

Non-Smokers' Rights Association Smoking and Health Action Foundation

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Human Rights and No-Smoking Policies for Multi-Unit Dwellings

The smoke-free multi-unit housing trend in Canada is gaining momentum as more landlords and housing providers realize the many benefits of a no-smoking policy. However, some stakeholders in the housing sector are under the mistaken impression that no-smoking policies are discriminatory, believing that because smoking tobacco is an addiction, it therefore constitutes a disability.

Every province and territory in Canada has legislation governing human rights, and in most jurisdictions it is called the *Human Rights Code* or *Act*. Each Code or Act usually overrides all other laws, protecting people from discrimination on protected grounds such as disability, family status, age, race, sexual orientation, income, etc. in areas of provincial jurisdiction such as housing and education.

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. Section 15(1) of the Charter protects against discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. However, the Charter only applies to government laws and actions (including the laws and actions of federal, provincial, and municipal governments), not to private activity.

Although smoking in itself is not an enumerated ground for protection in any of these laws, there are a few Canadian legal cases where no-smoking policies have been challenged on the basis that smoking is a disability. However, there are two sides to the smoking and discrimination story, and case law is emerging in which residents of multi-unit dwellings cite discrimination because of chronic health conditions made worse by involuntary exposure to second-hand smoke in their own homes.

Is smoking a disability?

The question of smoking being recognized as a disability has been considered a number of times in recent years, mostly under section 15 of the *Canadian Charter of Rights and Freedoms*. Judges and arbitrators have consistently ruled, with one exception, that smoking is not a disability.¹

¹ For example, see *McNeill v. Ontario (Ministry of the Solicitor General and Correctional Services)* (1998), 126 C.C.C. (3d) 466 (Ont. Ct. J. (T.D.)); *R. v. Ample Annie's Itty Bitty Roadhouse*, [2001] O.J. No. 5968

The one exception is a 2000 arbitration decision made by the British Columbia Labour Relations Board with respect to that province's *Labour Relations Code*.² At issue was an employer's decision to ban smoking on company property inside and out. Cominco is a nickel smelter with property that exceeds 450 acres—a size that makes the average 15 minute smoke break off property impossible. The Union argued that nicotine addiction and the related effects of nicotine withdrawal constitute a disability within the meaning of the BC *Human Rights Code*. Further, the Union's position was that the company's no-smoking policy discriminated against smokers because, if they couldn't control their addiction and refrain from smoking for an 8 or 12 hour shift, the end result would be their dismissal. The Union stated that addicted smokers must be accommodated in ways that would permit them to continue working, the best way being to permit smoking in outside areas away from other employees.³

It is important to note that a key consideration of the Cominco decision was the disabling effect of nicotine withdrawal on employees during their long shifts. In making his decision, the arbitrator specified that it is the "state of disablement" that is protected by human rights legislation, not the behaviours that may have led to the addiction. However, the arbitrator also recognized that there is no inherent right to smoke and that the employer's no-smoking policy was reasonable and was adopted to protect non-smokers from a known hazard. The matter was referred back to the parties to resolve how to accommodate employees, subject to undue hardship of the company. Cominco's smoking ban remains in effect today.⁴

Are no-smoking policies in multi-unit dwellings discriminatory?

Landlords and housing providers have the choice to adopt a no-smoking policy. Such a policy could prohibit smoking in private units, could include a ban on smoking on balconies, patios and in common-use outdoor areas, or could even extend to the entire property. To clarify, a no-smoking policy:

- Does not prohibit smokers from renting or buying accommodation;
- Does not mean people will be evicted simply for being smokers; and
- Does not force people to quit smoking.

The Non-Smokers' Rights Association is not currently aware of any Canadian legal case where a landlord's no-smoking policy has been challenged on the

(Ont. Ct. J.); *Regina Correctional Centre Inmate Committee v. Saskatchewan (Department of Justice)* (1995), 133 Sask. R. 61 (Q.B.).

² *Cominco Ltd. v. United Steelworkers of America, Local 9705*, [2000] B.C.C.A.A.A. No. 62.

³ *Ibid.*

⁴ Smoke-Free Housing BC., "TeckCominco Decision: 2000 BC Labour Relations Board Arbitration between Cominco Ltd. & the Union Re: Cominco Smoking Ban", undated, www.smokefreehousingbc.ca/pdf/teckcominco-decision.pdf.

basis of discrimination. Furthermore, given the existing case law on smoking and discrimination, it appears highly unlikely that any future challenges would be successful. Even the Cominco case is unlikely to influence future decisions, as it focused on the disabling effects of nicotine withdrawal during shift work. Residents of smoke-free multi-unit dwellings are free to step outside for a cigarette any time they choose—thus avoiding the potentially disabling effects of serious nicotine withdrawal.

