Non-Smokers' Rights Association
Smoking and Health Action Foundation

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A Review of Second-hand Smoke Decisions Made by Adjudicators of Landlord and Tenant Boards

Introduction

Housing in Canada is a provincial/territorial responsibility, with each jurisdiction having its own legislation. Commonly but not always known as residential tenancies acts, these laws set out the rights and responsibilities of landlords and tenants who rent residential properties. When a landlord or a tenant has a problem that cannot be settled amicably, the complainant can submit an application for a resolution to a landlord and tenant board. These boards, which are known by different names in different provinces, have exclusive authority to rule on matters under their jurisdiction, as defined under the relevant provincial/territorial law. The boards are essentially quasi-judicial dispute resolution mechanisms with appointed adjudicators. Although arbitrators prefer to be consistent, their decisions are not bound by precedent. Decisions are made using the "balance of probabilities" standard of proof, which essentially comes down to a question of credibility. Arbitrators must decide whose side of the story is more likely to be truthful.

The infiltration of second-hand smoke (SHS) in multi-unit dwellings is an emerging public issue. The issue has been gaining momentum in recent years as public acceptance of the need to protect health from the risks of involuntary exposure to SHS continues to grow. Presently, the Non-Smokers' Rights Association (NSRA) is aware of only a handful of landlord and tenant board decisions pertaining to SHS. However, an Ontario arbitrator who recently presided over a SHS case in Kingston believes there will be many more such cases: *"I think this is just the tip of the iceberg and I believe this* [SHS] *will be the issue of the decade."*[1]

The purpose of this document is to analyze and comment upon available landlord and tenant board decisions on SHS made in the past 5 years. Obtaining board decisions is challenging, as not all judgments are published and readily available. Unpublished judgments on SHS no doubt exist but locating them through 'Access to Information' requests requires knowing

[1] Elliot, I. *Tenant wants smoking snuffed.* Kingston Whig-Standard, Thursday, March 22, 2007.

specifics such as names of parties involved or file numbers. For this document, ten SHS cases, from Ontario, Quebec and British Columbia, are included for analysis. These cases were selected based entirely on availability. Refer to Appendix 1 for a summary of each case. Because not all the decisions have been made public, the cases will only be referred to by province, year and file number to protect the privacy of the individuals involved.

The goal of this paper is two-fold: to identify key issues for future applicants and to influence policy at landlord and tenant boards by offering guidelines for arbitrators. There does not appear to be much consistency in board decisions on SHS, neither between nor within jurisdictions. Moreover, at the time of writing it did not appear that any jurisdiction in Canada had policy guidelines in place to handle applications pertaining to SHS. It should be emphasized that the residential tenancy legislation differs between provinces.

Smoking is not specifically addressed in the Ontario *Residential Tenancies Act*. According to a legal opinion provided by Aird & Berlis, landlords have the right to impose obligations on tenants beyond the terms of a standard lease agreement as long as the obligations do not conflict with federal or provincial laws. [2] In other words, it is legal in Ontario for a landlord to have a no smoking policy. A landlord has the right to seek penalties for non-compliance but only if the tenant in not complying with the smoking ban breaches another provision of the Act. For example, a landlord could try to uphold a smoke-free policy if the smoke damages property (section 20[1]) or bothers other tenants (section 22).

Smoking is also not specifically mentioned in the *Quebec Civil Code, Title Two: Nominate Contracts, Chapter IV: Lease.* However, as is the case in Ontario, a landlord is legally permitted to designate their property smoke-free. Landlords are required to provide tenants with “a peaceable enjoyment of the property throughout the term of the lease” (section 1854), and section 1860 requires tenants not to “disturb the normal enjoyment of the other tenants.” A landlord may seek termination of the lease if a tenant violates the right of other tenants to “normal enjoyment.”[3]

The situation is different in British Columbia, where landlords can both implement and directly enforce smoke-free policies. Section 14(2) of the *Residential Tenancy Act* permits an amendment to the tenancy agreement, other than a standard term, provided both the landlord and the tenant agree to the change. Section 47(h) states that the landlord can give a tenant notice regarding termination of the lease if (i) the tenant has failed to comply with a material term of the lease and (ii) has not corrected the situation within a reasonable time after the

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[2] Doumani, R.G & Harrington, P.J. *Ontario perspectives on drifting second-hand smoke in residential buildings: Where we are and where we could go.* Aird & Berlis LLP. March 20, 2007.

[3] Quebec *Civil Code Title Two: Nominate Contracts, Chapter IV: Lease.* www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ/CCQ_A.html. Accessed December 17, 2007.

landlord gives written notice to do so.[4]

Based on the cases under consideration, two questions arise:

- What orders have been sought at board hearings and what were the outcomes?
- What are the key issues on which arbitrators base their decisions?

