Canadian Case Law on Drifting Second-hand Smoke in Multi-Unit Dwellings

This document is intended to clarify the often confusing debate about smokers' versus non-smokers' rights related to drifting second-hand smoke in multi-unit dwellings (MUDs). On this issue, some would argue that tobacco control advocates who talk about smoking bans in MUDs cross the line by infringing on the rights of smokers in their own homes. We often hear that a person's home is their castle, and what they choose to do behind closed doors is no one's business but their own.

The case law included in this document should clarify the rights of smokers and those of non-smokers as interpreted by the courts. However, before turning to it, it is important to review which pieces of legislation have a bearing on this issue.

The *Canadian Charter of Rights and Freedoms* is a bill of rights entrenched in the Constitution of Canada. It forms the first part of the *Constitution Act, 1982*, and is intended to protect certain political and civil rights of people in Canada from the policies and actions of all levels of government. The *Charter* only applies to government laws and actions (including the laws and actions of federal, provincial, and municipal governments and public school boards), not to private activity such as what is contained in a landlord's lease. Contrary to the claims of various smokers' rights groups, the *Canadian Charter of Rights and Freedoms* does not provide protection against discrimination as a smoker. The *Charter* does not recognize smokers as a group suffering social, political, or legal disadvantage in our society. Under this legislation smoking is not considered a physical disability, and this has been demonstrated in a small handful of cases.

Every province and territory in Canada has a piece of legislation governing human rights, and in most jurisdictions it is called the *Human Rights Code* or *Act.* Each *Code* or *Act* overrides all other pieces of legislation in that jurisdiction, unless a specific exemption is given. Pertaining to specific things including housing and employment, these provincial and territorial laws protect people from discrimination on the basis of disability, race, ancestry, sexual orientation, age, gender, family status, income, etc. Smoking is not identified anywhere as grounds for protection in these *Acts*, and the NSRA is not currently aware of any Canadian human rights case law where smoking was found to be so. Just because someone exercises their freedom to smoke does not mean they have an absolute right to smoke. In addition, smoking is not the only way to feed an addiction to nicotine - there are nicotine replacement therapies like the patch or gum, as well as a variety of smokeless tobacco products.

However, there is a difference between smoking and being addicted to nicotine, and there is a body of Canadian case law on addiction and disability. Nicotine addiction hasn't worked its way through the courts yet, but it is feasible in the future that a judge could find someone's nicotine addiction to be a disability. In fact, in a 2000 arbitration case in British Columbia between Cominco smelter operator and its union, a Canadian Labour Relations Board arbitrator found that the company's no-smoking policy unfairly discriminated against its

heavily-addicted smoking employees. The arbitrator determined that there was no inherent right to smoke, but required the employer to take all steps up to the point of undue hardship to accommodate the employees. And there lies the key: “reasonable accommodation up to the point of undue hardship.” In a housing situation, it is unlikely that a judge would strike down a landlord's smoke-free policy, given the known health hazards of exposure to SHS. In the event of a court case, the judge might require the landlord to reasonably accommodate the tenant's disability by providing a safe smoking area outside.

To sum up:

- There is no right to smoke enshrined in Canadian law
- Personal autonomy is not synonymous with unconstrained freedom
- Smokers are not a protected class nor recognized as having a disability under the *Canadian Charter of Rights and Freedoms*
- Non-smokers have a right to breathe clean air and children have a right to be raised in a smoke-free environment
- In a small handful of cases, Canadian courts have been sympathetic to the plight of non-smokers unwillingly exposed to drifting SHS in their own homes. Cases have been won on the premise of nuisance, as well as a breach of the covenant of quiet or peaceful enjoyment.

Drifting SHS: Breach of the Covenant of Quiet or Peaceful Enjoyment

1. Cartwright v. Gray, 1866 (O.J. No. 268), Upper Canada Court of Chancery

   A nuisance smoke case involving a neighbour erecting a carpenter's shop and running a circular saw, and burning the pine shavings and other refuse. The plaintiff complained about the smoke, noise and sparks produced by the engine.

   The judge said:

   “A man may not use his own property so as to injure his neighbour. When he sends on the property of his neighbour noxious smells, smokes, &c. [sic], then he is not doing an act on his own property only, but he is doing an act on his neighbour's property also; because every man, by common law, has a right to the pure air, and to have no noxious smells or smoke sent on his land, unless, by a period of time, a man has, by what is called a prescriptive right, obtained the power of throwing a burden on his neighbour's property... Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences – injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected.”

