Environmental Tobacco Smoke as a Breach of the Covenant for Quiet Enjoyment

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1. Introduction

In recent years there has been a growing awareness of the dangers posed by environmental tobacco smoke (ETS)[1] to nonsmokers.[2] Consequently, many jurisdictions have implemented smoke-free policies for public places. A recent report by the Non-Smokers' Rights Association contends that over 170 municipalities in Canada have adopted bylaws prohibiting smoking in public areas.[3] One area that has received inadequate attention is the private sphere,

[1] ETS, more commonly referred to as second-hand smoke, is the smoke produced by a lit cigarette, cigar or other tobacco product, or exhaled by smokers. Smoke drawn through the cigarette and exhaled by the smoker is referred to as "mainstream smoke" while the smoke emitted from a burning cigarette is called "sidestream smoke." See U.S. Department of Health & Human Services, *The Health Consequences of Involuntary Smoking: A Report of the Surgeon General* (1986). Nonsmokers are mainly exposed to sidestream smoke, which, of the two, poses the greatest danger, Ann H. Zgrodnik, "Smoking Discrimination: Invading an Individual's Right to Privacy in the Home and Outside the Workplace?" (1994-1995) 21 Ohio N.U. L. R. 1227 at 1228 [Zgrodnik]. Exposure to ETS is often referred to as "involuntary smoking" or "passive smoking." This paper recognizes that "ETS" is a controversial term, having been coined by the tobacco industry as an attempt to downplay ambient tobacco smoke. The term favoured by health groups is usually "second-hand smoke." This paper intentionally uses ETS precisely because of its use by the tobacco industry. If indeed ETS depicts a less harmful substance than second-hand smoke (although this paper suggests that such a distinction is artificial), then it is useful to demonstrate how ETS, the lesser of the two evils, constitutes a breach of the covenant for quiet enjoyment. If ETS represents a breach it would logically follow that the court would make an equivalent determination for second-hand smoke.

[2] The literature on point is extensive. As the Alberta Alcohol and Drug Abuse Commission (AADAC) notes, "[t]he overwhelming body of medical evidence, contained in hundreds of scientific studies and six internationally recognized comprehensive reviews undertaken during the last decade, clearly demonstrates the direct causes and linkages between exposure to second-hand smoke and serious health effects among non-smokers" *Tobacco Basics Handbook: 2004 Edition* (Edmonton, AB: AADAC, 2004), online: AADAC http://tobacco.aadac.com/about_tobacco/tobacco_research/ at 69 [AADAC]. For more, see: H. Witschi, J.P. Joad & K.E. Pinkerton, "The Toxicology of Environmental Tobacco Smoke" (1997) 37 Annual Review Pharmacological Toxicology 29; California Environmental Protection Agency, *Health Effects of Exposure to Environmental Tobacco Smoke: Final Report* (California: CEPA, 1997); Canadian Centre for Occupational Health and Safety, "Environmental Tobacco Smoke (ETS): General Information and Health Effects" (November 2000), online: CCOHS http://www.ccohs.ca/oshanswers/psychosocial/ets_health.html; S.A. Glantz & W.W. Parmley, "Even a Little Secondhand Smoke is Dangerous" (2001) 286 J.A.M.A. 462; National Health and Medical Research Council, *The Health Effects of Passive Smoking* (Canberra, Australia: National Health and Medical Research Council, 1997), online: Australian Government, http://www.health.gov.au/nhmrc/publicat/_synpses/ph23syn.htm; Health Canada, *Environmental Tobacco Smoke and Perceived Health Risk. National Population Health Survey Highlights, No 1: Smoking Behaviour of Canadians* (Cycle 2, 1996/97) (Ottawa, ON: Health Canada, 1999).

[3] Non-Smokers' Rights Association, Smoking and Health Action Foundation, *Exposure to Drifting Second-hand Smoke in Multi-Unit Dwellings Backgrounder* (NSRA, February 2006) at 21 [Non-Smokers' Rights Association]. These smoking bans have primarily affected restaurants, bars, workplaces, malls, public transit, public areas (libraries, arenas, et cetera), and common areas in residential areas (stairwells, hallways, and lobbies). For a discussion of bans and restriction on smoking in public places in Canada, see Barbara von Tigerstrom, "Tobacco Control and the Law in Canada" in Tracey M. Bailey, Timothy Caulfield & Nola M. Ries, *Public Health Law & Policy in Canada* (Markham, ON: LexixNexis Canada, 2005) 273 at 312-316 [von Tigerstrom].

particularly the home.[4] Traditionally, there has been considerable resistance to regulating the activities done within one's home. Nevertheless, if ETS is of sufficient harm to protect nonsmokers in the public sphere, why is the same protection not being afforded them in their homes?[5] The impetus for this paper is the belief that nonsmokers ought to be protected from the deleterious effects of drifting ETS invading their homes. This paper contends that protection is available to nonsmokers through the covenant for quiet enjoyment.[6]

The use of the covenant for quiet enjoyment to protect nonsmokers from ETS in their homes is not a novel idea. Many tobacco control agencies and nonsmokers' rights associations have identified the covenant as a means of protection.[7] It has also been the focus of academic commentary.[8] What is currently lacking, however, is any material succinctly identifying how one

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[4] A survey of the literature available on point, and the position of tobacco control agencies and non-smoker's rights organizations, identifies the private sphere as an important front for protecting and promoting the rights of nonsmokers. Many are opposed to the incursion into the private realm. For instance, Ann H. Zgrodnik has argued that "[w]hile reasonable restrictions may be imposed upon persons in community areas, such as in the workplace or public domain, there is no vehicle by which those restrictions may be conveyed into the private home" Zgrodnik, *supra* note 1 at 1254. It is relevant to note that Zgrodnik does not examine claims under the covenant for quiet enjoyment. Hence her assertion that "[t]he most recent steps in the antismoking crusade go a bit too far" (at 1254) by entering into the private sphere does not take into consideration the legal rights of tenants in multi-unit residential dwellings that legitimize the entrance into the private sphere.

[5] The protection afforded prisoners in correctional facilities may be presented an analogous situation to drifting ETS in residential settings. Correction facilities have adopted smoke-free policies to protect inmates and workers from the dangers posed by ETS. See S. Katharine Hammond & Karen M. Emmons, "Inmate Exposure to Secondhand Smoke in Correctional Facilities and the Impact of Smoking Restrictions" (2004) 15:3 Journal of Exposure Analysis and Environmental Epidemiology 205 and Niyi Awofeso, "Implementing Smoking Cessation Programmes in Prison Settings" (2003) 11:2 Addiction Research and Theory 119.

[6] It should be noted that the terms "quiet enjoyment" and "reasonable enjoyment" are often used interchangeably. Conceptually, the terms are considered synonymous for the purpose of this paper. Donald H.L. Lamont notes that whether quiet enjoyment and reasonable enjoyment are synonymous is legally "irrelevant as the accent is on reasonable in the circumstances" *Residential Tenancies*, 6th ed. (Scarborough, ON: Thomson Canada Ltd., 2000) at 81 [Lamont].

[7] For instance, the Non-Smokers' Rights Association, *supra* note 3 at 15, discussed the use of the covenant suggesting that "[m]ost rental agreements and provincial/territorial tenancy laws specify that the renter is entitled to "quiet enjoyment" of their residence and that is must be "fit for habitation." It is conceivable that you could win a case based on the argument that the second-hand smoke infiltrating your unit destroys your enjoyment of your property." Similarly, organizations such as Action on Smoking and Health (ASH) have information available on their websites (www.ash.org in the United States and www.ash.ca in Canada) to assist tenants exposed to ETS.