Orders Sought

Of the ten cases included in this analysis, half resulted in wins or partial wins for those parties seeking relief from involuntary exposure to SHS. The complainants have sought orders for the following forms of redress:

- Repairs to their premises
- Reductions in rent until repairs have been completed or until smoke has stopped infiltrating the unit
- The upholding of non-smoking policies
- Reimbursement of moving expenses, change of address expenses, medical expenses, etc.
- Eviction

It is not possible to speak in broad terms about which orders are treated more favourably by arbitrators, given that every case is considered individually and on its own merit. Indeed, there are a number of factors taken into consideration that contribute to an arbitrator's final judgment, including how the complainant presented himself and how credible he is perceived to be, what kinds of evidence were introduced, what the parties did prior to making the complaint to try and solve the problem amicably, whether lawyers were involved, etc. Much also depends on which arbitrator presides over the case, including his own personal biases and attitudes.

Nonetheless, some general comments on these order requests are appropriate. With respect to repairs, if the tenant's side of the story is accepted as credible and the landlord has not done much in the way of attempting to fix the problem, it is entirely possible that the board could order the landlord to make repairs. This was the case in four instances, with orders including the sealing of cracks and gaps,[5] sealing as well as the inspection of a fan and

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[4] British Columbia *Residential Tenancy Act [SBC 2002] CHAPTER 78.* www.qp.gov.bc.ca/statreg/stat/R/02078_01.htm#section7. Accessed December 12, 2007.

[5] British Columbia Residential Tenancy Office, 2006 (Burnaby File # 188052).

installation of a filter (*"if feasible and possible"),*[6] renovation of a floor,[7] and the requirement that a landlord obtain a written report clarifying that the ventilation system was both in working order and suitable for the building.[8] It is interesting to note that in the 2002 Ontario case, the arbitrator indicated no health, safety or building codes were being violated, and yet still ordered repairs to be made. The arbitrator stated that it is the landlord's duty to take all reasonable steps to ensure the tenant gets what he expected. This ruling is in contrast to the apparent situation in BC where the board reportedly has no authority to order repairs unless it can be proven that the landlord broke building codes or safety standards.[9] Clearly, it would be useful to future applicants to know whether arbitrators in their province/territory have the authority to make repair orders in the absence of building code or safety violations.

In terms of rent reductions, in only two instances did an arbitrator order a reduction of rent for a tenant. In one case, an abatement equalling approximately 5% of the total rent was granted, effective throughout the period that the tenant was exposed to smoke and prior to the completion of repairs by the landlord.[10] In the second case, the board ordered that if the landlord did not complete the mandated repairs within 30 days, the tenant would be entitled to deduct $100 per month from her rent until the repairs were completed.[11] Unfortunately, when the smoke continued to enter her apartment following repair work, the tenant's second application was dismissed on the basis that she had failed to prove that the smoke constituted an unreasonable disturbance.[12]

Amongst the cases included in this analysis, there is just one instance of a tenant requesting a board to uphold a smoke-free policy. The arbitrator denied the request, stating that he did not have the jurisdiction to do so. He clarified further by indicating that for an order involving all the units of the building, as would be the case in a smoke-free complex, all the other tenants would need to be proper parties on the application.[13] This issue will be discussed further in the section on "the right to smoke."

Reimbursement for various costs associated with the loss of reasonable enjoyment or moving appears to be an appropriate request, and winnable, provided the complainant is able to make a case for it. One tenant was even awarded reimbursement for chiropractic treatments made necessary from back pain due to chronic coughing.[14]

Eviction of tenants for smoking is rare. It appears that arbitrators are not easily prepared to

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[6] British Columbia Residential Tenancy Office, 2006 (Burnaby File # 186676).
[7] Ontario Rental Housing Tribunal, 2002 (Docket # TST-04047, Carswell Ont 5023).
[8] Ontario Rental Housing Tribunal, 2006 (File # SWT-08000).
[9] Sharon Hammond, BC Clean Air Coalition. Personal communication August 30, 2007.
[10] Ontario Rental Housing Tribunal, 2002 (Docket # TST-04047, Carswell Ont 5023).
[11] British Columbia Residential Tenancy Office, 2006 (Burnaby File # 188052).
[12] British Columbia Residential Tenancy Office, 2007 (Victoria File # 194712).
[13] Ontario Rental Housing Tribunal, 2006 (File # SWT-08000).
[14] British Columbia Residential Tenancy Office, 2005 (Victoria File # 233968).

make such an order, and certainly not without first ordering intermediate steps. There is just one case in which a landlord, who lived above her smoking tenant, was successful in securing an order for the tenant to stop smoking in the unit. The arbitrator determined that if the tenant breached the terms of the order, the landlord could apply for eviction without notice to the tenant.[15] This decision is significant in that the landlord did not have a smoke-free policy in place.

Key Issues

The following issues have been identified in some or all of the SHS cases included in this analysis:

- The right to smoke
- The concept of unreasonable disturbance and SHS as a breach of the covenant of peaceful/quiet/reasonable enjoyment
- Complainants as complainers with hypersensitivity to SHS
- Health risks of exposure to SHS
- Objective evidence of the presence of SHS versus "subjective complaints"

The Right to Smoke

Although there is no "right to smoke" enshrined anywhere in Canadian law, arbitrators typically identify that tenants (and landlords) who smoke have a right to do so. However, whether or not the unit/building was advertised as smoke-free and whether or not there was a no smoking clause/policy written into the lease appears to hold some weight in some arbitrators' decision-making. For example, one arbitrator stated, *"Since the terms of his tenancy also do not prohibit smoking, I find that he has a prima facie right to do so."*[16] In other words, if smoking is not mentioned in the lease, then at first glance tenants have a right to smoke. This implies that the reverse should also hold true—that is, if smoking indoors is prohibited in the lease, then tenants do *not* have the right to smoke.

