

provided that they requested an exemption from the new rule by November 21, 2018 (the “Grandparenting Exemption”). Approximately 1/3 of the units requested this Grandparenting Exemption. Ms. Linhart was one of such condo owners who was grandparented under the Grandparenting Exemption.

[7] YCC’s General Rules regulating the common elements and condo units (the “Rules”) provide that the Grandparenting Exemption may be revoked in respect of a condo unit if YCC receives complaints of smoke odours entering other condo units. YCC set a procedure to deal with any such complaints: Once YCC identifies the source of smoke it can take certain steps such as sealing vents. Whether these measures assist with the smoke transmission depends on the configuration of the units. YCC also sends the condo unit owner letters regarding the complaints. Ultimately, if the complaints continue, YCC may revoke the Grandparenting Exemption.

[8] The condo owner in the unit above Ms. Linhart (the “Complainant”) unfortunately has a severe allergy to smoke. The Complainant, a 67-year old retiree, started to complain to YCC about cigarette smoke shortly after Ms. Linhart moved into her unit below. The Complainant had moved into her unit in August 2003 and had not previously made complaints to YCC.

[9] Shortly after Ms. Linhart moved into her unit, YCC wrote the first letter to Ms. Linhart on December 29, 2017 to advise that her cigarette smoke was disturbing her neighbours and should be addressed.

[10] YCC followed its procedure and sent formal letters to Ms. Linhart dated May 13, 2019 and June 17, 2019 asking her to take steps to resolve the issue. Ultimately, YCC took steps to revoke Ms. Linhart’s Grandparenting Exemption. In this regard YCC’s solicitor sent a letter in January 2020 to Ms. Linhart revoking her Grandparenting Exemption. However, YCC continued to receive complaints regarding Ms. Linhart’s smoking, which resulted in YCC commencing this application.

[11] Ms. Linhart is the first condo owner at YCC to have her Grandparenting Exemption revoked.

Analysis

[12] Under section 134 of the Condo Act, YCC is entitled to make an application before this court for “an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules...” YCC has requested that the court grant the order on the basis that (i) Ms. Linhart’s smoking is causing injury to the Complainant and YCC cannot permit this to persist further to section 117 of the Condo Act; and (ii) Ms. Linhart is in breach of YCC’s rules.

[13] Ms. Linhart told the court that she has smoked her entire adult life. She indicated that when she purchased her condo unit she checked the Rules to ensure that they did not prohibit smoking. She submitted to the Court that as her condo unit is her private residence she should be permitted to smoke in her home.

(i) *Section 117 of the Condo Act*

[14] As a multi-dwelling building governed by the Condo Act, condominiums are subject to certain rules that may differ from those that apply to a single-dwelling home. For example, section 117 of the Condo 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.

[15] Accordingly, the governing statute requires YCC to ensure the protection of the health and safety of ALL unit owners and residents. If an activity being carried on is likely to cause injury to another individual, then YCC must ensure that activity ceases.

[16] In this case, the evidence is clear that the Complainant is suffering adverse health consequences as a result of Ms. Linhart's smoking. The Complainant was diagnosed as having an allergy to cigarette smoke at age 20. The Complainant regularly suffers from cough, dry itchy eyes and skin, and she developed eczema on both of her eyelids. The Complainant's affidavit provides that the smoke coming from Ms. Linhart's condo unit affects her in the following ways:

"...my eyes get itchy and sore, my chest becomes tight and my head begins to ache. My stress level increases and I usually have to stop what I am doing and find some way to clear the smoke. I have opened my windows even when it is cold outside. I put my coat on and shiver rather than suck back the smoke. Recently, I had severe allergy attack – very dry, itchy eyes, stuffed up, uncontrollable sneezing and itch scratchy throat. I used decongestant, eye drops, and cold compresses on my eyes to try to stop my allergy symptoms. I could not get my symptoms to stop for a few hours. I was in really bad shape. I finally took an antihistamine and my symptoms quieted down. I discovered a few days later from the Property Manager who was following up on my complaint about the smoke that Ms. Linhart was in her unit smoking most of that day."

[17] YCC took steps to determine from which unit the smoke was emanating. The affidavit of Linda Celar (the "Celar Affidavit"), the on-site manager for YCC, states the following:

- "I am certain that the smoke entering [the Complainant's] unit is coming from suite G9, Ms. Linhart's unit."
- "I recall when [the Complainant] first complained of smoke. I did a walk around the halls to locate the smell. Cigarette smoke is very distinct, it is easy to spot. As I approached Ms. Linhart's front door, the smell got stronger and stronger. It was obvious to me that Ms. Linhart's unit (located directly below [the Complainant's] unit) was full of cigarette smoke. I did not smell smoke coming from any other nearby unit and determined immediately that the smoke entering [the Complainant's] unit was coming from Ms. Linhart's unit".
- "I have been inside of Ms. Linhart's unit on more than one occasion. Once, on October 21, 2019, I walked into her suite to discuss recent complaints about

transmission of smoke (I had just come from [the Complainant's] unit). I could physically see the smoke in her unit. There was a white haze of cigarette smoke hanging in her living room..."