2. Raith v. Coles, 1984, County Court of Westminster, British Columbia

   A nuisance case involving drifting cigar smoke from one condominium unit to another above. The judge granted an injunction to prevent the smoke from continuing to bother the plaintiffs.

   The judge said:

   "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... 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..."

3. Young v. Saanich Police Department, et al., 2003 (BCSC 926), Supreme Court of British Columbia

   A medical marijuana case involving drifting second-hand smoke in a social housing project and alleged *Charter* breaches interfering with the right to grow and use marijuana. The court upheld an arbitrator's decision that the landlord had established sufficient cause to terminate the Youngs' tenancy.

   The judge said:

   "...Did the tenants disturb other tenants?... The answer is yes... It is inconceivable that the tenant's right, indeed his need to smoke marijuana in order to treat his disease, could be used to defeat the rights of other occupants to peaceful enjoyment of their homes. As the tenants disturbed other occupants, they breached article 13 of the Tenancy Agreement and section 36(1) (h) of the Residential Tenancy Act. "

   "*I have great sympathy for an individual who must consume marijuana for alleviation of the symptoms of his disability. I cannot ignore, however, the interests of the numerous tenants who were found to have been adversely affected by the marijuana smoke produced by Mr. Young. The evidence suggests that the odour has made their suites virtually unliveable. Whether or not this is the case, what is at issue is the constitutionality of a policy that prohibits the unreasonable disturbance of neighbours by marijuana smoking. In my view, the state interest in protecting tenants from unreasonably disturbing odours must prevail."*

   "To hold otherwise would permit a single apartment-dweller to dramatically impair the quality of life of his fellow tenants. One need only look to the lengthy history of the common law tort of nuisance to recognize that it has been a long-standing principle of

our justice system 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."

4. Feaver v. Davidson, 2003 (O.R.H.T.D. No. 103, File No. TSL-52189), Ontario Rental Housing Tribunal

   A case involving a landlord (Feaver) seeking to have her smoking basement tenant (Davidson) evicted for substantial interference with her reasonable enjoyment of the residential complex. There was no written lease and no oral agreement that addressed the issue of smoking. The arbitrator determined that the tenant had indeed interfered with reasonable enjoyment. Further, if the tenant did not stop smoking in his unit, the landlord would be able to obtain an eviction order without further notice to the tenant.

   The arbitrator said:

   "The legislated limits that have been placed on smoking have come about because of the overwhelming evidence that smoking and second-hand smoke pose serious health risks. There can be no debate... It is clear that the risks associated with smoking are so grave that it is prudent to avoid inhaling cigarette smoke... Fear 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."

   "...It is not reasonable for the Tenant to expect to continue smoking in this unit where he shares the air with other occupants of the complex, when another occupant of the complex perceives a threat to their health. Although the Tenant may chose [sic] to accept the risks associated with smoking, he has no right to require the Landlord to share them... I find that the Tenant's smoking has substantially interfered with the Landlord's reasonable enjoyment of the residential complex..."

5. Beverly E. Reeves v. Globe General Agencies, 2007 (Manitoba Residential Tenancies Branch, Order # W2007-000506)

   A case involving a landlord passing a non-smoking policy. The policy states, in part:

   "... effective October 1st, 2006, all of our buildings will have a non smoking policy... All existing tenants will be 'grandfathered' during their length of tenancy. This means that you, your visitors or guests will continue to be allowed to smoke inside your rental unit, balconies or patios... All new tenants, visitors, or guests will not be permitted to smoke in any of the rental units, balconies and patios as well as on the property."

   The tenant, Beverly Reeves, asked the Residential Tenancies Branch to determine

whether the landlord's rule was reasonable, which it did.

The arbitrator said:

"The landlord's argument is persuasive, and I conclude that the rule will improve people's access to peaceful enjoyment of their units and of the complex, it will improve the safety, comfort and welfare of tenants, their guests, and workers at the complex, and it will reduce and eventually eliminate cleaning and replacement expenses brought on by the prevalence of tobacco smoke..."

Charter Rights and Freedoms

1. Blencoe v. British Columbia (Human Rights Commission), 2000 (2 S.C.R. 315), Supreme Court of Canada

   This case is a leading Supreme Court of Canada decision on the scope of section 7 (the right to life, liberty and security) of the *Canadian Charter of Rights and Freedoms,* and on the administrative law principle of natural justice.

   The court stated:

   "...Liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental importance... Although an individual has the right to make fundamental personal choices free from state interference, such personal autonomy is not synonymous with unconstrained freedom."