Unfortunately, things are not that simple, as illustrated by the following case in which the complainants believed the whole complex to be smoke-free. A newspaper advertisement for their apartment read "Non Smoking." The arbitrator concluded that the complainants' apartment was indeed non-smoking because no one smoked in it: *"I have considered the fact that when these tenants rented the unit, they did so believing that the whole complex was*

[15] Ontario Rental Housing Tribunal, 2003 (File # TSL-52189).
[16] Ontario Rental Housing Tribunal, 2003 (File # TSL-52189).

smoke-free. This provision was incorporated into their lease. This certainly weighs in their favour. However, there is apparently no similar provision in the lease for Apartment 2. In fact, the lease contemplates that the non-smoking … requirements may not be universal, but subject to negotiation between the parties."[17]

In a SHS case recently heard at the Quebec Rental Board, a landlord who had screened potential tenants by including a no smoking clause in the rental application failed to prevent her tenant from lighting up by not including a no smoking clause in the actual lease. The board ruled that an application form is not a binding document to which tenants may be held.[18] The landlord has since appealed the case and is currently waiting for a decision.

These cases highlight the need for clarity when landlords and tenants are negotiating rental arrangements. Prospective tenants need to double-check when a unit is advertised as smoke-free that the policy includes the entire building and that all tenants sign a lease with the same no smoking provisions. In addition, landlords who wish to have a smoke-free building need to have a clear policy included in the rental agreement and not simply rely on a statement that the unit is smoke-free in a newspaper advertisement or rental application form.

Despite the fact that some arbitrators have determined that tenants have a right to smoke in their apartments unless otherwise indicated, it is clear that this right to smoke is not absolute. In other words, arbitrators have concluded that the right to smoke is conditional and does not extend to bothering someone else with the smoke. Arbitrators are then tasked with figuring out if the alleged presence of SHS qualifies as an unreasonable disturbance and thus constitutes a breach of the covenant of quiet, peaceful or reasonable enjoyment.

Breach of the Covenant of Quiet, Peaceful or Reasonable Enjoyment

Many of the known cases pertaining to SHS in Canada involve the application for an order recognizing the infiltration of SHS as a breach of the covenant of quiet, peaceful or reasonable enjoyment. In other words, complainants suffering from involuntary exposure to SHS would like the arbitrator to recognize that the smoke entering their units is so disruptive that it is interfering with their normal enjoyment and use of the premises. The "covenant for quiet enjoyment" is the right of the tenant to take possession, to use and to enjoy the premises, and to be protected against interference by the landlord or others claiming under the landlord.[19] The covenant is not dependent upon any explicit provisions in a lease, and is implied in every relationship between a landlord and a tenant. There are specific parameters within which an activity must fall for it to be considered a breach:

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[17] Ontario Rental Housing Tribunal, 2006 (File #SWT-08000).
[18] Quebec Rental Board, 2007 (File # 31 061110 009 G).
[19] Shelley, J. Environmental Tobacco Smoke as a Breach of the Covenant for Quiet Enjoyment. http://www.nsra-adnf.ca/cms/file/pdf/2007_quiet_enjoyment.pdf. Accessed August 7, 2007.

- It must render the premises uninhabitable as a residence; and
- It must be more than a temporary inconvenience, although it can be intermittent and not literally continuous.[20]

For a more thorough examination of the covenant of quiet enjoyment, consult the document "Environmental Tobacco Smoke as a Breach of the Covenant for Quiet Enjoyment" by Jacob Shelley. Of the cases examined for this document, most of the arbitrators were in agreement that SHS does theoretically constitute a breach of the covenant of quiet enjoyment. However, only about half of the applications were successful in having their SHS problem identified as such. In other words, it is not enough for smoke to be simply entering someone's apartment to be considered a breach of the covenant of quiet enjoyment. Complainants must convince the arbitrator that its presence is having such a negative effect as to render all or parts of their unit uninhabitable. Arbitrators typically pose questions to determine the severity of the alleged breach and to ascertain if a reasonable person in the applicant's position would also consider the problem an unreasonable disturbance. Issues such as the nature, duration and effect of the interference on other tenants and the nature of the premises in question, including the reasonable expectation of other tenants when they entered into their lease are considered.

