

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

YORK CONDOMINIUM CORPORATION NO. 529

Applicant

and

LEONOR PRUPAS, ELYSHEVA PRUPAS and BRYAN BURKART

Respondents

**FACTUM OF THE APPLICANT
YORK CONDOMINIUM CORPORATION NO. 529**

(APPLICATION RETURNABLE JANUARY 3, 2012)

December 27, 2012

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AND TO: **ELYSHEVA PRUPAS**
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AND TO: **BRYAN BURKART**
212 St. George Street
Suite [REDACTED]
Toronto, ON M5R 2N5

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A. INTRODUCTION

1. This is an application by York Condominium Corporation No. 529 (“**YCC 529**”) for relief to prohibit the respondents from, *inter alia*, smoking cigars on YCC 529’s property. YCC 529 is a residential condominium building in Toronto. As a condominium corporation, it has a positive statutory duty to ensure that no activities take place on the property which could cause injury to an individual. It also has a positive statutory duty to enforce its rules which rules, *inter alia*, prohibit owners from permitting anything from happening in their unit that interferes with the rights of other owners, or injures or annoys them and which prohibit nuisances that disturb the comfort and quiet enjoyment of other owners.
2. The respondent, Leonor Prupas owns a unit in YCC 529. Her tenants, Elysheva Prupas and Bryan Burkart (the “**Tenant Respondents**”) smoke cigars excessively. Residents on

the floor where Elysheva Prupas and Bryan Burkart live are concerned for their health and are disturbed by the excessive smoke. Among the residents are two pregnant women, a child with a chronic cough whose pediatrician recommends she not be exposed to second hand smoke, and a man with asthma. Considerable efforts have been undertaken to mitigate the smoke. None of the efforts have worked. Burkart has stated he has no intention to cease or curtail his smoking.

B. FACTS

3. YCC 529 is a non-profit condominium corporation created pursuant to the *Condominium Act*, S.O. 1978, c. 84 as amended, through the registration of a declaration in the Land Titles Division for the Land Registry Office of Toronto (No. 66) as instrument number B675013 (the “**Declaration**”), and a description on September 11, 1980. YCC 529 was created for the purpose of controlling, managing and administering the assets of condominium development comprised of forty-one (41) dwelling units, and appurtenant common elements, and municipally known as 212 St. George Street, Toronto, Ontario.¹
4. The respondent, Leonor Prupas, is the registered owner of unit 2, level 1, of York Condominium Plan No. 529, municipally known as Unit [REDACTED], 212 St. George Street, Toronto (“**Unit [REDACTED]**”).²
5. The respondents, Elysheva Prupas and Bryan Burkart, reside in Unit [REDACTED].³

¹ Affidavit of Richard Pearlstein, Application Record, Tab 7, paragraph 3, page 47

² *Ibid*, paragraph 4 at page 48;

³ *Ibid*, paragraph 5 at page 48;

6. Unit [REDACTED] is on the first floor of YCC 529. There are six units on the first floor. Unit [REDACTED] is to the south and is in the middle of Unit [REDACTED] and Unit [REDACTED]. Appurtenant to each unit is an exclusive-use common element patio.⁴
7. The respondents, Elysheva Prupas and Bryan Burkart smoke excessively in their unit and on the patio appurtenant to their unit. YCC 529 has received numerous complaints about the smoking.⁵
8. YCC 529's rules provide, in part, as follows:⁶

4. No owner shall do, or permit anything to be done in his unit or bring or keep anything therein which will in any way increase the risk of fire or the rate of fire insurance on any building, or on property kept therein, obstruct or interfere with the rights of other owner, or in any way injure or annoy them, of conflict with the laws relating to fire or with regulations of the Fire Department or with any insurance policy carried by the corporation or any owner, or conflict with any of the rules and ordinances of the Board of Health or with any statute or municipal by-law

* * *

8. Owners, tenants, their families, guests, visitors and servants shall not create or permit the creation or continuation of any noise or nuisance which, in the opinion of the board or the manager, may or does disturb the comfort or quiet enjoyment of the property by the other owners, their families, guests, visitors, servants, and persons having business with them.

* * *

29. Any loss, cost or damages incurred by the corporation by reason of a breach of any rules in force from time to time by any owner, his family, guests, servants, agents or occupants of his unit shall be borne by such

⁴ *Ibid*, paragraph 8 at page 49;

⁵ *Ibid*, paragraph 11 at page 50;

⁶ *Ibid*, paragraph 9 at pages 49 -50;

owner and may be recovered by the corporation against such owner in the same manner as common expenses.