2. Her Majesty the Queen v. Ample Annie's Itty Bitty Roadhouse et al., 2001 (Ontario Court of Justice)

   A case challenging the Guelph smoke-free by-law on a number of grounds, including infringement of Sections 7 (the right to life, liberty and security) and 15 (the right to equal protection and equal benefit of the law without discrimination) of the *Charter of Rights and Freedoms*. The application brought before the court was dismissed on all grounds.

   The judge said:

   "The Charter was designed to protect against what can only be termed serious infringements of basic rights, which, by their nature, constitute a denial of fundamental justice... To some extent, all laws and in particular regulatory statutes deny a citizen the 'right to do as they please'. The laws are designed to regulate activities that are legal but require regulation for the benefit, safety and protection of all persons. Prime

examples are various statutes regulating traffic on the highways of our country... Few would contend that such restrictions constitute a violation of the right to liberty guaranteed in the Charter."

"The applicants contend that smokers suffer from an addiction and that this addiction amounts to a physical or mental disability under s.15 of the Charter... In order to establish an analogous ground the party must demonstrate the following:
-the targeted group has suffered historical disadvantage, independent of the challenged distinction,
-the group constitutes a "discrete and insular minority" and is not a disparate or heterogeneous group,
-distinction is made on the basis of a personal characteristic, and
-the personal characteristic is immutable...
Addiction to nicotine insofar as it can be considered a disability at all falls far short of the types of disabilities intended to be included in the section."

3. Regina Correctional Centre (Inmate Committee) v. Saskatchewan (Department of Justice), 1995 (30 C.R.R. (2d) 371, 133 Sask R. 61), Saskatchewan Court of Queen's Bench.[1]

   The case involved a prison smoking ban, with the inmates claiming that it violated sections 2a (freedom of religion), 7 (fundamental justice), 12 (cruel and unusual punishment), and 15 (equality) under the *Charter of Rights and Freedoms.*

   The judge said:

   "While tobacco is addictive it is also a health risk when smoked, not only to the user but to others and it is for these persons that the authorities have chosen to regulate its use. The resulting deprivation to the inmates is not therefore a punishment, nor even a treatment, but merely a necessary precaution to protect non-smoking employees and inmates (who may have a constitutional right not to smoke) from the effects of environmental or 'second-hand' smoke."

4. McNeill v. Ontario (Ministry of the Solicitor General & Correctional Services), 1998 (O.J. No. 2288, Court File No. 702/97), Ontario Court of Justice (General Division)

   A case involving a smoking ban in prison. Inmate McNeill claimed the ban was cruel and unusual treatment or punishment, discriminated against him because he was dependent on nicotine, and thus a violation of section 12 of the *Charter.* He also argued that the ban violated his section 15(1) right to equality. The judge dismissed his application, noting that the *Charter* was not violated.

1 Rob Cunningham, "Tribunals and Administrative Decisions: Canadian Court and Tribunal Findings that Secondhand Tobacco Smoke is Harmful to Health." 2003.

The judge said:

"While withdrawal from an addiction to nicotine is an unpleasant and difficult experience, it is temporary and limited. The former smoker does not require medical attention. Discontinuance of the habit is ultimately of significant benefit to the health of the quitter..."

"The 'mental or physical disability' enumerated as a ground for protection in the Charter should not be trivialized or minimized. Addiction to nicotine is a temporary condition which many people voluntarily overcome, albeit with varying degrees of difficulty related to the strength of their will to discontinue smoking... Smokers are not part of a group 'suffering social, political and legal disadvantage in our society..."

"Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions... persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale... Addiction to nicotine, insofar as it can be considered a disability at all, falls far short of the types of disabilities intended to be included in the section."

5. Edwards v. Canada (Correctional Services of Canada), 1991 (45 F.T.R. 145), Federal Court of Canada – Trial Division

   A case involving inmates who did not want to be transferred to another correctional facility, citing among other things the smoke-free status of the new facility.

   The judge said:

   "The smoking habit is far from a legal or constitutional right to which the State must pander."

Child Custody

6. MacDonald v. MacDonald, 2003 (N.S.J. 90), Nova Scotia Supreme Court, Family Division[2]

   A child custody case.

   The judge said:

   "*There is no dispute that second hand smoke is dangerous to children. It is*

2 Rob Cunningham, "Tribunals and Administrative Decisions: Canadian Court and Tribunal Findings that Secondhand Tobacco Smoke is Harmful to Health." 2003.

recognized that children have the right to be raised in a smoke free environment. The Court has the authority to impose conditions on custody. A condition of custody will be that there will be no smoking in the home when the children are present."