According to the cases reviewed, arbitrators have reached widely different conclusions on these questions. On one end of the spectrum, there is a case in which the plaintiff (landlord) asserted that the smoke from her basement tenant caused her headaches and sinus congestion, left residue and toxins on her windows, walls and curtains, and reduced her to sleeping with her window open, even in the winter. Granting an order that a breach of the covenant had indeed taken place, the arbitrator stated, "*I do not believe it necessary for the landlord to prove that the tenant's smoking has caused her current symptoms. Fear of the threat alone is enough to cause the prudent person to take measures that the Landlord has taken.… She has a right to be free of the risks of smoking in her unit."*[21]

The other end of the spectrum is illustrated by three other cases. In the first example, the tenants (one with severe allergies) reported that smoke entering their apartment left them with constricted breathing, headaches, nausea, irritated eyes, loss of voice, coughing, chest congestion and anxiety about its presence. In addition, they stated that their sleeping had been severely disrupted, and at times they felt it necessary to vacate their apartment for hours waiting for the smoke to dissipate. Their neighbour claimed she had stopped smoking some months prior, so both the landlord and neighbour maintained throughout the hearing that there was no SHS present at all. The arbitrator did not agree with the tenants' position, stating, *"Each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may*

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[20] Shelley, J. Environmental Tobacco Smoke as a Breach of the Covenant for Quiet Enjoyment. http://www.nsra-adnf.ca/cms/file/pdf/2007_quiet_enjoyment.pdf. Accessed August 7, 2007.
[21] Ontario Rental Housing Tribunal, 2003 (File # TSL-52189).

co-exist.… Relief is available only in those cases in which the harm or risk to one is greater than they ought to be required to bear under the circumstances, at least without compensation." The arbitrator further stated that "*there must continue to be a balancing of the right of a tenant to smoke in their own unit, with the right of other tenants not to have their own unit unreasonably invaded by second-hand smoke."*[22] This case was dismissed because the arbitrator never believed that SHS existed. However, based on his comments, it would be interesting to find out what sort of harm is eligible for relief if exposure to SHS is not, given that SHS is a known human carcinogen with no known safe level of exposure.

In a second example from BC, a tenant was actually hospitalized for asthma attacks as a result of her SHS exposure and had the appropriate documentation to prove it. Although she was successful in getting an order to have her apartment sealed, the "repairs" did little to solve the problem.[23] Her second application for a reduction in rent "*until the landlord comply* [sic] *with the RTA* [Residential Tenancy Act] *and take steps that will immediately stop second-hand smoke from the neighbouring unit entering applicant suite"* was dismissed.[24] In the third example, another tenant in the same building who also filed a SHS application citing "excessive smoking" likewise secured an order for the sealing of cracks and gaps. However, she too was turned down for a rent reduction. The arbitrator stated that *"the covenant of quiet enjoyment does not assure a tenant of no inconvenience, disruption, nuisance or disturbance by another tenant."*[25] Since these applications were dismissed, one is left to question what constitutes a reasonable amount of SHS entering an apartment.

Complainants as Complainers with Hypersensitivity to SHS

Several arbitrators' decisions are based on their conclusion that tenants complaining about SHS are merely complainers with unrealistic expectations who are hypersensitive to tobacco smoke. Shelley indicates that for a breach of the covenant of quiet enjoyment to be recognized it must be something greater than a mere personal annoyance. He illustrates his point with a 2003 case from Ontario, where the tribunal was hesitant to hear the complainant's second application (for relief from SHS), and ultimately dismissed it, questioning the severity of the problem.[26] Building on Shelley's point, in cases where smoke was still reportedly infiltrating an apartment following a landlord's attempt to fix the problem, the plights of plaintiffs have not been well-received. In one case, the arbitrator said, *"It is likely that any amount of second-hand smoke is too much for the applicant, given her health issues."*[27] It is worth noting that the tenant in question had resided in the building, where half

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[22] Ontario Rental Housing Tribunal, 2006 (File # SWT-08000).
[23] British Columbia Residential Tenancy Office, 2006 (Burnaby File # 188052).
[24] British Columbia Residential Tenancy Office, 2007 (Victoria File # 194712).
[25] British Columbia Residential Tenancy Office, 2006 (Burnaby File # 186676)
[26] Shelley, J. *Environmental Tobacco Smoke as a Breach of the Covenant for Quiet Enjoyment.* http://www.nsra-adnf.ca/cms/file/pdf/2007_quiet_enjoyment.pdf. Accessed August 7, 2007.
[27] British Columbia Residential Tenancy Office, 2007 (File # 194712).

the tenants smoke, for seven years before filing an application. In addition, the tenant was granted a "handicapped" unit by the landlord on the basis of her health disabilities that included asthma. The issue of hypersensitivity to SHS was also addressed by another arbitrator in a separate case, who stated *"where the complainant is being overly sensitive, the law will not provide a remedy."*[28]

In a separate case that put a tenant between a rock and a hard place, an arbitrator ruled against the tenant because, among other things, she was not sensitive *enough* to SHS.[29] These cases exemplify a *Catch 22* situation and beg the question of who is in a worse position: someone labelled as hypersensitive to SHS and who is therefore unreasonable in their desire not to be exposed to tobacco smoke, or someone considered reasonable because they are not hypersensitive but who is arguably not as negatively affected by SHS exposure as a result?