9. In the opinion of the property manager and the board of directors of YCC 529, the smoking by Elysheva Prupas and Bryan Burkart constitutes a nuisance which disturbs the comfort and quiet enjoyment of the property by other owners and their families contrary to YCC 529's rules.⁷
10. The Tenant Respondents have been told on numerous occasions to stop the excessive smoking. Burkart has refused. Burkart received a letter from YCC 529's lawyers which told him to stop the excessive smoking. Burkart then telephoned the property manager and admitted receiving the letter but then said he had no intention to cease or curtail his smoking.⁸

STEPS UNDERTAKEN TO MITIGATE THE SMELL AND NUISANCE OF THE SMOKE

11. YCC 529 has undertaken considerable work to try to stop the smoke from Unit [REDACTED] from migrating into the neighbouring units, namely, they have installed vent hood covers over the Respondents' patio. Further, YCC 529 ensures that the building's make-up air unit, which brings a continual fresh air supply to the interior common area corridors of the condominium, is serviced on a regular basis. The make-up air unit is in optimal working order. However, owing to the excessive smoking, these measures have not prevented the risk or disturbance caused by Elysheva Prupas and Bryan Burkart.⁹

⁷ *Ibid*, paragraph 10 at page 50;

⁸ *Ibid*, paragraphs 16 – 17, at pages 51- 52

⁹ *Ibid*, paragraph 13 at page 51;

12. In addition, unit owners affected by the smoke have undertaken their own significant efforts to minimise the impact of the smoke.

13. Deborah Shub and Chris Hatto live in Unit [REDACTED] with their two-year old daughter. Deborah Shub is pregnant with their second child. Unit [REDACTED] shares a common wall with Unit [REDACTED]. Deborah Shub and Chris Hatto have gone to great lengths to mitigate the smoke that permeates from Unit [REDACTED] into their unit including:
 - a. Two and a half years ago, they replaced their kitchen and, when they did so, they ensured that all wall penetrations were sealed;
 - b. They put caulking along the baseboard and insulating foam in electrical outlets and light switches on the common and perpendicular walls with Unit [REDACTED], in addition to taping over electrical outlets (rendering them unusable) and light switches;
 - c. They put weather stripping around their front door to reduce smoke penetration from the hallway;
 - d. There was a significant wall penetration below the kitchen sink, which was there for access to the water shut-off. They closed off that penetration by installing an access panel and then sealing around and over the panel;
 - e. They recently replaced their floors and asked the contractor to seal between the walls and the new floor; and
 - f. Around one and a half years ago they spent approximately \$800.00 on an air purifier for their daughter's room.¹⁰

¹⁰ Affidavit of Deborah Shub, Application Record, Tab 2, paragraph 12 at page 14, and Affidavit of Chris Hatto, Application Record, Tab 2, paragraph 10 at pages 31 – 32;

14. Grant Ramsay and Tim Hughes who live in the unit on the other side of Unit [REDACTED] and who also share a common wall with Unit [REDACTED], have also taken steps to mitigate the smell of smoke. They have installed foam sealing in the electrical outlets. They also use air fresheners (both spray and plug-in), room deodorizers and scented candles, all on an ongoing basis. They still suffer from the smell of smoke.¹¹
15. The residents of the first floor who have provided affidavits are unanimous that the Tenant Respondents have smoked excessively for some time. However, for about the last two years the Tenant Respondents have been smoking cigars which are particularly noxious.¹²
16. Some of the first floor residents experience the cigar smoke on a daily basis, but at a minimum, those affected experience it at least several times per week.

SPECIFIC HEALTH CONCERNS OF UNIT OWNERS

17. Not only are the residents of the first floor who have provided affidavits significantly bothered by the smoke, but they are also seriously concerned for their health.¹³
18. Deborah Shub and Lara Robinson are both pregnant. They both fear for the health of their unborn children.

¹¹ Affidavit of Grant Ramsay, Application Record, tab 5, paragraph 8 at page 39;

¹² Affidavit of Deborah Shub, Application Record, Tab 2, paragraph 12 at page 18; Affidavit of Chris Hatto, Application Record, Tab 3, paragraph 10 at pages 31 – 32; Affidavit of Stacey Jenkins, Application Record, Tab 4, paragraph 9 at page 35; Affidavit of Grant Ramsay, Application Record, Tab 6, paragraph 14 at page 40; Affidavit of Lara Robinson, Application Record, Tab 6, paragraph 5 at page 44;

¹³ Affidavit of Deborah Shub, Application Record, Tab 2, paragraph 12 at page 14; Affidavit of Stacey Jenkins, Application Record, Tab 4, paragraph 13 at page 36; Affidavit of Grant Ramsay, Application Record, Tab 6, paragraphs 3-5 at page 39; Affidavit of Lara Robinson, Application Record, Tab 6, paragraph 11 at page 44

19. Deborah Shub and Chris Hatto have a two year old daughter with a chronic cough. Their pediatrician has suggested that it is possible that the chronic cough is affected by second-hand cigarette/cigar smoke. He writes as follows¹⁴:

Re: Simona Hatto

She is a health 2 yr. 2 mo. old girl under my care. She has a chronic cough.

It is possible that her cough is affected by second-hand cigarette/cigar exposure.

Accordingly I would advise that her exposure to cigarette/cigar smoking be avoided or minimized.