[8] For instance, see Robert L. Kline, "Smoke Knows no Boundaries: Legal Strategies for Environmental Tobacco Smoke Incursions into the Home Within Multi-Unit Residential Dwellings" (2000) 9 Tobacco Control 201 [Kline]; S. Schoenmarklin, Tobacco Control Legal Consortium, "Infiltration of Secondhand Smoke into Condominiums, Apartments and Other Multi-Unit Dwellings" (2004); and David B. Ezra, ""Get Your Ashes Out of

might use the covenant for quiet enjoyment to limit their exposure to ETS.[9] More specifically, there is little accessible material that addresses the covenant for quiet enjoyment in the context of ETS that adequately discusses what elements must be present to constitute a breach of the covenant. This paper attempts to address this void.

This paper will proceed by first discussing the problem of ETS in multi-unit residential dwellings (MURD). Second, the covenant for quiet enjoyment will be thoroughly examined. The third part of this paper will explore whether ETS constitutes a breach of the covenant for quiet enjoyment. This will entail a discussion of the appropriateness of litigation as a response, an examination of how ETS constitutes a breach of quiet enjoyment, the expected obstacles to litigation and the likelihood of success. This paper will conclude with a brief discussion of two pragmatic recommendations that ought to be undertaken concurrently with litigation, namely, policy reform and an awareness-raising campaign, to ensure residential tenants the greatest degree of protection from ETS. Although this paper will specifically focus on Canadian jurisprudence[10], the basic framework for the covenant for quiet enjoyment transcends jurisdictional boundaries. As such, this paper remains relevant and practical as a guide for litigation concerning breaches of the covenant for quiet enjoyment resulting from ETS in other jurisdictions.

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my Living Room!" Controlling Tobacco Smoke in Multi-Unit Residential Housing" (2001-2002) 54 Rutgers L. Rev. 135 [Ezra].

[9] For example, the Non-Smokers' Rights Association, *supra* note 3 at 16, suggests that a "body of case law is growing" and advises that professional legal advice be sought, but offers no further assistance. Similarly, Kline, *supra* note 8 at 203-204, identifies the covenant for quiet enjoyment and discusses one case, but does not explicate in any greater detail what is entailed in bringing an action for a breach of the covenant.

[10] As will be discussed below, the covenant for quiet enjoyment is either explicitly accounted for in residential tenancies legislation or is implied within the common law. Subsequently, any litigation involving the covenant must take into account the relevant legislation from the jurisdiction in question.

2. Residential Tenancies

The focus of this paper is MURD possessed via leaseholds.[11] For our purposes, MURD refers to any facility containing more than one residential unit.[12] This paper contends that ETS in MURD requires immediate attention for several reasons. First, a large segment of society currently rents their home. Census statistics indicate that approximately 34% of the population rents.[13] Second, the nature of MURD is such that ETS exposure is not an idle threat. Aside from the potential exposure to ETS in common areas, "there is also a risk of smoke entering apartments through windows, air conditioners, holes around pipes and electric lines, gaps between floors and walls, and from hallways."[14] Third, demographically, people living in MURD are more likely to be or have within close physical proximity a current smoker, thereby increasing their potential to be exposed to ETS. Although a comprehensive discussion is beyond the scope of this paper, this is nevertheless a relevant consideration. Studies have shown that the

[11] A lease "is a demise of land under which exclusive occupation is conferred by a landlord on a tenant. A leasehold estate, as with all estates, delimits the duration of the tenant's holdings. While the lease continues in force the landlord retains a reversionary interest; the landlord's right to actual possession is suspended during the term of the tenancy" Bruce Ziff, *Principles of Property Law*, 3rd ed. (Scarborough, ON: Thomson Canada Limited, 2000) at 255 [Ziff]. The freehold estate, on the other hand, refers to "absolute ownership" (Ziff at 52-53). For the remainder of the paper MURD will be restricted to those tenancies held in leasehold. For an extensive discussion of leases see Ziff at 253-282.

[12] This includes residential dwellings such as attached townhouses, apartment buildings and homes with separate suites. Condominiums pose a problem, however. Although susceptible to many of the same factors as MURD, condominiums are typically owned, not rented. This restricts what actions are available. ETS may also represent a breach of the covenant for quiet enjoyment in commercial settings. Further discussion concerning condominiums and commercial leases is beyond the scope of this paper.

[13] Data collected by Statistics Canada in 2001 indicated that 33.9% of private dwellings were rented, Statistics Canada, "Owner- and Renter-Occupied Dwellings as a Proportion of Total Dwellings, Canada, Provinces, Territories and Health Regions, 2001" (2001), online: Statistics Canada http://www.statcan.ca/english/freepub/82-221-XIE/00503/tables/html/2213_01.htm. The U.S. Census Bureau found similar data in 2003, where 33.6% of units were renter occupied. See Table 2-1, "Introductory Characteristics – Occupied Units" in U.S. Census Bureau, *American Housing Survey for the United States: 2003, Current Housing Reports* (Sept. 2004), online: US Census Bureau, Construction and Housing PDF Publications www.census.gov at 42.

[14] D. Hennrikus, P.R. Pentel & S.D. Sandell, "Preferences and Practices Among Renters Regarding Smoking Restrictions in Apartment Buildings" (2003) 12 Tobacco Control 189 at 189 [Hennrikus, Pentel & Sandell].

percentage of people renting increases proportionately as income decreases.[15] Similarly, the lower a household's income the higher the percentage of that income is dedicated to housing.[16] Income is also inversely related to smoking prevalence.[17] Statistically, then, occupants of MURD are more likely to be smokers, increasing the likelihood of ETS exposure to other tenants. Furthermore, given the lower socioeconomic status of MURD occupants, the harm caused by ETS is compounded by the statistically higher probability that such persons are already at risk of

[15] Kathryn P. Nelson, Mark Treskon & Danilo Pelletiere, *Losing Ground in the Best of Times: Low Income Renters in the 1990s* (Washington, D.C.: National Low Income Housing Coalition, 2004), online: Community Wealth http://www.community-wealth.org/search.php?search_query=Losing+Ground&submit.x=0&submit.y=0; John M. Quigley & S. Raphael, "Is Housing Unaffordable? Why Isn't it More Affordable?" (2004) 18:1 *Journal of Economic Perspectives* 191, online: University of California http://repositories.cdlib.org/postprints/428 [Quigley & Raphael]. Housing is often used as an indicator of income. For instance, "[h]ousing tenure and car access have often been used as indicators of material resources when a direct measure of income has not been available" Mikko Laasksonen, *et al*., "Socioeconomic Status and Smoking: Analysing Inequalities with Multiple Indicators" (2005) 15:3 European Journal of Public Health 262 at 262 [Laasksonen]. Studies also use postal codes to determine income, affirming that where one lives is an indicator of income, Raywat Deonandan, *et al*., "A Comparison of Methods for Measuring Socio-economic Status by Occupation or Postal Area" (2000) 21:3 Chronic Diseases in Canada, online: Public Health Agency of Canada http://www.phac-aspc.gc.ca/publicat/cdic-mcc/21-3/c_e.html.

[16] This is reflected in the percentage of income spent on a residential dwelling as well. "The average household devotes roughly one-quarter of income to housing expenditures, while poor and near-poor households commonly devote half of their incomes to housing" Quigley & Raphael, *supra* note 15 at 191.