Labelling complainants as hypersensitive and determining that the law will not provide a remedy appears to contradict the long standing "thin skull" principle of law. This principle essentially states that you must take the victim as you find him. In other words, the principle makes the at fault defendant liable for the plaintiff's injuries even if the injuries are unexpectedly severe for that individual, owing to a pre-existing condition.[30] With respect to SHS, this means that even if a plaintiff has severe asthma and the infiltration of SHS has caused problems that a "normal" person might not experience, an adjudicator should still give the case due consideration and not dismiss it by labelling the plaintiff as hypersensitive.

What if the tables are turned for a moment to examine the behaviour of the smoker in such a situation? Would a reasonable and prudent person, knowing that his SHS is injurious to those around him, take reasonable steps to try and mitigate potential exposure regardless of the sensitivity of those around him? Perhaps arbitrators should consider the source of the SHS in addition to the complainant when pondering the reasonableness of the people involved in such cases.

Recognition of the Health Risks of Exposure to SHS

There is no known safe level of exposure to SHS. Public recognition of the danger of exposure to SHS is great, and acceptance of the need for smoke-free indoor environments and workplaces is high. This is due to the evidence-based scientific bedrock upon which clean indoor air laws rest. It is estimated that each year in Canada approximately 1,000 non-smokers die from exposure to SHS: over 700 from heart disease and over 300 from lung

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[28] Ontario Rental Housing Tribunal, 2006 (File # SWT-08000).
[29] Ontario Rental Housing Tribunal, 2003 (File # TNT-03370).
[30] Nancy Ralph and Associates. *The thin skull rule.* www.nancyralph.com/expertdilemma.htm. Accessed December 21, 2007.

cancer.[31] Thousands more are sickened from involuntary exposure. Research shows that there is a dose-response relationship between exposure to SHS and its effect on health. Numerous reputable health and scientific agencies, including the World Health Organization, the International Agency for Research on Cancer, the U.S. Surgeon General, the U.S. Environmental Protection Agency (EPA), the California EPA and the British Scientific Committee on Tobacco and Health have all come to the same conclusion on SHS—exposure is harmful and involuntary exposure should be eliminated. The most recent meta-analysis on SHS, the U.S. Surgeon General's report, states:

- SHS causes premature death and disease in children and adults who do not smoke
- Children are at an increased risk for sudden infant death syndrome (SIDS), acute respiratory infections, ear problems, and more severe asthma.
- Exposure of adults has immediate adverse effects on the cardiovascular system and causes coronary heart disease and lung cancer
- There is no risk-free level of exposure
- Eliminating smoking in indoor spaces fully protects non-smokers. Separating smokers from non-smokers, cleaning the air, and ventilating buildings cannot eliminate exposures of non-smokers to SHS.[32]

Upon examination of the cases considered for this paper, it does not appear that the health effects of exposure to SHS are universally accepted at board hearings. In some of the cases, the arbitrator did not consider the health effects of exposure at all.[33,34,35] In another case, the arbitrator stated, "*the tenant adduced no evidence as to the quantity of airborne pollutants (if any) in her unit or whether the presence of the odour of tobacco necessarily indicates the presence of carcinogens and/or other health-threatening substances."*[36] While it is necessary that cases be considered individually and on their own merits, it is surprising that some arbitrators do not even include the health effects in their decision-making, or that they demand evidence to prove that the presence of SHS constitutes a health hazard.

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[31] Makomaski Illing, EM & Kaiserman, MJ. *Mortality attributable to tobacco use in Canada and its regions, 1998.* Canadian Journal of Public Health, 2004:95(1):38-44.

[32] U.S. Department of Health and Human Services. *The health consequences of involuntary exposure to tobacco smoke: A report of the Surgeon General—executive summary.* U.S. Department of Health and Human Services, 2006.

[33] Ontario Rental Housing Tribunal, 2006 (File # SWT-08000).

[34] British Columbia Residential Tenancy Office, 2006 (Burnaby File # 188052).

[35] British Columbia Residential Tenancy Office, 2007 (Victoria File # 194712).

[36] Ontario Rental Housing Tribunal, 2003 (File # TNT-03370).

Objective Evidence of the Presence of SHS versus "Subjective Complaints"

Some arbitrators want to see objective evidence of the presence of SHS.[37,38,39] In one case, the arbitrator asserted that, *"the nature of the disturbance must be objectively considered. [T]he party complaining of an 'unreasonable disturbance' cannot be the sole judge…."*[40] In another example, even when three different people testified in writing on three separate occasions confirming the smell of SHS in a complainant's apartment, the arbitrator questioned the reliability of the evidence. Conversely, the arbitrator accepted written statements from the landlord's wife and the town's chief building official that they could not smell any smoke the one time they checked.[41] It is illogical that a sniff test would be insufficient to prove the presence of smoke, yet sufficient to prove its absence.