Landlords and housing providers should also note the successful adoption of smoke-free policies at many hospitals in Canada, including facilities like the Mental Health Centre Penetanguishene, Ontario's only maximum-security psychiatric hospital. The smoking rate among people with mental illnesses is much higher than in the general population, and secure-facility patients are not permitted to smoke at all.

The Ontario Human Rights Commission (OHRC) is an independent statutory body, providing leadership for the promotion, protection and advancement of human rights. In 2007 the OHRC published a report on human rights and rental housing which expressed concern that no-smoking policies could have the effect of indirectly discriminating against marginalized families by creating a barrier to affordable housing.⁵

This seems unlikely. At present, there are virtually no smoke-free choices in the affordable housing market for low income Canadians. In fact, it is arguable that the lack of smoke-free choice is in itself discriminatory, given the disproportionate burden of chronic disease and disability faced by low income Canadians.

The duty to accommodate

Under human rights legislation, landlords and other housing providers have the duty to accommodate residents who have been discriminated against up to the point of undue hardship. In 2009 the OHRC published guidelines to help improve equal access to rental housing in Ontario. The document, *Policy on Human Rights and Rental Housing*, is "Canada's first comprehensive look at how barriers to housing can be identified and eliminated."⁶

Section 6.1 of the report deals with smoking in rental housing, and reaches the following conclusion:

A housing provider has a duty to explore accommodation requests from tenants with any form of disability. Tenants may

⁵ Ontario Human Rights Commission, "Right at home: Report on the consultation on human rights and rental housing in Ontario", May 28, 2008,

www.ohrc.on.ca/en/resources/discussion_consultation/housingconsultationreport/pdf.

⁶ Ontario Human Rights Commission, "Policy on Human Rights and Rental Housing", July 21, 2009, <http://www.ohrc.on.ca/en/resources/Policies/housing>.

also be asked to cooperate and help facilitate the provision of accommodation for themselves, and where appropriate, for their fellow tenants as well.

However, given the inherent risks associated with smoking, a housing provider may have little or no obligation to accommodate a tenant's need to smoke when to do so would amount to undue hardship, for example, by negatively affecting the health and safety of other tenants.⁷

For the sake of argument, it is possible that a judge or arbitrator might accept that a landlord's no-smoking policy is discriminatory. However, facilitating an addiction to nicotine by simply striking down a no-smoking policy and allowing other residents to continue being involuntarily exposed to second-hand smoke would not generally be regarded as reasonable accommodation of the smoker. Reasonable accommodation could potentially involve the creation of an outdoor designated smoking area or access to the provision of smoking cessation resources. There are many ways of managing an addiction to nicotine that do not pollute the air and involuntarily expose others to second-hand smoke.

Discrimination cuts both ways

Residents of multi-unit dwellings with health conditions made worse by exposure to second-hand smoke are beginning to speak up and protect themselves using human rights legislation. The Non-Smokers' Rights Association is aware of three such cases, all from British Columbia, where tenants have claimed that their housing providers have discriminated against them by failing to provide smoke-free housing.⁸

One case, involving a tenant living in social housing provided by the Greater Vancouver Housing Corporation, has been settled.⁹ Unfortunately, a gag order was put into place and very few details are available except that the complainant is still living in her original unit and the building is now 100% smoke-free. The other two cases are currently being settled and no other details are available.

Conclusion

Access to smoke-free housing, both market rate and affordable, remains extremely poor in Canada. Concern that no-smoking policies may be discriminatory will hamper an increase in the supply of smoke-free housing choices for Canadians.

⁷ Ontario Human Rights Commission, "Policy on Human Rights and Rental Housing", July 21, 2009, <http://www.ohrc.on.ca/en/resources/Policies/housing>.

⁸ *Abraham v. Greater Vancouver Housing*, 2008 BCHRT 41; *Borutski v. Kiwanis Club of White Rock*, 2009 BCHRT 46; *Kabatoff v. Strata Corp.* NW 2767, 2009 BCHRT 344.

⁹ *Abraham v. Greater Vancouver Housing*, 2008 BCHRT 41.

Canadian case law suggests that it is unlikely that smoking would be considered a disability in the context of a landlord's no-smoking policy. Further, facilitating an addiction to nicotine by simply striking down a no-smoking policy and allowing other residents to continue being involuntarily exposed to second-hand smoke would not generally be regarded as reasonable accommodation of a resident smoker.

Moreover, there is emerging human rights case law involving residents of multi-unit dwellings claiming that their housing providers have discriminated against them for failing to provide smoke-free housing.

Canadians are starting to demand smoke-free housing and landlords should pay attention. The risk of maintaining the status quo and not providing a smoke-free choice appears far greater than the risk of possibly discriminating against smokers. There are two sides to this debate and future legal challenges will help to clarify and guide the discussion.