[17] "Smoking status among Albertans appears to vary by the level of household income in the past year, and by level of income adequacy as determined by Statistics Canada. In general, Albertans with lower annual household incomes (i.e. less than $45,000 in the past year) have higher smoking rates than Albertans with annual household incomes in excess of $45,000" AADAC, *supra* note 2 at 28. Numerous studies have looked at the impact of socioeconomic status on smoking prevalence. Next to education, socioeconomic status has been determined as a key factor in smoking prevalence. It has been shown that "[s]moking is related to structural, material as well as perceived dimensions of socioeconomic disadvantage" Laasksonen, *supra* note 15 at 268. Socioeconomic status also has an impact on the smoking prevalence of specific population. For example, Hilary Graham *et al*., found that "women's domestic circumstances may represent an important pathway of influence on their smoking status" in "Socioeconomic Lifecourse Influence on Women's Smoking Status in Early Adulthood" (2006) 60 J. Epidemilol. Community Health 228 at 232. Fred C. Pampel observes that "[s]moking may not only help cope with difficult economic and social circumstances, but also may have less serious health consequences for low [socioeconomic status] groups. Those likely to die early from a variety of nonsmoking causes will see themselves as having less to lose from smoking and less reason to give up the pleasure of nicotine" in "Socioeconomic Distinction, Cultural Tastes, and Cigarette Smoking" (2006) 87:1 Social Science Quarterly 19 at 20. Other studies worth noting include: M.T. Basset, "Smoking Among Deprived Populations: Not Just a Matter of Choice" (2003) 93 Am. J. of Public Health 1035; Elizabeth Barbeau, Nancy Krieger & Mah-Jabeen Soobader, "Working Class Matters: Socioeconomic Disadvantage, Race/Ethnicity, Gender, and Smoking in NHIS 2000" (2004) 94 Am. J. of Public Health 269; Richard G. Rogers, Charles B. Nam & Robert A. Hummer, "Demographic and Socioeconomic Links to Cigarette Smoking" (1995) 42 Social Biology 1; Office of Applied Studies. *The NHSDA Report: Tobacco Use, Income and Education Level* (Rockville, MD: US Department of Health and Human Services, Substance Use and Mental Health Services Administration, 2002); and, B. Jefferis, *et al*., "Effects of Childhood Socio-Economic circumstances on Persistent Smoking" (2004) 94 Am. J. of Public Health 279.

debilitating health conditions.[18] ETS, a dangerous substance at any exposure level, harnesses more destructive potential amongst such a vulnerable population. This amplifies the need to more fully explore how to protect nonsmokers (and smokers) in residential settings.

3. The Covenant for Quiet Enjoyment

Before discussing how ETS qualifies as a breach of the covenant for quiet enjoyment, it is necessary to demarcate the covenant's application. In many jurisdictions, the covenant is expressly provided for through residential tenancies legislation.[19] Explicit legislation is not necessary for the covenant's existence, however, as it is also implied in every relationship between a landlord and tenant.[20] The covenant is not dependent upon any explicit provisions in a lease[21] as it exists within the common law.[22] The covenant stipulates that in every landlord-tenant relationship there exists "a right to take possession, and to be protected against interference with the tenant's use and enjoyment of the premises by the landlord or others claiming under the landlord."[23]

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[18] M. Marmot, "The Influence of Income on Health: Views of an Epidemiologist. Does Money Really Matter? Or is it a Marker for Something Else?" (2002) 21 Health Aff. 31; B. Galobardes, J.W. Lynch & G. Davey Smith, "Childhood Socioeconomic Circumstances and Cause-Specific Mortality in Adulthood: Systematic Review and Interpretation" (2004) 26 Epidemiol Rev 7; R.A. Pollitt, K.M. Rose & J.S. Kaufman, "Evaluating the Evidence for Models of Life Course Socioeconomic Factors and Cardiovascular Outcomes: A Systematic Review" (2005) 5 B.M.C. Public Health 7; S.V. Subramanian & I. Kawachi, "Wage Poverty, Earned Income Inequality, and Health" in J. Heymann, ed., *Global Inequalities at Work* (New York: Oxford University Press, 2003) 165; and, S.V. Subramanian & I. Kawachi, "Income Inequality and Health: What Have We Learned So Far?" (2004) 26 Epidemiol. Rev. 78.

[19] In Alberta, for instance, s. 16(b) of the *Residential Tenancies Act*, SA 2004, c. R-17.1 provides that "neither the landlord nor a person having a claim to the premises under the landlord will in any significant manner disturb the tenant's possession or peaceful enjoyment of the premises." Section 26 of Ontario's *Tenant Protection Act, 1997*, S.O. 1997, c.25 prohibits a landlord from substantially interfering with the "reasonable enjoyment" of the rental unit.

[20] Wm. B. Stoebuck & Dale A. Whitman, *The Law of Property*, 3rd ed. (St. Paul, MN: West Group, 2000) at 281 [Stoebuck & Whitman].

[21] Robert Megarry & H.W.R. Wade, *The Law of Real Property*, 5th ed. (London: Stevens & Sons Ltd., 1984) at 693 [Megarry & Wade].

[22] Lamont, *supra* note 6 at 81.

[23] Ziff, *supra* note 11 at 268.

The covenant has a long history, having been expressed or implied in leases and conveyances for centuries.[24] Conceptually, the covenant has undergone an extensive evolution. Perhaps this is a result of the fact that the

> covenant for quiet enjoyment is, and always has been, framed in words so large that it might include every interruption to a beneficial enjoyment of the thing demised, whether accidental or wrongful, or in whatever way the interruption may be caused, even if it be caused by some extraordinary occurrence of nature.[25]

To be sure, there is no consensus regarding what falls within the covenant's purview.[26] Historically, quiet enjoyment has had restricted application, at one point applying only to physical interference with use and enjoyment.[27] In *Browne v. Flower* it was held that in order for there to be a breach of the covenant "there must be some physical interference with the enjoyment of the demised premises, and that a mere interference with the comfort of persons using the demised premises by the creation of a personal annoyance such as might arise from noise, invasion of privacy or otherwise is not enough."[28] In recent years, however, Courts have been broadening the interpretation of the covenant with the interest of benefiting tenants.[29] Presently, there are only a few requirements necessary for an act to constitute a breach of quiet enjoyment.

First, the alleged action must have been committed by the landlord or by someone claiming under the landlord.[30] The covenant, therefore, does not provide protection against

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[24] *Southwark London Borough Council v. Mills Baxter v. Camden London Borough Council (No.2)*, [2001] 1 AC 1 (H.L.) at para. 11 [*Southwark*].

[25] *Harrison, Ainslie and Co. v. Muncaster*, [1981] 2 Q.B. 680 (C.A.) at 684.

[26] For instance, Lamont observes that the courts have not consistently interpreted what a breach of the covenant entails, *supra* note 6 at 82.

[27] For instance, in *Jaeger v. Mansions Consol. Ltd.* (1902), 87 L.T. 690 at 692, "[t]he disturbance must be of a physical and not a metaphysical nature." Megarry & Wade (1984) explicitly note that "[u]sually there is no breach of the covenant unless the tenant suffers some physical interference with his enjoyment of the property", *supra* note 21 at 694.

[28] *Browne v. Flower*, [1911] 2 Ch. 219 at 228.

[29] Lamont, *supra* note 6 at 81.

[30] Cornelis J. Moynihan & Sheldon F. Kurtz, *Introduction to the Law of Real Property*, 3rd Ed. (St. Paul, Minn.: West Group, 2002) at 94. Those claiming under the landlord include tenants, employees (such as

otherwise tortious acts or unlawful interferences by third parties.[31] As such, quiet enjoyment remains as a qualified covenant.[32] Second, the act must interfere with the normal enjoyment of one's premise. The term "quiet" here is a misnomer, as breaches are not dependent upon an interference caused by excessive noise.[33] Rather, "quiet enjoyment" ensures that

> [a] tenant has the right to use his or her apartment 24 hours of the day, with no exception with respect to tenants that go to work or attend school during the day. They are entitled to use their apartment in the normal way and not have that use encumbered in such a way as would interfere with their full use of their premises.[34]

Breaches, consequently, involve any action restricting a tenant from the normal enjoyment of their residence. In 1976, the Ontario Law Reform Commission made several recommendations to combat what they saw as the shortcomings of the covenant for quiet enjoyment.[35] Their third recommendation listed the acts they considered to constitute breaches of the covenant for quiet enjoyment. The Commission's recommended that

> a breach of the covenant should arise from any acts which result in the tenant's reasonable peace, comfort, or privacy being interfered with, whether due to liquids, gases, vapours, solids, odours, vibration, noise, abusive language, threats, fire, the total or partial withholding of heat, electricity, water, gas, or other essential services, or the removal of windows, doors, walls or other parts of the rented premises.[36]

The Commission further recommended that no attempt be made to delimit those acts constituting a breach of the covenant, suggesting instead that it should be left "to the court to determine

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superintendents and property managers), and other agents of the landlord. Actions for breaches of the covenant are brought against the landlord(s).