In a BC decision based more on the science of SHS rather than mere opinion, the arbitrator stated that *"even if this witness has not smelled any second hand smoke, that fact alone does not mean that the tenant did not smell second hand smoke…. There are simply too many variables involved."*[42] This perspective was not endorsed, however, during a recent hearing in Ontario where an arbitrator considering the transmission of smoke from an alleged two cigarettes per day expressed disbelief that *"such limited smoking could emit an odour from cigarette butts in an ashtray and that the odour would travel to the unit above."*[43]

The problem is that all buildings are different, with the transfer of air between units depending on building design, size, age and ventilation type, among other things. Without testimony from an expert witness such as a SHS biophysicist, coupled with air quality data, an arbitrator really has no objective measure of the extent of someone's exposure to SHS. Therefore, to date arbitrators have relied on the credibility of the parties involved and their own opinion of what constitutes an unreasonable amount of SHS.

Recommended Policy Guidelines

When tenants sign leases to live in multi-unit buildings, most recognize and accept that there will inevitably be a certain amount of disturbance and inconvenience in terms of noise, odours, etc. It is unreasonable to expect otherwise when people live in such close proximity to one another. However, the concept of give-and-take should not apply when someone is being repeatedly exposed to a known human carcinogen. Second-hand smoke is not like noise or vibrations or other typical disturbances. In the weighing of interests and tenants' rights, the

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[37] British Columbia Residential Tenancy Office, 2007 (Victoria File # 194712).
[38] Ontario Rental Housing Tribunal, 2003 (File # TNT-03370).
[39] Ontario Rental Housing Tribunal, 2006 (File # SWT-08000).
[40] British Columbia Residential Tenancy Office, 2007 (Victoria File # 194712).
[41] Ontario Rental Housing Tribunal, 2006 (File # SWT-08000).
[42] British Columbia Residential Tenancy Office, 2005 (Victoria File # 233968).
[43] Ontario Landlord and Tenant Board, 2007 (File # EAL-00666 & EAT-08083).

right to health and clean air should come before an individual's right to smoke in his own home.

To ensure that their decisions are more consistent and that they take into account the facts regarding SHS exposure, it is recommended that landlord and tenant boards adopt the following guidelines regarding the infiltration of SHS from one unit to another:

1. Complainants should not need to provide evidence that exposure to SHS is a health hazard. Every major credible scientific and public health organization that has studied SHS has concluded that there is no known safe level of exposure and that all involuntary exposure should be avoided. Landlord and tenant boards should take judicial notice that exposure to SHS is dangerous for anyone, and more so for children, the elderly, and those with pre-existing medical conditions.

2. Complainants should not be required to provide evidence of the presence of SHS in the form of sophisticated indoor air quality tests. The protocols for measurement of SHS in multi-unit dwellings are still under development and existing generic indoor air quality testing is expensive and doesn't measure those components of SHS unique to SHS. As noted in a BC case, arbitrators are not required to comply with the rules of evidence known to courts of law.

   There is no known safe level of exposure to SHS—if it can be smelled, it is present. On the balance of probabilities, a positive sniff test by 3 or 4 credible people on separate occasions should be sufficient proof that SHS is present and that the complainant is being exposed. Other documentation supplied by the complainant, such a log of SHS incursions, could corroborate the application. A negative sniff test on a single occasion should not constitute proof that SHS is absent.

3. In the interest of consistency, landlord and tenant boards should adopt guidelines regarding the amount of SHS that constitutes an unreasonable disturbance. We recommend that guidelines similar to those adopted by the state of Utah in 1997 under code 78-38-1(3), whereby SHS is defined as a nuisance:

   (1) A nuisance is anything which is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property…

   (3) A nuisance under this section includes tobacco smoke that drifts into any residential unit a person rents, leases, or owns, from another residential or commercial unit and this smoke:

   (a) drifts in more than once in each of two or more consecutive seven-day

periods; and
(b) creates any of the conditions under Subsection (1).[44]

4. Exposure to SHS is dangerous for anyone, and if the infiltration of SHS meets the conditions required to be recognized as a nuisance, the law should provide a remedy. People with young children and people with asthma, allergies and other pre-existing medical conditions are neither "hypersensitive" nor "unreasonable" regarding their expectations for clean air.

5. Ordering the use of filters, air purifiers, fans or other types of ventilation may address the problem of SHS odour but will not address the health risks caused by SHS exposure. In its 2005 position document on SHS, the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE), the international standard-setting body for indoor air quality, asserts that ventilation cannot control for the adverse health effects of SHS exposure. ASHRAE, as well as Health Canada, advises that the optimal way to effectively remove SHS from indoor air is to remove the source.[45,46]

6. Boards should recognize that the right to smoke in one's own home is not absolute, even in the absence of a "no smoking" clause in the tenancy agreement.

7. Boards should clarify that landlords have a responsibility to take action to eliminate the infiltration of smoke from one unit to another. Applicants have a right to know what sorts of remedies are realistic if an arbitrator finds, on the balance of probabilities, that there is a SHS infiltration problem. Boards could serve Canadians better by issuing guidelines on the types of orders that arbitrators are able to make in each jurisdiction. For example, it is understood that in British Columbia arbitrators cannot order a landlord to evict a tenant, nor can they order repairs if there are no building, health or safety code violations involved.