- "I followed up again with a second visit on May 21, 2020. On that day the cigarette smoke was so strong in [Ms. Linhart's] unit that I could see a white haze."

[18] The Celar Affidavit also indicates that Ms. Celar has "personally verified that [the Complainant's] unit smells of smoke a number of times." and that, when the Complainant calls her into her unit to complain about the cigarette smoke, she can "always smell the smoke."

[19] In the Complainant's affidavit, she stated the following:

- "When I can, I keep my windows open to try to clean the air. I also purchased an air purifier which I keep running, and I stay out of my home as long as I can. However, cigarette smoke continues to enter my unit".
- "...I do not often want to shower because I do not want to go into my bathroom where the smoke is so much worse. I run into my bathroom, have a quick shower, and run out again."
- "I cannot even do laundry in my home without being tormented by the smoke."
- "My underlying fear is that the secondhand smoke is not healthy. It has been shown to cause cancer. I am going into year three of breathing in smoke in my own home, and this is causing me distress."

[20] Unfortunately for Ms. Linhart, the location of her condo unit is such that her smoking is causing injury to the Complainant in the unit above her, contrary to section 117 of the Condo Act. Based on the record before me, it is clear that Ms. Linhart's smoking is seriously affecting the health of the Complainant. As a result, in my view the circumstances are such that I should grant the relief sought by YCC.

[21] In doing so, I recognize that this is affecting Ms. Linhart's ability to smoke cigarettes in her personal residence. However, as noted above, when a person decides to live in a multi-unit dwelling, such as a condominium, they are obligated to comply with the Rules and the governing statute.

(ii) *Breach of the Rules*

[22] YCC and Ms. Linhart are required by subsection 119(1) of the Condo Act to comply with the provisions of the Condo Act, the declaration, the by-laws and the condo Rules:

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 the rules.

[23] In addition, YCC has an obligation under the Condo Act to enforce the Rules. Subsection 17(3) of the Condo Act provides:

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.

[24] YCC's Rules were amended in 2018 to prohibit owners from smoking in the units or common elements:

C5: 1. There shall be no smoking, as that term is hereinafter defined, anywhere on, within or upon the Units of the Corporation or the common elements of the Corporation (which shall include all exterior common elements of the Corporation, whether designated for the exclusive use of an owner or otherwise, including patios, terraces and/or balconies), except in areas as may specifically be designated by the Board from time to time, if any.

2. For the purposes of this Rule, "smoking" includes, but is not limited to, the combustion, vaporization and/or inhalation of tobacco or tobacco products, herbal products, cannabis (marijuana) or cannabis products, or such other substances as the Board may prohibit, in its absolute discretion, by any means or method including, but not limited to, cigarettes, cigars, cigarillos, joints, pipes, vaporizers or other means or methods as the Board may prohibit, in its absolute discretion.

[25] Under the Condo Act, YCC is permitted to amend its Rules pertaining to the use of the units and the common elements to "promote the safety, security or welfare of the owners of the property and the assets" or "prevent unreasonable interference with the use and enjoyment of the units."

[26] As indicated, the Rules also contemplate that residents who smoked in their condo units prior to the changes to the Rules could register for the Grandparenting Exemption. However, the Rules further indicate that this exemption may be revoked:

5. Notwithstanding paragraph 4, above, [the Grandparenting Exemption] in the event that complaints are received by the Corporation that smoke or smoke odours are entering other units or the common elements as a result of smoking by a resident who is registered in the Smoking Register, and the complaint(s) are not resolved following the receipt of written notice of the complaint(s) from the Board or the Property Manager, the Board and/or the Property Manager may, by written notice, prohibit smoking by the registered resident in the resident's Unit and/or on the exclusive use common elements appurtenant to his/her Unit.

[27] Ms. Linhart was asked by YCC on numerous occasions to take steps to eliminate the transmission of smoke to neighbouring units or cease smoking. These requests were made both before and after the changes were made to YCC's Rules to prohibit smoking, subject to any grandfathering. Ms. Linhart advised the court that she purchased an air purifier designed to address smoking fumes at a personal cost of \$1,500, which she keeps running at all times. Unfortunately,

as the complaints have continued, the air purifier has not prevented the transmission of smoke into the Complainant's condo unit.