[31] H.W. Wilkinson, "Landlord & Tenant: Loss of Quiet Enjoyment" (1990) 140 New Law J. 1158. An example of a third party would be someone who was trespassing, and therefore, had no legitimate claim under the landlord.

[32] *Kenny v. Preen*, [1963] 1 Q.B. 499.

[33] Courts have found noise capable of breaching the covenant for quiet enjoyment, provided that the noise interferes with the use of the demised premises, *Han v. Wilson*, 1995 CarswellBC 1930 (B.C. S.C.) at para. 12.

[34] *Pellatt v. Monarch Investments Ltd.* (1981), 23 R.P.R. 8 (Ont. Co. Ct.) at 16

[35] Lamont discusses the recommendations made by the Commission, *supra* note 6 at 86-87.

[36] *Pellatt v. Monarch Investments Ltd., supra* note 34 at para. 35. See also Lamont, *supra* note 6 at 86.

whether, in all the circumstances of the case, the covenant has been breached."[37] The Ontario Court of Justice, in *Caldwell v. Valiant Property Management*, explicitly refers to the Commission's recommendations, suggesting at a minimum that the Court was willing to accept the enumerated acts as constituting a breach of the covenant.[38] Recently, the House of Lords held that the covenant for quiet enjoyment provides a tenant with a right of possession without interruption, and refers "to the exercise and use of the right and having the full benefit of it, rather than to deriving pleasure from it."[39]

Although the Commission advised that no limits should be placed on what acts constitute a breach of quiet enjoyment, there are specific parameters within which an act must fall for it to be considered a breach. First, for an act to breach the covenant it must *substantially* interfere with the resident's quiet enjoyment. *Gordon v. Lidcombe Developments* established that only those disturbances or disruptions considered substantial would be sufficient to breach a lessor's obligation.[40] To be considered substantial, an interference "must be of such severity that the premises become "untenable"—uninhabitable as a residence or unusual for the tenant's business."[41] The House of Lords has suggested that a substantial interference is one that restricts a tenant from being able to use their possession in an ordinary, lawful way.[42] Second, an act must be of a grave and permanent nature. In other words, it must be more than a temporary inconvenience, constituting an actual interference.[43] However, "[w]hile the interference cannot be a one-time or isolated occurrence, it need not be literally continuous, but may be

[37] Lamont, *supra* note 6 at 86. The Commission also recommended that it not be permissible to contract out of the covenant.

[38] *Caldwell v. Valiant Property Management* (1997), 33 O.R. (3d) 187, 9 R.P.R. (3d) 227 (Ont. Gen. Div.).

[39] *Southwark*, *supra* note 24 at para. 11.

[40] *Gordon v. Lidcombe Developments*, [1966] 2 NSWR 9; see also Peter Butt, "Conveyancing and Property" (July 1998) 72 The Australian Law Journal 495.

[41] Stoebuck & Whitman, *supra*, note 20 at 285.

[42] *Southwark*, *supra* note 24 at para. 12.

[43] *Torgan Enterprises Ltd. v. Contact Arts Management Inc.,* [1997] O.J. No. 2759 (Ont. Gen. Div.).

intermittent."[44] Consequently, for an act to qualify as breaching the covenant for quiet enjoyment it must, at a minimum, substantially interfere with the tenant's normal use of their residence and cannot be of a temporary nature or a matter of personal annoyance.[45]

Identifying a breach of the covenant for quiet enjoyment serves little purpose if there is not a corresponding remedy. There are several remedies available, the most important of which is the requirement for landlords to address the problem. In effect, this requires a landlord to take the necessary steps to eliminate the problem of drifting ETS. Other remedies include the ability to accept the lease as having been breached or collecting rent abatement. The specifics of the remedy depend on the determination of the Courts.

4. Environmental Tobacco Smoke as a Breach of Quiet Enjoyment

The remainder of this paper will examine whether ETS invading one's home constitutes a breach of the covenant and how one can use the covenant as a means of combating exposure to ETS in their home. Prescribing a particular course of action is difficult, however, given that the specifics required to bring an application for a breach of the covenant before the Courts varies with each jurisdiction.[46] This paper will proceed by demonstrating how ETS constitutes a breach

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[44] Stoebuck & Whitman, *supra* note 20 at 285.

[45] As will be demonstrated below, this is an obstacle to litigation. Aversion to ETS has previously been construed as a matter of personal preference. Conceivably, then, the courts may be hesitant to set precedent that ETS, *prima facie*, represents a breach of the covenant for quiet enjoyment on the premise that it is simply a matter of annoyance.

[46] For instance, in Alberta the *Residential Tenancies Act, supra* note 19, permits communities to establish a Landlord and Tenant Advisory Board to help mediate tenancy issues and disputes (the City of Edmonton has established such a Board, information for which can be found at: www.edmonton.ca/portal/server.pt/gateway/PTARGS_0_2_104_0_0_35/http%3B/cmsserver/COEWeb/community+and+people+services/housing+services/landlordandtenantadvisoryboard.htm). The Alberta Act also provides that tenants and landlords can apply to a court for remedies resulting from breaches of the tenancy agreement. Section 37 permits tenants to apply to a court for a remedy, as defined by the Act, where a landlord breaches a condition of the residential tenancy, "Court" referring to the Provincial Court or the Court of Queen's Bench, per s. 1(c). One's course of action, then, would depend on whether a Board had been established in their community or if they must apply directly to the Courts. This differs from Ontario, where the *Tenant Protection Act*, *supra* note 19, establishes the Ontario Rental Housing Tribunal, which has the jurisdiction to determine all of the applications under the Act.

of the covenant for quiet enjoyment based on the aforementioned caselaw and additional caselaw specifically contemplating ETS. Included in this discussion is an examination of whether litigation is an appropriate response and the identification of obstacles to litigation.

4.1. Litigation as an Appropriate Response?

Although one must always inquire whether litigation is an appropriate means by which to resolve a problem they are facing, this is a particularly salient concern when dealing with one's neighbours or landlord.[47] The literature suggesting that ETS exposure in the home constitutes an action for breach of the covenant for quiet enjoyment almost unanimously recommends using the Courts only as a means of last resort.[48] As the Non-Smokers' Rights Association notes, "[g]oing to court is not an optimal route to take—it can be time-consuming and expensive and it pits private parties against each other, whether tenant vs. tenant or tenant vs. landlord."[49] There are also obvious concerns in maintaining civil relations in the context of an ongoing relationship.

Appeals to any decisions made by the Tribunal must be brought within 30 days to the Divisional Court under s. 196 of the Act. Interestingly, the Tribunal is permitted, via s. 197, to appeal decisions of the Divisional Court as if it were a party to the appeal. Information concerning the Ontario Rental Housing Tribunal can be found online at: http://www.orht.gov.on.ca/scripts/index_.asp.

[47] After all, unless an action is commenced after one has vacated their residence, they will be required to interact with those whom they are potentially suing. Moreover, confrontation increases the potential for conflict and may in fact lead to more disturbances. See *Manhattan House v. Zeigler, infra* note 51.

[48] A pamphlet distributed by Health Canada in British Columbia, "Is unwanted tobacco smoke drifting into your apartment or condominium? Information to protect tenants from exposure to second-hand smoke", advocates the use of the judicial system only if the "problem continues after you have taken all reasonable steps to negotiate a solution." Similarly, the Non-Smokers' Rights Association discusses legal options available to tenants under the subheading "Last Resorts (When You Can't or Don't Want to Move)", implying that moving out of one's residence may be a preferable resolution, *supra* note 3 at 15. The Tobacco Public Policy Center at Capital University Law School advises, "legal action should be considered a last resort, and that legal counsel should be contacted before initiating any action." See "Secondhand Smoke in Multi-Unit Housing: A Tenant's Guide", online: Tobacco Public Policy Center www.tobaccopolicy.org.

