasonable.

[26] According to Mr. Kovalenko, Ms. Romanino's smoking interferes with his quiet use and enjoyment of his unit, since he can never open the windows or balcony door lest he and his family be exposed to smoke and odour. He also asserts he cannot use his balcony when Ms. Romanino is smoking. He further takes the position that YCC 272 is permitting an activity to continue (i.e., smoking) that is creating a nuisance in the form of smoke and odour in his unit, effectively interfering with the enjoyment of his home and that it has failed to properly investigate his complaints.

[27] 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.

- [28] To support his claim of nuisance, Mr. Kovalenko submitted a log he kept of what he calls 'smoking events'. The log records numerous smoking events dating back to 2021 – all of which he attributes to Ms. Romanino. He also submitted several email complaints he sent to YCC 272, wherein he reports that smoke is migrating into his unit through his open windows and balcony door and identifies Ms. Romanino as the smoker responsible..
- [29] It is clear from the email complaints that Mr. Kovalenko has become, over time, increasingly agitated by the smoke and is intensely focused on Ms. Romanino as the source of the smoke. His complaints to YCC 272 begin cordially enough, acknowledging that smoking is allowed on balconies and porches, but nonetheless asking for assistance with how to deal with the fact that smoke is migrating from the porch below him into his unit when his windows and door are open. The complaints, however, soon become more aggressively worded and devolve into accusations that Ms. Romanino is intentionally smoking and leaving cigarette butts to smolder to harass him and his family, at times referring to Ms. Romanino's smoking (or that of her guests) as "harassment attacks." He also begins to assert that only the complete absence of smoke will satisfy him.
- [30] Ms. Romanino does not deny that she often smokes outside on her porch, however, she notes that there is no rule that prevents her from doing so. The building does not prohibit smoking in units or on balconies or porches.
- [31] She does deny that she smokes excessively or to the extent claimed by Mr. Kovalenko. She also disputes the accuracy of the log provided by Mr. Kovalenko and provided an affidavit from a partner at the law firm where she works, which verifies that on at least some of the occasions recorded by Mr. Kovalenko, Ms. Romanino was seen in the office, and thus could not have been smoking during the "smoking events" recorded by Mr. Kovalenko. There is also testimony from the former condominium manager that when investigating an email complaint of smoke from Mr. Kovalenko – cameras confirmed Ms. Romanino was not on her porch smoking (as indicated in the complaint) so could not have been the source of the smoke.
- [32] The evidence before me does support a finding that Mr. Kovalenko experiences

smoke migration into his unit if he opens his windows and his balcony door when Ms. Romanino is smoking. And there is no question that Ms. Romanino (and sometimes her guests) smokes on her porch. However, as noted, to rise to the level of a nuisance, the interference must be substantial and unreasonable and there is no objective evidence to suggest that Mr. Kovalenko is experiencing smoke and odour at this level. Even if I accept Mr. Kovalenko's log is, for the most part, accurate, Mr. Kovalenko's log records on average 3-4 instances of smoking per day (some days more, some days less, some days no recorded events). In several emails to the board, he also cites 3-4 instances of smoking per day. I am not persuaded that in a building that allows smoking, this is an unreasonable frequency of smoking events even if all such events involve only a single smoker.

[33] Additionally, the evidence shows that smoke migrates into Mr. Kovalenko's unit only when his doors and windows are open. I appreciate that Mr. Kovalenko wants to minimize his family's exposure to smoke and that this has become even more important for him since the birth of his child earlier this year; however, the evidence shows that he can do so by closing his doors and windows when Ms. Romanino smokes. This may, indeed, inconvenience Mr. Kovalenko and interfere with his preference to keep his windows open; however, Mr. Kovalenko has chosen to live in a building where smoking is permitted (both indoors and outdoors). This means that some smoke and odour migrating through open windows and doors is to be expected and will need to be tolerated. It is not reasonable for Mr. Kovalenko to expect or demand a complete absence of smoke and odour from people smoking while living in this condominium.