Yours truly,

“Anthony Y. Hui”

20. Grant Ramsay has asthma. His concerns over second hand smoke are exacerbated by this fact.¹⁵

THE SECOND-HAND SMOKE’S NEGATIVE EFFECT ON THE OTHER UNIT OWNER’S COMFORT AND QUIET ENJOYMENT OF THEIR PROPERTY

21. Deborah Shub states that she is afraid to open her windows because she is anxious about smoke coming in. Some days the smell is so bad in her kitchen she will not go there to prepare food for herself.¹⁶ She also says that she believes that living in her unit is compromising the security of her family because of the smoke.¹⁷
22. Stacey Jenkins ran for election for the board of directors specifically because she thought someone from the first floor should be on the board to address the smoking by the Tenant Respondents. She states that the smoke is so thick it sometimes creates a haze in the

¹⁴ Affidavit of Deborah Shub, Application Record, Tab 2A, Exhibit “A”

¹⁵ Affidavit of Grant Ramsay, Application Record, Tab 6, paragraph 14 at page 40;

¹⁶ Affidavit of Deborah Shub, Application Record, Tab 2, paragraphs 9 and 17 at pages 13 and 15, respectively;

¹⁷ Affidavit of Deborah Shub, Application Record, Tab 2, paragraph 15 at page 15

hallway. Ms. Jenkins has smelt the smoke as far away as the outdoor garage entrance to the building.¹⁸

23. Lara Robinson states that the first floor hallway is unbearable to her because of the smoke and she will not travel through it.¹⁹

24. Grant Ramsay states the cigar smell has permeated his unit so much that items of clothing in his closet smell of smoke and that his unit feels like a “smoker’s apartment.”²⁰

RESIDENTS CONTINUE TO SUFFER FROM THE SMOKE

25. Stacey Jenkins swore a further affidavit on December 4, 2012, in which she deposes that YCC 529 passed a rule which prohibits smoking on the common elements, and which allows smoking in units only if it does not interfere with other’s health or enjoyment of the property.²¹

26. Stacey Jenkins also deposes that as at December 4, 2012, the smoke from the respondents is “atrociously bad,” that it “detracts from her enjoyment of her unit and the common elements,” and that she is in “full agreement with pursuing every means to make this awful situation end.”²²

¹⁸ Affidavit of Stacey Jenkins, Application Record, Tab 4, paragraphs 8, 11 and 12 at pages 35 – 36;

¹⁹ Affidavit of Lara Robinson, Application Record, Tab 6, paragraph 7 at page 44;

²⁰ Affidavit of Grant Ramsay, Application Record, Tab 6, paragraph 13 at page 40;

²¹ Affidavit of Stacey Jenkins, sworn December 4, 2012, Supplementary Application Record, Tab 1, paragraph 3 at pages 1 -2, and Exhibit “A”

²² Affidavit of Stacey Jenkins, sworn December 4, 2012, Supplementary Application Record, Tab 1, paragraph 4 at page 2

27. On December 11, 2012, Deborah Shub swore a further affidavit in which she deposes that the cigar smoking has not abated and continues at previous levels.²³
28. Ms. Shub states that there was a brief period in November, 2012 when the respondents smoked outside which meant she could not open her windows for fresh air. The smoking has resumed inside again, though.²⁴
29. Ms. Shub and her husband purchased a second air purifier, but it has been of little help on “particularly smoky days.”²⁵
30. Ms. Shub deposed that on December 7, 2012, after a court appearance, she saw Burkart return to the building and from that time on cigar smoke permeated the first floor.²⁶
31. On December 10, 2012, Ms. Shub reports there was cigar smoke in her kitchen, in the hallway, and in the stairwell.²⁷
32. Ms. Shub deposed that her baby is due any day and she wants to bring her baby home to “clean and non-toxic air.”²⁸

²³ Affidavit of Deborah Shub, sworn December 11, 2012, Further Supplementary Application Record, Tab 1, paragraph 4 at page 2

²⁴ Affidavit of Deborah Shub, sworn December 11, 2012, Further Supplementary Application Record, Tab 1, paragraph 6 at page 2

²⁵ Affidavit of Deborah Shub, sworn December 11, 2012, Further Supplementary Application Record, Tab 1, paragraph 5 at page 2

²⁶ Affidavit of Deborah Shub, sworn December 11, 2012, Further Supplementary Application Record, Tab 1, paragraph 7 at page 2

²⁷ Affidavit of Deborah Shub, sworn December 11, 2012, Further Supplementary Application Record, Tab 1, paragraph 8 at page 2

²⁸ Affidavit of Deborah Shub, sworn December 11, 2012, Further Supplementary Application Record, Tab 1, paragraph 9 at page 3

THE RESPONDENTS' POSITION

33. The owner of the unit, Leonor Prupas, and Brian Burkart have provided virtually identical affidavits consisting largely of legal argument.²⁹
34. Neither Prupas nor Burkart deny any of the allegations about smoking in the unit. In fact, they appear to accept it as a given that the smoking is occurring as alleged. Their defence appears to be an attempt to shift the blame to YCC 529 for what they allege are breaches in the fire separations between the units, and on this point they seek to rely on a Notice of Violation issued December 17, 2012 by the City of Toronto Fire Services.³⁰
35. First, there is no evidence that the alleged damaged fire separations would have any impact in curbing the second-hand smoke caused by the respondents and suffered by other residents on the floor. Alleged damaged fire separations cannot explain smoke permeating the first floor, and in the hallway and stairwells, and coming in from the outside.
36. Second, there is no evidence as to the nature of the alleged damaged fire separations and it is unclear who would be responsible. Notably, however, the unit boundaries extend to the backside surface of the drywall.³¹
37. Third, given the date of the Notice of Violation (namely, December 17, 2012), that the Notice of Violation is related to Unit [REDACTED], and names Elysheva Prupas and Bryan