[49] Non-Smokers' Rights Association, *supra* note 3 at 16.

Several other options have been suggested as appropriate responses prior to legal action.[50] Each, however, is not without its own limitations. Given the resistance to restrictions on smoking in public places, the extension of restrictions into their private sphere will likely be met with hostility. Discussing the problem of ETS with a neighbour, therefore, may bear a certain risk[51] and amicable resolutions may be unlikely.[52] Advocating for one's building to adopt a smoke-free policy has been suggested as an alternative to litigation.[53] Nevertheless, a smoke-free policy may not adequately address the problem as provisions are often grandfathered in the adopted policy to allow existing tenants to continue smoking in their homes.[54] Other actions,

[50] These include: including discussing the problem with neighbours, advocating for the building to adopt a smoke-free policy, "smoke-proofing" one's residence, request that the building's ventilation system be upgraded, or even treating the lease as having been breached (this last point will be discussed in greater detail below).

[51] David Ezra notes, "nonsmokers are viewed as meddlesome troublemakers who aggressively interfere with the smoker's "privacy" when they ask for a smoker to refrain from lighting up", *supra* note 8 at 141. Confrontations, therefore, are conceivable. In *Manhattan House v. Ziegler* (1997), 28 O.T.C. 294 (Ont. Gen. Div.), for instance, when a tenant confronted his neighbour about the problem caused by his smoking. The neighbour began harassing the tenant with other noises and verbal altercations, including abusive language. It also led to the tenant being physically assaulted suffering a bruised nose, bruised knee, swollen tongue, and a black eye, and ultimately resulted in criminal charges being laid (at paras. 4-6).

[52] In response to smoking restrictions and the nonsmokers' rights movement a smokers' rights movement has also emerged. This movement has even suggested that the actions against smokers constitute a form of discrimination. For instance, see Zgrodnik, *supra* note 1 and M.L. Tyler, "Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers" (1998) 86:3 The Georgetown Law Journal 783. Smoking neighbours are likely to believe they have a "right" to smoke in their home and will likely oppose any attempt to restrict that right.

[53] Some of the literature advocates this approach as the most appropriate and suggest that given the decline in smoking prevalence rates, that it is likely to be successful based on the logic that "you are likely not the only one who is suffering from drifting smoke" see Health Canada *et al*., "Fact Sheet: Information for Tenants on Drifting Second-Hand Smoke in Multi-Unit Dwellings", online: www.cleanaircoalitionbc.com/Tenants-final.pdf. A limitation, however, is that even some nonsmokers are concerned with the incursion of outside controls and regulations in the private sphere. Thus, in spite of not being smokers, they may view such a course of action unfavourably. Furthermore, although the general populace is more aware of the dangers posed by ETS, it is unclear whether there is an awareness to the dangers posed even by minimal exposure. That is to say, where there is likely to be widespread support to prevent one's residence from becoming a fumigator for drifting smoke those who are only exposed to ETS from a few cigarettes a day may be viewed as "whiners" without legitimate concerns. This will be addressed in more detail below.

[54] That is to say, the problem of ETS will not be fully resolved until all tenants residing in the building at the time of the policy being adopted have moved out. This is the experience of this author who earlier this year was successful in campaigning to have his building adopt a smoke-free policy. Unfortunately, despite the success, the policy allowed for existing tenants to continue to smoke in their units, implementing the smoke-free policy to new tenants only. As a result, the author is still subject to drifting ETS on a near daily basis.

such as "smoke-proofing" or increasing ventilation are likely to be met with minimal success.[55] Although there is always the option of moving residence this presents a multitude of challenges one must face, which are further complicated when one considers the socioeconomic status of those affected.[56] All things considered, this paper suggests that litigation should not be considered a "last resort." In fact, the mere threat of legal action may serve as sufficient impetus for landlords to facilitate a solution, and thus an advisable approach.[57] Moreover, this paper advocates the use of the legal system as a means by which to set the necessary precedent to encourage a widespread adoption of policies recognizing ETS as a breach of quiet enjoyment.[58]

4.2. Bringing an Action for Breach of Quiet Enjoyment

As discussed, the mechanics of bringing an action for the breach of quiet enjoyment will vary between jurisdictions. Irrespective of jurisdiction, however, to constitute a breach of the covenant, ETS must fit within the parameters of acts constituting a breach. The following will demonstrate why ETS represents a legitimate breach.

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[55] For example, it has been demonstrated that no amount of ventilation can remove ETS from the air, National Institutes of Health, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders: The Report of the US Environmental Protection Agency* (Atlanta, GA: US Department of Health and Human Services, 1993). This has been accepted by the Courts, where it was acknowledged that "[i]ncreasing ventilation will dilute the smoke in a room, but will not make it safe since there is no known safe level of exposure to the carcinogens in cigarette smoke" and that "[e]lectronic air cleaning systems would need to increase the air-exchange rate a thousand fold to be effective—resulting in gale force winds!" See *Feaver v. Davidson,* 2003 CarswellOnt 4189 (O.R.H.T.) at paras. 29 & 30.

[56] Treating a lease as having been breached may not be a desirable option as it comes at great personal frustration, hassle and cost. Moreover, unless one can ensure that their new residence is smoke-free, there is no guarantee that they will not again be forced to endure ETS exposure from a neighbouring tenant.

[57] Non-Smokers' Rights Association, *supra* note 3 at 16.

[58] Litigation has been recognized as "an increasingly important way of using the law to address the impact of tobacco use" von Tigerstrom, *supra* note 3 at 317. For a more comprehensive discussion of tobacco litigation in Canada see von Tigerstrom at 317-325.

4.2.1. Act of the Landlord

The first aspect of a breach of quiet enjoyment, that the landlord or one acting in the capacity of the landlord commits the act, does not require much attention. Clearly, the acts of fellow tenants and the landlords themselves meet the criteria. Furthermore, it is difficult to conceive of many situations where the problem of ETS will arise where it is not due to those normally under the ambit of the covenant.[59]

4.2.2. Interference

For an act to be considered a breach of the covenant for quiet enjoyment the act must interfere with the regular enjoyment of the property. As noted, this interference no longer is required to be physical in nature. Lord Denning, in *McCall v. Abelesz*, is often quoted for extending the covenant beyond the physical disturbances into the metaphysical by acknowledging that the "covenant is not confined to direct physical interference by the landlord [but] … extends to any conduct of the landlord or his agents which interferes with the tenant's freedom of action in exercising his rights as a tenant."[60] That an indirect action constitutes a breach of the covenant was affirmed in *Federic v. Perpetual Investment Ltd.* where carbon monoxide fumes rendering an apartment unlivable were considered interference with the tenant's peaceful enjoyment.[61] In *Pellatt v. Monarch Investments Ltd.* odour and noises resulting from exterior cleaning and tar machines hired by the landlord to upgrade the building were found to constitute a breach of the covenant as it invaded the tenant's right to the "peace and comfort" of

[59] A possible example might be the problem of drifting ETS from a location within close proximity to one's residence, such as a bus stop, but clearly not associated with the landlord. In such circumstances actions for loss of quiet enjoyment will likely be unsuccessful; other legal actions, such as nuisance or trespass, may still be available, but a discussion of this is beyond the scope of this paper. What is less clear, however, is whether ETS resulting from persons who normally would fall within the authority of the landlord, such as those persons doing repairs or maintenance on the property, would constitute a beach of the covenant.

[60] *McCall v. Abelesz*, [1976] Q.B. 585 (C.A.) at 594.