[34] Based on the evidence before me, I cannot conclude that either the smoke or the odour Mr. Kovalenko is experiencing is substantial and unreasonable and constitutes a nuisance as described in s. 117(2) of the Act or that it violates YCC 272's Rule 8.

**Issue No. 2: Has YCC 272 failed to properly investigate the Applicant's claims of smoke and failed to enforce section 117(2) of the Act and its Rule 8?**

[35] Throughout almost the entire hearing, Mr. Kovalenko was adamant that this issue was to be decided and provided evidence and arguments related to it. However, very near to the end of the hearing, in his final submissions, Mr. Kovalenko indicated he no longer wished to pursue this issue with the board (which has undergone some changes since the start of this proceeding). However, to ensure completeness of my decision, I will decide it.

[36] Section 17(3) of the Act requires a condominium to take all reasonable steps to ensure that owners and occupiers comply with the Act and its governing



documents. It also has the right under subsection 119(3) of the Act to require an owner to comply with the Act and its governing documents.

- [37] The evidence shows that when YCC 272 received Mr. Kovalenko's first complaints in 2021, it took them seriously. Even though Ms. Romanino was not breaching any rule, YCC 272 made Ms. Romanino aware of the complaints and attempted to work with her to find a potential solution to the problem. For example, according to Ms. Romanino she spoke with management in 2021 about the possibility of providing advanced notice via text to Mr. Kovalenko before she smoked so he could close his windows. However, she submits that Mr. Kovalenko's behavior towards her became increasingly aggressive, ending any such discussions.
- [38] Nonetheless, emails between Mr. Kovalenko and the board exchanged between March 2022 and June 2022 show that YCC 272 continued to advise Mr. Kovalenko that they were discussing the issue and possible solutions at their board meetings. At one point, YCC 272 did propose a mediation between the parties (whether this was to be formal or informal is not clear). However, this mediation does not appear to have taken place.
- [39] In June 2022, at least in part in response to Mr. Kovalenko's concerns, YCC 272 set up a committee to consider the issue of smoking in the building. Mr. Kovalenko sat on this committee. In response to the eventual recommendations of this committee, the board moved to explore the possibility of implementing a no smoking rule. The committee also recommended they explore the possibility that Ms. Romanino's smoking may be a nuisance, although the committee noted that they had no authority to advise the board on enforcement options and there is no indication what evidence the committee relied on to make this recommendation.
- [40] In March 2023, YCC 272 sent a memo to owners proposing such a rule. However, a non-smoking rule was never implemented, a fact that appears to have significantly increased Mr. Kovalenko's frustration and anger with the board. In a witness statement from the past president of the board, Irina Pyryeskina, she testified that it became difficult to "keep up" with and answer all of Mr. Kovalenko's complaints (although, not all these complaints were about smoking) and that the tone of his communications had become increasingly aggressive and rude. His emails from this time period support this statement. His complaints become more aggressive, and he begins referring to Ms. Romanino as a terrorizer.
- [41] Finally, in May 2024, as part of the mediation process which preceded this Stage 3 – Tribunal Decision, YCC 272 sought to work with Mr. Kovalenko to further investigate the smoke migration and generate possible solutions by conducting a test in his unit. However, the emails provided by Mr. Kovalenko indicate that these

conversations and the plan to investigate broke down when Mr. Kovalenko demanded very specific testing conditions, including the condition that someone smoke the identical cigarettes as Ms. Romanino and do so for the same amount of time and in the exact place where he believed Ms. Romanino normally sat. Only then would he consider it a valid test. When the board indicated to him that they could not mandate that someone smoke tobacco as part of the test, Mr. Kovalenko refused to further participate in any investigation or conversations regarding an investigation.