²⁹ Affidavits of Leonor Prupas and Bryan Burkart, Responding Application Record, Tabs 1 & 2

³⁰ Responding Application Record, Tab 8, Exhibit "F"

³¹ See: Schedule "C" to YCC 529's Declaration in Affidavit of Richard Pearlstein, Application Record, Tab 7A, Exhibit "A" at page 67

Burkart, it is reasonable to draw an inference that the attendance of the City of Toronto Fire Services was a result of the respondents attempting to defend these proceedings by shifting blame for their unrepentant and dangerous smoking.

C. LAW AND ARGUMENT

C.1 - Reciprocal Rights and Duties in a Condominium

38. The *Condominium Act, 1998*, S.O. 1998, c. 19 (the “*Act*”) sets out a statutory scheme of rights and obligations of a condominium corporation and unit owners with respect to the management and administration of a condominium corporation, and with respect to compliance with the *Act*, and with the declaration, by-laws and rules of a condominium corporation.

39. The objects and duties of YCC 529 are to manage the property which includes the units:

1(1) “property” means the land, including the buildings on it, and interests appurtenant to the land, as the land and interests are described in the description and includes all land and interests appurtenant to land that are added to the common elements;³²

17. (1) The objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners.

(2) The corporation has a duty to control, manage and administer the common elements and the assets of the corporation.³³

³² s. 1(1), *Condominium Act, 1998*

³³ s. 17 (1), (2), *Condominium Act, 1998*

40. Subsection 17(3) of the *Act* imposes a positive statutory duty on YCC 529 to take all reasonable steps to ensure that all unit owners comply with the *Act*, and with the declaration, by-laws and rules of YCC 529:

17 (3) The corporation 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.³⁴

41. Unit owners and residents, including the Respondents, have a legal duty to comply with the *Act* and YCC 529 has a right to require compliance. In this regard, Section 119 of the *Act* provides:

119. (1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this *Act*, the declaration, the by-laws and rules.

* * *

(3) A corporation, an owner and every person having a registered mortgage against a unit and its appurtenant common interest have the right to require the owners and occupiers of units to comply with the *Act*, the declaration, the by-laws and rules.³⁵

42. There is no contracting out of the *Act*. Section 176 of the *Act* provides as follows: “*This Act applies despite any agreement to the contrary.*”

C.2 – Orders for Compliance with the Act under section 134

³⁴ s. 17(3), *Condominium Act, 1998*

³⁵ s. 119(1), (3), *Condominium Act, 1998*

43. Section 134 of the *Act* permits YCC 529 to make an application to the Court for an order enforcing compliance by the respondent with, *inter alia*, the provisions in the *Act*.

Compliance order

134. (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

Pre-condition for application

(2) If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes.

Contents of order

(3) On an application, the court may, subject to subsection (4),

- (a) grant the order applied for;
- (b) require the persons named in the order to pay,
 - (i) the damages incurred by the applicant as a result of the acts of non-compliance, and
 - (ii) the costs incurred by the applicant in obtaining the order; or
- (c) grant such other relief as is fair and equitable in the circumstances.

Order terminating lease

(4) The court shall not, under subsection (3), grant an order terminating a lease of a unit for residential purposes unless the court is satisfied that,

- (a) the lessee is in contravention of an order that has been made under subsection (3); or
- (b) the lessee has received a notice described in subsection 87 (1) and has not paid the amount required by that subsection.

Addition to common expenses

(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining

the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.³⁶

44. Although the relief in Section 134 of the *Act* is discretionary courts are very reluctant not to require compliance:

[22] By the terms of the statute, the condominium has the duty to effect compliance by the owners of units. Moreover, the Act gives the condominium the right to require compliance by the owners. Where most unit owners are following the rules, the court is, in effect, “duty bound” in the judicial exercise of discretion to give the condominium the assistance of the court. One of the advantages of requiring compliance is that a message is sent, by the board and the court, to unit owners that the declaration, bylaws and rules are in place for a good reason and that they will be enforced. To permit noncompliance opens the door to the noncompliance of other unit owners (see *Re Peel Condominium Corporation No. 78 and Harthen et al.* (1978). 20 O.R. (2d) 225 (Co. Ct.); *Metropolitan Toronto Condominium Corp. No. 776 v. Gifford* (1989), 6 R.P.R. (2d) 217 (Ont. Dist. Ct.)).