[61] *Federic v. Perpetual Investment Ltd.,* [1969] 1 O.R. 186, 2 D.L.R. (3d) 50 (H.C.).

their apartment.[62] Similarly, in *Bramar Holdings Ltd.v. Deseron* an odour that persisted after the basement had flooded was considered to interfere with the tenant's quiet enjoyment as it placed the tenant in a situation where they were unable to use that which they were paying for.[63] On the strength of these cases alone it likely that ETS would represent a breach of the covenant.

In the past few years, several cases have been brought before the courts explicitly claiming ETS to be a breach of the covenant. In 2002, Renuka Satchithananthan applied to the Ontario Rental Housing Tribunal for a reduction in her rent contending that her landlords substantially interfered with the reasonable enjoyment of her unit.[64] Of the problems identified, the infiltration of ETS was considered to be "substantially interfering with the Tenant's reasonable enjoyment of the rental unit for all usual purposes."[65] The Tribunal found in favour of Satchithananthan, ordering a rent abatement. This case is also important, however, for several specific reasons. First, it established that landlords are liable for their failure to take reasonable steps to stop the interference "even where the building itself does not contravene any health, safety, housing or maintenance standards."[66] Second, it established that it is incumbent upon the landlords to take "whatever steps are reasonably necessary" to prevent the problem.[67] In spite of the Tribunal's orders, the problem of ETS persisted, and Satchithanathan brought another application alleging that the harms caused by ETS had not been sufficiently dealt with and requested, in addition to an abatement of rent, that the offending tenant be evicted or, alternatively, that a $4,000 HEPA air filtration system be installed.[68] Whereas the Tribunal had favoured the complaint earlier, on the second application the Tribunal was "not satisfied that the

[62] *Pellatt v. Monarch Investments Ltd.*, *supra* note 34 at para. 26.
[63] *Bramar Holdings Ltd. v. Deseron* (1996), 1 R.P.R. (3d) 287 (Ont. Gen. Div.) at para. 52.
[64] *Satchithananthan v. Cacciola*, 2002 CarswellOnt 5023 (O.R.H.T.) [*Satchihananthan* 2002].
[65] *Ibid* at para. 50.
[66] *Ibid* at para. 50.
[67] *Ibid* at para. 54.
[68] *Satchithananthan v. Cacciola*, 2003 CarswellOnt 2641 (O.R.H.T.) at para. 14 [*Satchithananthan* 2003].

Tenant had demonstrated . . . [that] the occasional odour of tobacco in the air has substantially interfered with the Tenant's reasonable enjoyment of her unit for all usual purposes."[69] Moreover, the Tribunal felt that Satchithananthan had "exaggerated the frequency of [the] problem, its duration and the impact it has had upon her."[70] It is unclear whether the Tribunal was speaking here to the untrustworthiness of the evidence, or to the lack of a substantial interference. In addition, where the first application had been successful because it had demonstrated that the landlords had not made any effort to address the problem, at the time of the second application, the landlords were found to have made a reasonable effort. According to the Tribunal, the landlords had "fulfilled their obligations"[71] as they were only required to "take reasonable steps to address any legitimate concerns."[72]

Sitting under a different Member, the same Tribunal was faced with determining whether a landlord could evict a tenant who was reasonably interfering with the reasonable enjoyment of the residential complex with ETS in *Feaver v. Davidson*.[73] This case is important as it not only acknowledged the great harms caused by ETS[74] but found that it was not necessary for a tenant to prove smoking was the cause of their symptoms in an application for the breach of quiet

[69] *Ibid* at para. 16.
[70] *Ibid.*
[71] *Ibid* at para. 17.
[72] *Ibid* at para. 24. The Tribunal notes, "the Landlords have made reasonable efforts. They have investigated the matter, spoken with the other tenant involved and provided him with a large air purifier to use while smoking in his unit" (para. 17). They also note that it was within the landlord's authority to commence an application against the smoking tenant to let the Tribunal determine whether or not to evict the tenant, and that the landlord was correct in opting not commence such an action in these circumstances. The Tribunal also found that the smoking tenant was compliant with the initial order, and only resumed smoking in his unit when the weather was foul.
[73] *Feaver v. Davidson*, *supra* note 55.
[74] *Ibid* at paras. 27-34. The Tribunal acknowledged, among other things, that ETS is "filled with more than 4,000 chemicals" (para. 27); "opening a window, smoking in another room or having air purifies or ventilation systems can't protect you from second-hand smoke" (para. 29); that "exposure for as little as 8 to 20 minutes causes physical reactions linked to heart and stroke disease" (para. 32); and "[t]here is only one way to eliminate second-hand smoke from indoor air: remove the source" (para. 34).

enjoyment.[75] The Tribunal found that the "[f]ear of the threat alone is enough to cause the prudent person to take the measures that the Landlord has taken and to cause continuing anxiety about her health. She has a right to be free of the risks of smoking in her unit."[76] Thus, despite the Tribunal finding that the tenant had a *prima facie* right to smoke in their unit[77] that it was not reasonable to expect to be able to continue smoking when said activity affects other tenants who have not chosen to accept the risks associated with smoking.[78]

Two additional cases of note are *Manhattan House v. Ziegler*[79] and *Young v. Saanich Police Department.*[80] In the former the Ontario Court of Justice found that exposure to ETS, and its negative effects on one's health, was a sufficient reason to grant rent abatement. The latter case, heard by the Supreme Court of British Columbia, dealt with marijuana smoke. The Court found that the marijuana smoke unreasonably disturbed other tenant's quiet enjoyment because of the noxious smell and perceived health concerns.[81] Mr. Young, who was permitted to smoke marijuana for medicinal purposes, contended that he only smoked the equivalent of 1 ½ tobacco cigarettes per day.[82] The Court nevertheless held that the smoke breached the covenant for quiet enjoyment, therefore, establishing a precedent that even a minimal amount of smoke is sufficient to constitute a breach.

4.2.3. Substantial Interference

Not only must an act interfere with the tenant's use, the interference must be substantial. That is to say, it must restrict the tenant's ability to use their residence in an ordinary lawful way

[75] *Ibid* at para. 44.
[76] *Ibid* at para. 45.
[77] *Ibid* at para. 42.
[78] *Ibid* at para. 46.
[79] *Manhattan House v. Ziegler*, *supra* note 51.
[80] *Young v. Saanich Police Department* (2003), 15 B.C.L.R. (4th) 84 (B.C. S.C.).
[81] *Ibid* at para. 39.
[82] *Ibid* at para. 15.

or render a residence uninhabitable.[83] It is not difficult to argue that ETS renders a residence uninhabitable, particularly given that carbon monoxide, offensive odours, excessive noise, among many other acts, have been considered substantial breaches.[84] Moreover, as is noted, it has been determined that ETS substantially interfered with a tenant's quiet enjoyment in *Satchithananthan*.[85] Given the awareness of the harms associated with ETS, as noted in *Feaver v. Davidson*, the fear of the threat posed by ETS is sufficient to warrant a breach of quiet enjoyment.[86]

4.2.4. Sufficient Duration and Extent

Finally, to constitute a breach of quiet enjoyment, the problem ETS poses must not be an isolated event.[87] It is not required, however, that exposure to drifting ETS be a daily occurrence. Although it is difficult to foresee that the Courts would construe complaints about ETS as matters of personal annoyance, it is possible. The Courts will base their determination on the duration and extent of exposure, as "the extent of the effect of ETS on health depends on the concentration of smoke in the environment, the length of exposure, and the vulnerability of the individual."[88] Hence, the importance of emphasizing the harmfulness of ETS in any litigation. Research has shown there are no safe exposure levels to ETS, that minimal amounts of ETS has

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[83] *Southwark*, *supra* note 24 at para. 12 and Stoebuck & Whitman, *supra* note 20 at 285.

[84] The impact ETS has on one's health alone is sufficient to argue that it constitutes a substantial breach. An alterative approach would be to argue that in addition to the harmful effects, the offensive odour of ETS satisfies the criteria for substantial interference.