Conclusions

Second-hand smoke in multi-unit dwellings is an emerging public issue. Canadians recognize the health risks associated with involuntary exposure to SHS and are becoming less tolerant towards it in all settings, including their homes. Landlords have a responsibility to ensure that

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[44] Utah State Legislature. www.le.state.ut.us/~code/TITLE78/htm/78_34003.htm. Accessed September 7, 2007.
[45] American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. *Environmental Tobacco Smoke. Position Document.* June 30, 2005. www.ashrae.org/content/ASHRAE/ASHRAE/ArticleAltFormat/20058211239_347.pdf. Accessed December 12, 2007.
[46] Health Canada. *Ventilation and filters.* www.hc-sc.gc.ca/hl-vs/tobac-tabac/second/fact-fait/air/index_e.html#control. Accessed September 7, 2007.

the apartments they rent to tenants are in a good state of repair and fit for habitation. The law also recognizes that tenants have the right to reasonable/peaceful/quiet enjoyment of their premises. It is expected that the volume of applications to housing boards dealing with SHS will increase, given the current lack of smoke-free multi-unit accommodations and the inability of landlords in some jurisdictions to enforce their smoke-free policies. It would be prudent for residential tenancy boards to establish policy guidelines on this issue that will better serve Canadians and the interests of public health.

These policies need to establish reasonable means for determining whether SHS is infiltrating one unit from another. Currently some arbitrators have dismissed the sniff test, and others have alluded to the need for sophisticated (and expensive) indoor air quality testing. On the issue of whether SHS constitutes a breach of the covenant of quiet, peaceful or reasonable enjoyment, arbitrators have reached a wide range of conclusions. It is a serious concern that those who need help the most are being labelled as hypersensitive and unreasonable, while others with no medically documented sensitivities to SHS but who nonetheless do not want to be exposed to the many toxins in tobacco smoke are also being dismissed. There is no known safe level of exposure to SHS for anyone, whether or not they have a pre-existing medical condition. Arguably most disturbing in the present environment is the fact that some arbitrators did not even consider the health effects of SHS in rendering their judgments. The reluctance of the state to interfere in what is seen as the private domain of the home should not be taken to such an extreme that people are denied the right to health and well-being in their own homes.

Appendix 1—Case Summaries

1. **British Columbia Residential Tenancy Office, 2006 (Burnaby File # 188052)**

   A subsidized tenant with disabilities including asthma testified that SHS from her neighbour and her neighbour's boyfriend, both of whom chain smoke indoors and out, negatively affected her health and breached her quiet enjoyment. The tenant testified she had been hospitalized as a result of the exposure. The tenant requested a reduction in rent until the landlord repaired the unit to stop the smoke from entering.

   The adjudicator ordered the complainant's unit to be investigated and sealed, with the repairs to be made within 30 days. The decision stated that if the repairs were not completed within 30 days, the tenant would be permitted to deduct $100.00 per month from her rent until they were finished.

2. **British Columbia Residential Tenancy Office, 2007 (Victoria File # 194712)**

   This case was filed following the case above (Burnaby File # 188052) in which the adjudicator ordered the landlord to investigate and seal the apartment to prevent SHS from entering the tenant's unit. In the previous hearing the tenant had been awarded a rent abatement if the repairs were not completed within 30 days. In this case the same tenant maintained that the repairs had not worked and requested that the landlord provide a rent abatement until the SHS stopped infiltrating her apartment.

   The tenant's application was dismissed. The adjudicator ruled that the complainant failed to provide objective evidence proving that her neighbour's smoking constituted an "unreasonable disturbance." The adjudicator noted that the landlord (a municipal, community housing organization) had already gone to some length to address the problem, including establishing a smoke-free building as well as offering the tenant alternative accommodation (albeit reportedly mouldy). The adjudicator implied that the tenant was hypersensitive and that any amount of SHS would be too much.

3. **British Columbia Residential Tenancy Office, 2006 (Burnaby File # 186676)**

   A different tenant in the same building as above testified that SHS from a lower floor neighbour was entering her apartment and breaching the covenant of quiet enjoyment. The tenant sought orders:

   (a) that the landlord comply with the *Residential Tenancy Act* to ensure she is free from unreasonable disturbance;
   (b) that the landlord repair her unit to prevent smoke from entering; and

(c) that the landlord reduce her rent until the repairs are completed.

The adjudicator accepted that exposure to SHS is a health risk and ordered the landlord to caulk or seal the tenant's unit but did not order a rent reduction. The adjudicator stated that the landlord had not breached the covenant of quiet enjoyment, explaining that the covenant does not assure a tenant of no inconvenience, disruption, nuisance or disturbance by another tenant.

4. Ontario Rental Housing Tribunal, 2002 (Docket # TST-04047, Carswell Ont 5023)

In this case the tenant complained, among other things, that the landlords had failed to meet their maintenance obligations and take reasonable steps to prevent tobacco smoke and noise from entering her apartment from the barber shop below.