[42] In summary, YCC 272 attempted several times, in different ways, to address Mr. Kovalenko's complaints, despite the fact that, Ms. Romanino was not breaking any rules and, as confirmed by this decision, there was no evidence to support the claim that Ms. Romanino's smoking constitutes a nuisance. While I recognize that these attempts by YCC 272 to address the situation did not meet Mr. Kovalenko's expectations or in the end generate the result Mr. Kovalenko wanted, Mr. Kovalenko's personal expectations are not the measure of whether the corporation acted reasonably to enforce their governing documents and rules. In this case, I find that YCC 272 did take reasonable steps to address the issue and to enforce its governing documents and the Act.

**Issue No. 3: Is any party entitled to costs? If so, in what amount.**

[43] Ms. Romanino has requested costs in total amount of \$19100.00; \$14 000 for legal fees, \$100.00 for the installation of cameras inside and outside her unit and \$5000 for "pain and suffering"

[44] While Ms. Romanino labels all these requests as requests for "costs", the latter is more appropriately dealt with as a request for compensation. I will deal with the request for compensation first and then address costs related to this proceeding.

[45] Section 1.44(1)3 of the Act provides that the Tribunal may make an order at the conclusion of the proceeding that directs a party "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."

[46] In describing details of her pain and suffering, Ms. Romanino largely references the impact of Mr. Kovalenko's alleged behavior on her, citing that it has caused "emotional and psychological harm." She cites instances of having to sleep elsewhere and/or have others stay at her place because she was feeling unsafe, and the cost of her time in having to constantly meet with board and management and contacting the police about the situation.

- [47] While I accept that this case has been stressful to Ms. Romanino, her claims for compensation for “pain and suffering” rest not on the fact that there has been an act of non-compliance, but rather on her allegations that Mr. Kovalenko has been harassing her (because of her smoking). As noted, whether Mr. Kovalenko has engaged in harassing behaviour is not an issue that is properly before me. Therefore, there is no basis for compensation for damages under section 1.44(1)3 of the Act.
- [48] 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.” Section 1.44 (2) of the Act states that an order for costs “shall be determined ...in accordance with the rules of the Tribunal”.
- [49] 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.
- [50] The Tribunal’s “Practice Direction: Approach to Ordering Costs” 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; the indemnification provisions in a corporations governing documents and whether the parties attempted to resolve the issues in dispute before the CAT case was filed.
- [51] No details have been provided regarding the legal costs incurred by Ms. Romanino and I note she represented herself in this hearing. Nonetheless, Ms. Romanino submits she is entitled to her legal costs because Mr. Kovalenko filed this case in bad faith and for an improper purpose. She argues that despite the absence of objective evidence that her smoke was causing a nuisance he aggressively pursued his claims which were both frivolous and vexatious.

[52] While I have found that Ms. Romanino's smoking does not constitute a nuisance, and while the acrimony between the parties has no doubt contributed to the parties feeling as if that they have been unfairly targeted or pursued, I am not persuaded that Mr. Kovalenko filed this case for an improper purpose or that it was frivolous or vexatious. Mr. Kovalenko appears to have had a legitimate belief that Ms. Romanino's smoking was a nuisance, and when it became apparent to Mr. Kovalenko that his complaints could not or would not be addressed by the board, he filed this application. Notwithstanding that I have determined his position to be wrong, this is a legitimate use of the Tribunal.

[53] Additionally, Ms. Romanino has provided no evidence of legal fees incurred by her in relation to this case, and no evidence of lost business opportunities attributable to the work performed by her in support of her participation in this case. Mere attendance to a case, will not typically give rise to a costs award to a self-represented litigant, even one who is a lawyer.

[54] For the reasons above, I decline to award costs to Ms. Romanino.

[55] Mr. Kovalenko did not claim costs, nor would he be entitled to any as he was not successful in his claims.

**D. ORDER**

[56] The Tribunal Orders that:

1. This case is dismissed. No costs are awarded to any party.

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Nicole Aylwin  
Member, Condominium Authority Tribunal

Released on: September 30, 2024