[85] *Satchithananthan* 2002, *supra* note 64.

[86] *Feaver v. Davidson*, *supra* note 55. Establishing that ETS represents a substantial interference will likely be easiest for the approximately 20% of the Canadian population who have special health risks, such as asthma, allergies and heart disease, that are aggravated by exposure to ETS. For some people, exposure to ETS can be life threatening. See AADAC, *supra* note 2 at 67-83.

[87] For instance, it is highly unlikely that an action would be successful where drifting ETS was a one-time event resulting from a social gathering, or any number of conceivable situations where the problem of ETS is an isolated event.

[88] Hennrikus, Pentel & Sandell, *supra* note 14 at 189. See also, R.M. Davis, "Exposure to Environmental Tobacco Smoke: Identifying and Protecting Those at Risk" (1998) 280 J.A.M.A. 1947.

been shown to adversely affect nonsmokers[89], that ETS exposure causes a minimum of 15 chronic diseases[90], and that ETS is the third leading cause of preventable deaths in Canada.[91] On the strength of such arguments it is safe to postulate the Court will not view ETS as a temporary or personal annoyance.

4.3. Obstacles to Litigation

As with any litigation there are obstacles that may impede the likelihood of success. The following identifies the obstacles that might be encountered in litigation positing ETS as a breach of the covenant for quiet enjoyment. Suggestions for overcoming these obstacles, where necessary, will be offered.

4.3.1. Cost of Litigation

Perhaps the most obvious obstacles that will be faced are the restraints preventing people from initiating an action. For instance, many of those affected by ETS in their homes cannot afford the costs associated with legal action.[92] Even where expenses associated with legal action may be minimal there are still concerns regarding the time commitment. Finding the necessary time to see litigation through may also serve as an impediment. Furthermore, one must not overlook the social costs. Instigating legal action against one's neighbours or landlord will not

[89] The literature on point is extensive. For example, see: Environmental Protection Agency, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*. EPA/600/6-90/006F (Washington, DC: EPA, 1992); R. Otsuka, *et al*., "Acute Effects of Passive Smoking on the Coronary Circulation in Healthy Young Adults" (2001) 286 J.A.M.A. 436; and AADAC, *supra* note 2. A further danger of exposure to ETS in MURD is that a resident may or may not be aware of the prevalence of ETS in their home. It is plausible that residents who sleep with a window open in order to get fresh air are in fact breathing in drifting ETS each night. Moreover, ETS that may drift into their unit while they are absent remains a threat in spite of the lack of any lingering odour.

[90] AADAC, *supra* note 2 at 70 and the discussion regarding the diseases associated with exposure to ETS.

[91] See, Physicians for a Smoke-Free Canada, "Tobacco and the Health of Canadians", online: http://www.smoke-free.ca/Health/pscissues_health.htm.

[92] Even in situations where there is state-sponsored arbitration or the possibility of self-representation, the costs associated with filing documents, as well as the perceived costs (that is to say, legal action is often perceived to be extremely costly), may be sufficient to prevent an action from ever being started.

likely be well received. Moreover, litigation may result in one's quiet enjoyment being impeded in other ways.[93] For the most part, these obstacles can be overcome with the assistance of many of the tobacco-control agencies and nonsmokers' rights associations already in place. Not only can such organizations help with the financial costs and minimize the time required, it is possible that the agency can instigate the action *qua* the tenant.[94]

4.3.2. Expectations of Residents

A serious legal obstacle that will need to be overcome concerns the reasonable expectation of residents. In *Southwark* it was held that the tenants must have reasonably contemplated that there would be neighbouring flats and that noise from these flats may be heard from their own flat, and thus dismissed the application for a breach of quiet enjoyment.[95] It could be argued that tenants who reasonably contemplated that drifting ETS may infiltrate their unit would be barred from relying on the covenant for quiet enjoyment. In *Satchithananthan* the Tribunal found that the tenant had reasonably expected the apartment to be smoke-free and took this into consideration when granting the rent abatement.[96] The question a Court will face, then, is whether a tenant had any expectation as to the presence of ETS.[97]

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[93] This could entail retaliatory actions by the landlord or tenants, but is more likely to involve actions such as the intentional disruption of one's quiet enjoyment by the implicated parties.

[94] Class-action suits have been brought against tobacco companies on a number of grounds, von Tigerstrom, *supra* note 3 at 320-322. It is unlikely, however, that this would prove an effective strategy in residential disputes. Nevertheless, it is an option that should be examined in greater detail.

[95] *Southwark*, *supra*, note 24. See also *Lyttelton Times Co. Ltd. v. Warners Ltd.*, [1907] A.C. 476 where it was held that when the plaintiffs are aware of the intended use of the premises by the defendants that there would be no cause of action. The Privy Council maintained: "When it is a question of what shall be implied from the contract, it is proper to ascertain what in fact was the purpose, or what were the purposes, to which both intended the land to be put, and having found that, both should be held to all that was implied in this common intention… [If] it be true that neither has done or asks to do anything which was not contemplated by both, neither can have any right against the other" (at p. 481).

[96] *Satchithananthan* 2002, *supra* note 64 at para. 41.

[97] Some interesting questions arise with respect to the nature of the expectation. For instance, if a tenant reasonably expected nominal drifting ETS, would a significantly higher quantity (or even slightly higher quantity) of ETS be covered by that expectation? What if a tenant expected intermittent exposure to ETS but was experiencing

A further obstacle may arise from the smoking tenant's expectation that they should be permitted to smoke in their apartment. Landlords are required to weigh the interests of all residents, not just those with grievance. The position of the Court in *Feaver v. Davidson* was that the smoking tenant had a *prima facie* right to smoke in their unit, but determined that the severity of the threat posed by ETS was such that it not reasonable for the tenant to continue smoking.[98] It is likely that the Courts will continue to rely on the longstanding principle used in tort that "an individual's freedom to do as he wishes on his property is subject to the caveat that he not unreasonably disturb his neighbour's enjoyment of her property."[99]

4.3.3. Reasonable Effort

Presuming that there is a breach of the covenant, landlords are required to make a reasonable effort to eradicate the problem resulting in the breach. It is feasible that tenants will have no further course of action for interferences with their reasonable enjoyment if the landlord has acted reasonably to eliminate the problem.[100] Subsequently, tenants may still be exposed to the dangers of drifting ETS. The decision in *Satchithananthan* differs from other jurisprudence where, notwithstanding the reasonable efforts of the landlord, the covenant for quiet enjoyment was still breached. For instance, in *Bramar Holdings Inc. v. Deseron* the covenant was breached when the premises were flooded.[101] The court found that in spite of the actions of the landlords, which were deemed responsible, reasonable and within their duties, the tenant was still deprived

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daily exposure? It is beyond the scope of this paper to explore this issue further, which necessarily delves into an analysis of the "reasonable" standard. It is likely that the Courts will resolve this issue on a case-by-case basis, but it is important to bear in mind that Courts privilege the reasonable expectation. See *Southwark*, *supra* note 24.

[98] *Feaver v. Davidson*, *supra* note 55 at para. 42, 44-46. It is unclear why the Tribunal recognized a *prima facie* just to restrict it. It would appear, then, that perhaps no such right existed in the first place.

[99] *Young v. Saanich Police Department, supra* note 80 at para. 128.

[100] This is one of the potential consequences from the *Satchithananthan* cases where reasonable effort was a key factor to barring the second application. See *Satchithananthan* 2002, *supra* note 64 and *Satchithananthan* 2003 *supra* note 68.

[101] *Bramar Holdings Ltd. v. Deseron , supra* note 63.

the use of what they were paying for. Similarly, in *Pellatt v. Monarch Investments Ltd.* the Court found that the landlord had breached the tenant's quiet enjoyment despite the fact that every effort had been made to accommodate the tenant.[102] The difference between *Satchithananthan* and other jurisprudence on point may reside in how the Court perceived the complainant, which is the final obstacle that will be explored in this paper.