The adjudicator agreed that both the smoke and the noise substantially interfered with the tenant's reasonable enjoyment of the rental unit and ordered the landlords to repair the floor. The adjudicator awarded the tenant a rent abatement as well as financial compensation for the cost of filing the application. The adjudicator further stated that if the problem resumed, the landlords must take whatever steps are reasonably necessary to ensure that SHS does not enter the tenant's apartment.

5. Ontario Rental Housing Tribunal, 2003 (File # TNT-03370)

Following the case above, the same tenant returned to the tribunal to apply for an order determining that the landlords had substantially interfered with her reasonable enjoyment by failing to take adequate steps to prevent noise and tobacco smoke from entering her apartment. Despite the fact that a renovation of her floor had been completed, the tenant maintained that smoke was still coming into her unit.

The adjudicator stated that the tenant was not allergic to tobacco smoke and that she had failed to produce reliable, objective medical evidence to substantiate her claim that her dust allergy was worsened by SHS. In addition, the adjudicator stated that the tenant had offered no evidence about the quantity of SHS in her unit or whether the presence of the smell of SHS indicated the presence of potentially dangerous substances. The application was dismissed with the adjudicator emphasizing how the tenant had failed to provide objective evidence to substantiate her claims.

6. Ontario Rental Housing Tribunal, 2006 (File #SWT-08000)

The tenants filed an application stating that their landlord had interfered with their reasonable enjoyment of their apartment by failing to control the cigarette smoke that was entering their unit from a neighbour's unit. The tenants, one of whom had serious allergies and asthma, had selected the building to live in based on a newspaper

advertisement stating that the building was “smoke-free and pet-free.” The tenants wanted orders to force the landlord to:

a) close off the duct work from the air exchange system and remove the pipes from the apartment where the SHS originated;
b) install wall-mounted units for air exchange and humidity; and
c) restore the status of the building as “smoke free” and “pet free.”

The tenants’ application was dismissed. Although the adjudicator accepted that SHS could constitute a breach of the covenant of reasonable enjoyment, he concluded that the evidence did not support it in this case. The adjudicator stated it would be inappropriate to make the building smoke-free without adding the other tenants to the application. He further stated that the no-smoking requirement in their lease was not applicable to the other leases and that there was no universal smoke-free standard to uphold.

7. British Columbia Residential Tenancy Office, 2005 (Victoria File # 233968)

The tenant alleged she entered into the tenancy agreement on the basis that the building was non-smoking. Upon being exposed to SHS from neighbouring units, the tenant moved out and was seeking financial compensation from the landlord for her expenses.

The adjudicator ruled that the building manager had misrepresented the building as being non-smoking and that the tenant had been exposed to SHS. The adjudicator further stated that it was unnecessary to determine with certainty where the smoke was coming from, noting that arbitrators are not required to comply with the rules of evidence known to courts of law. The adjudicator awarded the tenant compensation for a variety of expenses related to moving, as well as for chiropractic treatments and massage therapy needed for her health problems caused by SHS exposure.

8. Ontario Rental Housing Tribunal, 2003 (File # TSL-52189)

The landlord, who had recently bought a house having a pre-existing basement tenant who smoked, claimed that her tenant’s SHS was substantially interfering with her reasonable enjoyment of the house. There was no written lease and no oral agreement that addressed the issue of smoking.

The adjudicator ruled that, despite the tenant having a prima facie right to smoke owing to the lack of a no-smoking rule, the landlord’s reasonable enjoyment of the house had indeed been interfered with and that she had a right to be free of the risks of smoking in her unit. The adjudicator ordered that the landlord would be able to obtain an eviction order for non-compliance.

9. Ontario Landlord and Tenant Board, 2007 (File # EAL-00666 & EAT-08083)

In this double case, the tenant applied for an order determining that the landlords had substantially interfered with her and her daughter's reasonable enjoyment by failing to prevent SHS from infiltrating her rental unit. Coincidentally, the landlords applied for an order to terminate the tenancy at the same time, citing they needed the unit for their parents.

Although the adjudicator accepted that SHS is harmful to health, he questioned the tenant's credibility and concluded that there had been no breach of the covenant of reasonable enjoyment. Finding the landlords' application had been made in good faith, the adjudicator terminated the tenancy, allowing the tenant to remain until the end of the school year.

10. Quebec Rental Board, 2007 (File # 31 061110 009 G)

An asthmatic, pregnant landlord applied for an order to prevent her upstairs tenant from smoking in the unit, as the tenant's SHS was infiltrating the landlord's downstairs apartment. Before signing the lease and moving in, the tenant had provided references on a form that clearly read "no pets and no smokers." The lease itself did not include the no-smoking rule.

The adjudicator ruled that the application form, which stated "no pets and no smokers," was not a binding document to which tenants may be held and thus permitted the tenant to keep smoking. A tobacco industry front group, *MonChoix.ca,* was on hand at the hearing to lend support to the tenant.

The landlord has since appealed this decision and the adjudicator has four months to make his ruling. The lawyer retained by the tenant is known to charge $300 per hour and at least one media report has questioned Big Tobacco's deepening involvement in this case.[47]

[47] Ravensbergen, J. *Landlord reignites fight over smoking ban.* The Montreal Gazette, Saturday, December 1, 2007.