[23] The general message should be that enforcement will be expected and exceptions will be rare. This is to foster the result that people only move into the condominium if they are prepared to live by the rules of the community which they are joining. If they are not, they are perfectly free to join another community whose rules and regulations may be more in keeping with their particular individual needs, wishes or preferences. The provisions of the Act and the declaration, bylaws and rules are “vital to the integrity of the title acquired by” unit owners. Unit owners are not only bound by the rules and regulations but are “entitled to insist that other unit owners are similarly bound” (see *Re Carleton Condominium Corporation No. 279 and Rochon et al. reflex*, (1987), 59 O.R. (2d) 545 (C.A.) at 522).³⁷

³⁶ s. 134, (1)-(5), *Condominium Act, 1998*

³⁷ *York Condominium Corporation No. 137 v. Merle Hayes*, 2012 CarswellOnt 9986

C.3 – Mediation is neither required nor appropriate in the case at bar

45. This matter is neither required to be mediated, nor is it an appropriate matter for mediation.
46. Section 132 of the *Act* provides the circumstances in which mediation is required. It provides, in part, as follows:

Mediation and arbitration

132. (1) Every agreement mentioned in subsection (2) shall be deemed to contain a provision to submit a disagreement between the parties with respect to the agreement to,

(a) mediation by a person selected by the parties unless the parties have previously submitted the disagreement to mediation; and

(b) unless a mediator has obtained a settlement between the parties with respect to the disagreement, arbitration under the *Arbitration Act, 1991*,

(i) 60 days after the parties submit the disagreement to mediation, if the parties have not selected a mediator under clause (a), or

(ii) 30 days after the mediator selected under clause (a) delivers a notice stating that the mediation has failed. 1998, c. 19, s. 132 (1).

Application

(2) Subsection (1) applies to the following agreements:

1. An agreement between a declarant and a corporation.
2. An agreement between two or more corporations.
3. An agreement described in clause 98 (1) (b) between a corporation and an owner.
4. An agreement between a corporation and a person for the management of the property. 1998, c. 19, s. 132 (2).

Disagreements on budget statement

(3) The declarant and the board shall be deemed to have agreed in writing to submit a disagreement between the parties with respect to the budget statement described in subsection 72 (6) or the obligations of the declarant under section 75 to mediation and arbitration in accordance with clauses (1) (a) and (b) respectively. 1998, c. 19, s. 132 (3).

Disagreements between corporation and owners

(4) Every declaration shall be deemed to contain a provision that the corporation and the owners agree to submit a disagreement between the parties with respect to the declaration, by-laws or rules to mediation and arbitration in accordance with clauses (1) (a) and (b) respectively.

47. Section 132(4) of the *Act* requires mediation and arbitration with respect to disagreements involving the *declaration, by-laws and rules*. There is no requirement to do so with respect to issues of compliance with the *Act*.
48. Further, subsection 132(4) of the *Act* contemplates disputes between owners (not tenants of owners) and a condominium corporation with respect to the declaration, by-laws or rules. Burkart and Elysheva Prupas are tenants – not owners. There is no requirement that YCC 529 mediate with tenants.
49. More particularly, it is both the wording of the statute and settled case law in Ontario that a condominium corporation need not proceed to mediation (and arbitration) when compliance with the *Act* is an issue, regardless of whether compliance with the declaration, by-laws or rules is also an issue.

50. In *McKinstry*,³⁸ Justice Jurianz as he then was, confirmed that mediation and arbitration is not required with respect to issues of compliance with the *Act*, even if there are other issues which involve compliance with the declaration, by-laws and rules.

19 The Legislature's objective in enacting s. 132 is to enable the resolution of disputes arising within a condominium community through the more informal procedures of mediation and arbitration. To attain this objective, the phrase "with respect to the declaration, by-laws or rules" in s. 132(4), which applies to disagreements between owners and the condominium corporation, should be given a generous interpretation. It applies, in my view, to disagreements about the validity, interpretation, application, or non-application of the declaration, by-laws and rules. It must be noted that s. 132(4) does not require owners and condominium corporations to submit disagreements with respect to the *Act* to mediation and arbitration.

37 There are several reasons why I conclude that s. 132(4) does not require an applicant under section 135 to first resort to mediation and arbitration where the conduct complained of is related to a disagreement with respect to the declaration, by-laws or rules.

38 First, section 135 states, without qualification, that an application may be made to the Superior Court of Justice

39 Second, many section 135 applications will be about a broad pattern of conduct, only a part of which is subject to s. 132(4). For example, a s. 135 application may complain of conduct both with respect to "the declaration, the by-laws or rules" and other conduct. I have already noted that s. 132(4) does not apply to disagreements between the parties with respect to the *Act*. A s. 135 application may be about conduct related to both the *Act* and by-laws. Making one part of such a broad application subject to mediation and arbitration would result in multiple proceedings. [Emphasis Added]

³⁸ *McKinstry v. York Condominium Corp. No. 472*, 2003 CarswellOnt 4948 (S.C.J.)