[28] YCC followed its procedure prior to revoking Ms. Linhart's Grandparenting Exemption. There was an email to Ms. Linhart on May 28, 2018, where YCC confirmed that they would be entering her condo unit "to inspect for the recommended filter or equivalent device to reduce the smoke migration into the neighbouring units". In the Celar Affidavit, the YCC's on-site manager indicated that she has "had numerous communications with Ms. Linhart about the smoke transmissions." They "have had conversations and exchanged emails" about the issue. She also sent Ms. Linhart formal letters on behalf of YCC's board of directors dated May 13, 2019 and June 17, 2019. These letters indicated that unless the smoke transmission ceased YCC's board of directors may prohibit smoking in Ms. Linhart's condo unit. The June 19, 2019 letter indicated that if the board continued to receive complaints, the next letter would be from YCC's solicitor. Ultimately, YCC's solicitor sent Ms. Linhart a letter revoking her Grandparenting Exemption and designating Ms. Linhart's condo unit as a non-smoking unit. The letter from YCC's solicitor stated: "Despite having been given ample notice of smoking migration, you have taken no steps to ensure that smoke does not migrate from your unit. Accordingly, pursuant to paragraph 5 of the Rule, the Corporation has determined that your grand-fathered status must be revoked. You are hereby required to immediately cease smoking in the Unit." The smoke transmission issue has continued even after the revoking of Ms. Linhart's Grandparenting Exemption.

[29] Ms. Linhart's Grandparenting Exemption was revoked as a result of the continued complaints about her smoking and the transmission of smoke into the condo unit above. Without the benefit of the Grandparenting Exemption, Ms. Linhart is in breach of the Rules if she continues to smoke in her condo unit.

Costs

[30] YCC asked that the court order costs against Ms. Linhart. In this regard, YCC argued that its Declaration requires condo unit holders to indemnify YCC for liability caused by the owner. Similarly, the Rules contain a provision that all losses, costs or damages incurred by YCC as a result of a breach of the Condo Act or Rules by a condo owner shall be paid for by the owner.

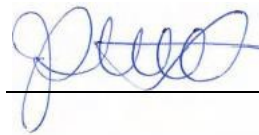
[31] Ms. Linhart is the first YCC condo owner to have her Grandparenting Exemption revoked. Further, she is the first resident in respect of whom YCC has sought a court Order. In the Celar Affidavit, she stated: "Jaromira Lindhart is the first unit owner to have her status as a "grandparented" smoker revoked. Unfortunately the Condominium is currently dealing with several other incidents of smoke transmission and I anticipate other owners will soon have their grandparent status revoked as well."

[32] The fixing of costs is a discretionary decision pursuant to section 131 of the *Courts of Justice Act*. Further, Rule 57.01 of the *Rules of Civil Procedure* sets out certain factors that the court may consider in the exercise of such discretion.

[33] In considering the issue of costs, I note Ms. Linhart's attempts to address YCC's concerns by, *inter alia*, purchasing an expensive air purifier at YCC's request. I also note that the Applicant's factum indicates that the configuration of Ms. Linhart's condo unit and the Complainant's condo unit are such that it was not possible for YCC to address the smoke

transmission issue through the sealing and insulating of vents. This is unfortunate as Ms. Linhart, a smoker for her entire adult life, purchased her condo unit with the understanding that she could smoke in her residence. I have taken into account that Ms. Linhart was the first condo resident to have her Grandparenting Exemption revoked by YCC after the changes were made to the Rules in 2018, and that it is anticipated that other condo unit owners will similarly have their status revoked. Having this first matter decided by the court in favour of YCC will be of precedential value and importance for YCC if they revoke other unit holders' Grandparenting Exemptions. It is a very important issue for YCC, as the corporation responsible for taking all reasonable steps to enforce the Condo Act, the declaration and the Rules, pursuant to the Condo Act.

[34] As the successful party, YCC has requested costs on a partial indemnity basis in the amount of \$7424.15 (inclusive of disbursements and taxes). In the circumstances of this case, I am ordering Ms. Linhart to pay YCC's costs fixed in the amount of \$500.00, inclusive of HST and disbursements. The costs should be paid within 30 days.



J. Steele J.

Released: October 15, 2020

CITATION: York Condominium Corporation No. 266 v. Jaromira Linhart, 2020 ONSC 6263
COURT FILE NO.: CV-20-644467
DATE: 20201015

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

YORK CONDOMINIUM CORPORATION NO. 266

Applicant

– and –

JAROMIRA LINHART

Respondent

REASONS FOR JUDGMENT

J. Steele J.

Released: October 15, 2020