4.3.4. Complainants as Complainers

One of the components of a breach of the covenant for quiet enjoyment is that it must be something greater than a mere personal annoyance. An obstacle facing complainants is that they may be perceived as complainers. Consider *Satchithananthan*, where the Tribunal was hesitant to accept the complainant's second application, questioning the severity of the problem. In particular, complainants may be perceived unsympathetically if they persist in lengthy litigation where effort was made by the landlord to address the problem.[103] A way of combating this is to reinforce the dangers posed by ETS, depicting complainants not as complainers, but as persons with genuine concerns.

4.4. Likelihood of Success

This paper predicts that where ETS can successfully be shown to substantially interfere with the normal use of one's residence, it will be considered a breach of the covenant for quiet enjoyment. This paper also contends that any exposure level to ETS will qualify as a substantial

[102] *Pellatt v. Monarch Investments Ltd*., *supra* note 34. Here the renovations undertaken by the landlord to improve the building were the cause of the breach.

[103] Again, it is unclear whether the Tribunal was speaking to the lack of credibility on the part of the complainant or if they did not find the interference to be substantial.

interference. Furthermore, the Courts have thus far shown favour to those applications brought before them alleging ETS as a breach of the covenant.[104]

5. Litigation as a Necessary but Insufficient Action

Although this paper advocates the use of litigation under the rubric of residential tenancies, it nevertheless remains as an insufficient action. There are limits to litigation that must be considered. Specifically, if litigation is successful, it only protects those directly involved. Successful actions may not even protect others adversely affected tenants in the same building. Unsuccessful actions may impede the utility of the covenant for quiet enjoyment as a remedy to drifting ETS. Consequently, this paper further suggests that policy reforms an awareness-raising campaign be concurrently undertaken.

5.1. Policy Reform

It is beyond the scope of this paper to thoroughly examine possible policy reform to protect tenants from drifting ETS. Suffice it to say that numerous initiatives should be encouraged.[105] Reforms relevant to this paper would include amending residential tenancies

[104] It is not entirely clear whether successful litigation would require the smoking tenant to cease smoking in their unit or simply require the landlord to take reasonable steps to prevent ETS from affecting the complainant. In other words, provided that ETS could be fully contained within the smoking tenant's unit, thereby eliminating the interference with others, that tenant would likely be permitted to continue smoking in their unit. It would erroneous to suggest that actions over breaches of the covenant for quiet enjoyment will result in smoking tenants being forced to stop smoking in their unit altogether. However, given that ETS is harmful even when it is undetected (i.e., just because a tenant does not smell the smoke from their neighbours, that does not mean that there is no risk) and that there is no effective means by which to remove ETS from the air (by ventilation or otherwise), the preferred solution is that smoking tenants not be permitted to smoke in their unit. Litigation concerning ETS as a breach of the covenant for quiet enjoyment should be pursued with this as the ultimate goal

[105] Some specific policy reforms that should be considered include: smoking bans under the jurisdiction of governments and housing authorities (e.g., foster homes and student residences) should be expanded to include all MURD and private homes with children under their jurisdiction; providing tax and insurance incentives to encourage MURD to adopt smoke-free policies (some property insurance companies provide nonsmokers with discounts on their home insurance due to the reduced fire risk. These discounts could be extended to multi-unit dwellings.); encourage landlords to create smoke-free floors, following the lead of the hotel industry; encourage

legislation. Although it is unorthodox to specifically legislate a particular act as constituting a breach of the covenant for quiet enjoyment, given the prevalence of ETS exposure in residential tenancies and the danger it poses, it may be advisable with respect to ETS. The risk, however, is that by specifying one thing there is a risk of characterizing the unitemized breaches.[106] Perhaps a more aggressive policy reform ought to be pursued, namely, the prohibition of smoking in residential tenancies altogether.[107] The expected success of such reforms at this time, admittedly, is not high. Hence it is suggested that an awareness-raising campaign addressing ETS in the home should also be undertaken.

5.2. Awareness-Raising Campaign

It is possible that the courts have not yet been inundated with cases alleging ETS as a breach of the covenant for quiet enjoyment because tenants in residential settings are not aware of the covenant or that ETS exposure may constitute a breach of the covenant. Thus, an aggressive awareness-raising campaign aimed at informing residential tenants of their rights

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landlords to grandfather smoking apartments in their buildings and to provide lower rent rates to nonsmokers given the increased cleaning and maintenance costs and risks (e.g., fires) associated with smoking tenants. Further policy reforms should be considered in the areas of public health law, family law and child protection law, each providing an effective means for combating ETS exposure. One might also seek to reform existing bylaws dealing with smoking, requiring greater effort to control drifting ETS. Comprehensive tobacco control policies pursuing numerous intermediate goals, with the ultimate aim being to reduce the overall human and economic costs associate with tobacco consumption, are most laudable. For a discussion of the various policy initiatives that could be undertaken see von Tigerstrom, *supra* note 3 at 287-316.

[106] If legislation specifically identifies ETS, the doctrines of statutory construction, *noscitur a scoiis* and *ejusdem generis*, may serve to limit the covenant for quiet enjoyment's application in other settings. The former doctrine limits a broad term to the characteristics it shares with the terms with which it is grouped. Specifically identifying ETS as a breach of the covenant, therefore, may restrict breaches to those acts similar to ETS. The latter doctrine is similar in nature, stating that where general words follow words listed in a statute, the courts construe the general words to include only objects similar in nature to the listed objects. It is important to carefully consider the implications of characterizing ETS as a breach of the covenant before implementing such a policy as it may serve to restrict the rights of tenants in the long run.

[107] Such a course of action, however, may fail to take into account the competing interests of other tenants, including those that choose to smoke. Although drifting ETS may substantially interfere with a tenant's quiet enjoyment of their property, if drifting ETS does not cause interference the prohibition from smoking could itself be construed as interfering with a tenant's quiet enjoyment and use of their property. An adjudicator will weigh the interests of both parties, and thus it is important to continually consider how a particular course of action will affect these parties.

would undoubtedly raise awareness as to what can be done to prevent drifting ETS. It is my suspicion that with an increase in litigation and awareness that the first initiative, policy reform, will be better received.[108]

6. Conclusion

The purpose of this paper was to address the problem of drifting ETS in MURD. It has demonstrated that where ETS is shown to substantially interfere with a resident's lawful use of their possession that it will be considered a breach of the covenant for quiet enjoyment. This paper discussed the obstacles to litigation and suggested concurrent initiatives to address the problem of ETS in MURD. The conclusion this paper has reached is that the covenant for quiet enjoyment presents a viable way for protecting occupants of MURD from the harmful and deadly affects of ETS. As a result, litigation over breaches of the covenant should not be treated as a last resort, but rather encouraged.[109]

[108] There are potential consequences to this that must be considered, including the economic fallout. There also may be negative consequences for tenants of MURDs. The costs associated with implementing and maintaining smoke-free buildings may raise rents or limit the number of available unit. It is unlikely, however, that smoke-free policies will raise rents, as landlords will save considerable money through the reductions in property insurance (for instance, between "1997 and 2001, fires caused by smokers' materials cost Albertans $46 million in property damage, and led to 40 deaths and over 280 injuries" Fire Commissioner's Office, *Alberta Fire Losses Caused by Smoker's Material: 1997-2001* (Edmonton, AB: Alberta Municipal Affairs, 2003).), the costs of repairs resulting from smoke damage, and the costs associated with litigation pursued by tenants.

[109] In light of this paper, the next step would be to initiate a series of test cases to further observe how the Courts will respond to ETS being presented as a breach of the covenant for quiet enjoyment. It is recommended that at a minimum two test cases be initiated: one involving a susceptible tenant, such as an asthmatic sensitive to ETS, and the other involving a tenant in good health. This will help to clarify how the Courts will treat ETS and whether the standard of "substantiality" will be determined.