51. As well, in the case of *Peel Condominium Corporation No. 283 v. Genik*, Dawson J. held, in a case where a unit owner had installed a satellite dish on a common element, that mediation and arbitration were not required:

This is not a situation in which mediation or arbitration is required. These are circumstances in which the evidence establishes a clear violation of the *Act*, the declaration and the rules. Those who choose to become owners or residents of condominium units are required by law to comply with the *Act*, the declaration and the rules, in the common interest of all residents in the development.³⁹ [Emphasis Added]

52. This application is about a hazardous condition being permitted to exist (namely, the smoking by the tenants, Burkart and Elysheva Prupas) which is a breach of section 117 of the *Act*. This application is about a breach by tenants, Burkart and Elysheva Prupas, of YCC 529's rules prohibiting nuisance. And this application is about a breach of a statutory duty under section 119(2) of the *Act* by the owner, Leonor Prupas, because she has failed to take steps to ensure that her tenants, Bryan Burkart and Elysheva Prupas, abide by the *Act* and the rules.
53. Moreover, the issues in this application are appropriately addressed under section 117 of the *Act*, which prohibits, *inter alia*, activities that could harm individuals. That is, the smoking complained of is a breach of the *Act*. There is no requirement to mediate breaches of the *Act*.

C.4 – The Smoking is a dangerous condition contrary to section 117 of the Act, and is a nuisance contrary to YCC 529's Rules.

54. Section 117 of the *Act* prohibits dangerous activities:

³⁹ *Peel Condominium Corporation No. 283 v. Genik* (2007), 2007 CarswellOnt 4113 (S.C.J.) at para. 9

Dangerous activities

117. 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.

55. YCC 529's rules plainly prohibit nuisances. As mentioned above, YCC 529's rule 8 states:

8. Owners, tenants, their families, guests, visitors and servants shall not create or permit the creation or continuation of any noise or nuisance which, in the opinion of the board or the manager, may or does disturb the comfort or quiet enjoyment of the property by the other owners, their families, guests, visitors, servants, and persons having business with them.

56. The danger and damage caused by second hand smoke is well recognised.

57. In particular, the courts have taken judicial notice that second-hand smoke:

- a. Is hazardous;⁴⁰
- b. Is sufficient reason to restrain a mother and her partner from smoking in a child's presence;⁴¹
- c. Is detrimental to children's health and contraindicated to an asthmatic condition;⁴²
- d. Kills and causes medical issues for a number of people.⁴³

58. In this case, the excessive second-hand smoke plainly causes injury to the other unit owners. The evidence demonstrates that the smoke negatively impacts the other unit

⁴⁰ *Jourdain v. Canada*, 1989 CarswellNat 120 (Federal Court of Canada – Trial Division) at paragraph 23;

⁴¹ *B.(G.) v. B. (D.)* March 18, 1997, Doc. Kenora D89/95 (Ont. Prov. Div.) referenced in annotation to *Simon v. Simon* 1997 CarswellBC 1237 by James G. McLeod;

⁴² *P. (H.L.) v C.(C.L.)*, 2006 CarswellNS 528 at paragraph 4

⁴³ *R. v. Kennedy*, 2007 CarswellOnt 9973 at paragraph 12

owner's enjoyment of their property, it causes them anxiety, and exacerbates their health concerns.

59. As well, the court in *R. v. Kennedy*⁴⁴ considered the *Smoke Free Ontario Act*, S.O. 1994, c. 10 and recognized that the legislature passed that legislation for a reason, namely, to protect the people of Ontario from the dangers of second smoke. Section 9 of the *Smoke Free Ontario Act* contains a prohibition from smoking in the "common areas" of a condominium. Subsection 9(1) of the *Smoke Free Ontario Act* provides as follows (emphasis added):

Prohibition

9. (1) No person shall smoke tobacco or hold lighted tobacco in any enclosed public place or enclosed workplace. 2005, c. 18, s. 9.

Other prohibitions

(2) No person shall smoke or hold lighted tobacco in the following places or areas:

1. A school as defined in the Education Act.
2. A building or the grounds surrounding the building of a private school, where the private school is the only occupant of the premises, or the grounds annexed to a private school, where the private school is not the only occupant of the premises.
3. **Any common area in a condominium**, apartment building or university or college residence, including, without being limited to, elevators, **hallways**, parking garages, party or entertainment rooms, laundry facilities, lobbies and exercise areas.
4. A day nursery within the meaning of the Day Nurseries Act.
5. A place where private-home day care is provided within the meaning of the Day Nurseries Act, whether or not children are present.

⁴⁴ Ibid.;

6. *The reserved seating area of a sports arena or entertainment venue.*

7. *A prescribed place or area.*

60. Paragraph 3 of section 9(1) of the *Smoke Free Ontario Act* is a remedial statute and one of its purposes is to protect non-smokers from second-hand smoke in condominium hallways. This rule loses its meaning if people are allowed to smoke in the private areas of their condominiums so excessively that the second-hand smoke creates a haze in the hallway – any other interpretation would completely negate the effect of the rule. The Tennant Respondents' second-hand smoke is plainly in contravention of the law and the other unit owners should not be forced to live this way for a single day longer.
61. Injunctory relief in the nature of the relief sought on this application has previously been granted to prevent the unreasonable dissemination of cigar smoke from one condominium into another. The case of *Raith v. Coles*⁴⁵, a decision from British Columbia, dealt with allegations against a unit owner of excessive smoking. The court writes as follows:

10 On the material before me it is obvious that the petitioners have acted as reasonably as possible to avert recourse to the courts as has occurred here. In considering the matter I am unable to say that the petitioners are unreasonable in their objections to the nuisance created by the cigar smoke. This is not a simple dislike of the smell — there is concern based on medical grounds. While the individual must be expected to put up with some inconvenience in today's world there comes a point where the perpetrator of a problem must curtail his actions when they become demonstrably harmful to others. Just as no person should be subjected to the unrestricted cacophony of stereo music from his neighbour, neither should he be subjected to the continuing smell of cigar smoke if the smell is unreasonably disseminated into other peoples' worlds. I consider it to be unreasonable if a person, knowing that the

⁴⁵ *Raith v. Coles* 1984 CarswellBC 2189

smell is deleterious to others, persists, unless, of course, it can be shown that he has no control over its presence. There is no such suggestion here.

11 The injunction is granted.

12 There are many things a person may not do in his house or castle — in the case of these respondents, one of these things now is that he may not allow there to be emitted or discharged a noxious substance, in this case, cigar smoke and odour, from his premises at Suite 203, 33490 Cottage Lane, in the Municipality of Abbotsford.

62. YCC 529 has submitted ample evidence demonstrating that the cigar smoking is excessive and that residents are negatively impacted by the banging. In their affidavits, several unit owners expressed serious concerns about their health, the health of their children or the health of their foetuses. The unit owners attested to the excessive amount of smoke in their units and in the common elements and to the fact that they are severely bothered by the smoke. The unit owners and the condominium corporation have tried to cope with the problem through various avenues with no success. In particular, owners in the units neighbouring the Tenant Respondents' unit undertook measures to prevent the smoke from permeating in to their units – but to no avail. Also, YCC 529's property manager and several of the unit owners repeatedly addressed their concerns with the Tenant Respondents. However, the Tenant Respondents appear unrepentant in their smoking and have indicated they will continue to smoke, despite being cautioned to stop. In this case, damage is evident and irreparable. Two of the women suffering from the smoke are pregnant and concerned for the health of their babies. Mr. Ramsay suffers from asthma and the second-hand smoke exacerbates his condition. Ms. Shub's daughter suffers from a persistent cough and her pediatrician believes that the second-hand smoke

affects the cough. There is no way to repair or compensate for the damage of continuing to live with the excessive second-hand smoke for these unit owners.

63. In addition to the health concerns, the residents that have submitted affidavits have attested to the fact that the enjoyment of their property is severely limited because of the Tenant Respondents' smoking. Daily tasks and chores are, at times, next to impossible. For example, Ms. Shub testifies that she is unable to open the window for fresh air, she cannot enjoy time on her patio, and she cannot use her kitchen because of the strong smell of smoke. She believes that she will be unable to remain at home during her maternity leave. Moreover, Ms. Shub has had to reinvent her parenting methods because the Tenant Respondents bang on the walls when her daughter cries – Ms. Shub cannot even count on a single night's sleep alone in her bed with her husband. Mr. Hatto, her husband, faces the same challenges. Ms. Jenkins describes the second-hand smoke situation as intolerable and states that it interferes significantly with the enjoyment of her living in the condominium. Mr. Ramsay is unable to entertain on his patio. Ms. Robinson's guests complain about the smoke in her unit. In addition, several of the owners avoid passing through the hallway because the smoke coming from the respondents' apartment is so thick.

C.5 – The Owner, Leonor Prupas, is responsible for the conduct of her tenants

64. Subsection 119(2) of the *Act* provides as follows:

Responsibility for occupier

(2) An owner shall take all reasonable steps to 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.

65. A unit owner is responsible for any tenant whom the owner chooses to place in their unit. A unit owner is responsible for ensuring that their tenants comply with the Act and the rules of the condominium corporation. Where a unit owner fails to do so, and the intervention of the condominium corporation is necessary, the unit owner is obligated to bear the condominium corporation's costs of the proceedings.⁴⁶
66. Leonor Prupas has remained silent up until the delivery of responding materials (she has not attended any court appearances) in which she supports her tenants and seeks to shift blame to YCC 529. She has had ample opportunity to take steps to cause Burkart and Elysheva Prupas to comply with the Act and rules and to smoke the smoking. Instead, Leonor Prupas has decided to throw her lot in with her tenants.

D. RELIEF SOUGHT

67. YCC 529 seeks the following relief on this application:
- a. An interim and permanent injunction pursuant to section 134 of the *Act* restraining the respondents, Leonor Prupas, Elysheva Prupas and Bryan Burkart from smoking cigars on the property of YCC 529.
 - b. In addition to, or in the alternative to the foregoing, an interim and permanent injunction pursuant to section 134 of the *Act* prohibiting the Respondents from emitting or discharging, or permitting to be emitted or discharged a noxious substance, namely, cigar smoke and odour from Unit [REDACTED], which is a unit in YCC 529 ("Unit [REDACTED]"), including the exclusive use common elements appurtenant to the said unit.

⁴⁶ *York Condominium Corporation No. 71 v. Sullivan* [1990] O.J. No. 840, *York Condominium Corporation No. 116 v Nunez, Carleton Condominium Corporation No. 555 v. Lagace* 2004 CarswellOnt 1448

- c. An interim and permanent injunction pursuant to section 134 of the Act prohibiting the Respondents from emitting or discharging, or permitting to be emitted or discharged other tobacco smoke that the board of directors of YCC 529 or the property manager, in their absolute discretion, deem to be excessive and/or which they deem affects the rights of other owners, injures or annoys other owners, or otherwise disturbs the comfort or quiet enjoyment of the property by the other owners, their families, guests, visitors, servants, and persons having business with them.
- d. An interim and permanent injunction prohibiting the Respondents from smoking on the non-exclusive use common elements of YCC 529.
- e. A declaration pursuant to, *inter alia*, section 134 of the Act that, contrary to section 117 of the Act, the Respondents have caused or permitted a condition on the property of YCC 529 that is likely to injure persons by causing or permitting the emission or discharge of a noxious substance, namely, cigar smoke and odour on the property of YCC 529.
- f. A declaration pursuant to, *inter alia*, section 134 of the Act that, contrary to section 119 of the Act and Rule and 4 of YCC 529, the Respondents have done and permitted something in Unit [REDACTED] which interferes with the rights of other owners and injures and annoys them in that the Respondents have caused or permitted the emission or discharge of a noxious substance, namely, cigar smoke and odour on the property of YCC 529.
- g. A declaration pursuant to, *inter alia*, section 134 of the Act that, contrary to section 119 of the Act and Rule and 8 of YCC 529 the Respondents have caused, or permitted, a nuisance which disturbs the quiet enjoyment of the property of YCC 529 by other owners and occupiers, in that the Respondents have caused or permitted the emission or discharge of a noxious substance, namely, cigar smoke and odour on the property of YCC 529.

- h. A declaration pursuant to section 134 of the Act that Leonor Prupas, as the registered owner of Unit [REDACTED], has breached her duties under section 119(3) of the Act in failing to take all reasonable steps to ensure that occupiers of Unit [REDACTED] complied with sections 117 and 119 of the Act and Rules 4 and 8 of YCC 529.
- i. An order pursuant to section 134 of the Act that the Respondents henceforth comply with the Act and the rules and, in particular, sections 117 and 119 of the Act, and Rules 4 and 8 of YCC 529.
- j. An order pursuant to section 134 of the Act that the Respondents pay to YCC 529 its costs of steps taken to mitigate the effects of the smoke in an amount to be determined at the hearing of the application.
- k. An interim and permanent injunction prohibiting Elysheva Prupas and Bryan Burkart from banging on the common walls of the Unit [REDACTED], and otherwise from having any direct or indirect contact with any people who have sworn an affidavit in these proceedings, except in writing and sent to the property manager for YCC 529.
- l. If necessary, an order validating service, abridging the time for service, or for substituted service on the Respondents of YCC 529's application, or related motion, materials.

- m. Its costs of this application.
- n. Such other and further relief as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27th DAY OF DECEMBER, 2012

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Of counsel for the Applicant/Moving Party,
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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Condominium Act, 1998* s. 1(1), 17 (1), (2), (3), 119 (1), (3), 134 (1)-(5), (22), (23)
2. *RJR MacDonald Inc. v. Canada* (Attorney General) (1994), 1 S.C.R. 311
3. *Raith v. Coles* 1984 CarswellBC 2189
4. *York Condominium Corporation No. 137 v. Merle Hayes*, 2012 CarswellOnt 9986
5. *Jourdain v. Canada*, 1989 CarswellNat 120 (Federal Court of Canada – Trial Division)
6. *B.(G.) v. B. (D.)* March 18, 1997, Doc. Kenora D89/95 (Ont. Prov. Div.) referenced in annotation to *Simon v. Simon* 1997 CarswellBC 1237 by James G. McLeod;
7. *P. (H.L.) v C.(C.L.)*, 2006 CarswellNS 528 at paragraph 4
8. *R. v. Kennedy*, 2007 CarswellOnt 9973
9. *Ivaco Rollings Mills (2004) LP v. LeBlanc*, 2005 CarswellOnt 7050
10. *McKinstry v. York Condominium Corp. No. 472*, 2003 CarswellOnt 4948 (S.C.J.)
11. *Peel Condominium Corporation No. 283 v. Genik*, 2007 CarswellOnt 4113 (S.C.J.)
12. *York Condominium Corporation No. 71 v. Sullivan* [1990] O.J. No. 840
13. *York Condominium Corporation No. 116 v Nunez*
14. *Carleton Condominium Corporation No. 555 v. Lagace* 2004 CarswellOnt 1448

YORK CONDOMINIUM CORPORATION NO. 529
Applicant

-and- LEONOR PRUPAS et al.
Respondents

Court File No. CV-12-464199

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

SUPPLEMENTARY FACTUM OF THE APPLICANT
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