

The Non-Smokers' Health Act

A discussion document

prepared by

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Introduction

The federal *Non-Smokers' Health Act*¹ (NSHA) came into force in 1989 to protect non-smokers from second-hand smoke (SHS) in the workplace. Relevant to employees falling under federal jurisdiction, the Act covers approximately 10% of Canada's working population. The activities that come within federal jurisdiction include, but are not limited to,

- The federal civil service
- The House of Commons, Senate, Library of Parliament
- Federal crown corporations and other federal governmental agencies
- Banks
- Radio and television broadcasting
- Commercial aircraft and airports
- Interprovincial and international services including
 - railways
 - highway transport
 - ferries, tunnels and bridges
 - shipping and shipping services
 - canals, pipelines
 - telephone, telegraph and cable systems
- Armed forces
- Prisons
- Certain grain elevators, feed mills, feed warehouses, flour mills and grain-seed cleaning plants
- Uranium mining and processing

The Act essentially separates smokers from non-smokers via designated smoking areas (DSAs) and designated smoking rooms (DSRs). Since some elements of the Act deal specifically with transportation, administration of the NSHA is shared jointly between Transport Canada and Human Resources and Social Development Canada. Prior to passage of the NSHA, there was no federal legislation protecting non-smokers from SHS in the workplace. As such, it was a welcomed and much needed piece of legislation for its time.

However, 17 years later, it is seriously outdated. A number of issues are at stake:

1. We know a lot more now than we did then about second-hand smoke and its damaging health effects;
2. There is also new science on ventilation and DSRs. Simply put, there is no safe level of exposure to SHS, and ventilation as a solution is not based on public health protection;
3. Canada ratified the *Framework Convention on Tobacco Control* (FCTC), the world's first

¹ Non-Smokers' Health Act. *Revised Statutes of Canada*. Chapter N-23.6 (R.S., 1985, c.15 (4th supp.)).

public health treaty, in November, 2004. Currently, the NSHA does not fulfill Canada's obligation to provide protection from SHS in areas of national jurisdiction under this legally-binding treaty;

4. Most provincial and territorial SHS legislation/occupational health and safety regulations have surpassed the level of protection offered by the NSHA. This has essentially created second-class employees who fall under federal jurisdiction, and is particularly noticeable in Canada's 7 smoke-free provinces and territories (Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, Nunavut and the Northwest Territories) where approximately 90% of employees enjoy clean air at work. Employees in airports and prisons deserve special mention in this respect. All employees, regardless whether they are governed by federal or provincial/territorial legislation or occupational health and safety (OHS) regulations, are entitled to a smoke-free workplace;
5. Public opinion favours 100% smoke-free work environments.

The Act and Its Regulations

The *Non-Smokers' Health Act* allows for DSRs and DSAs in a variety of federally-regulated workplaces. DSRs in older buildings do not have to be separately ventilated; smoke-laden air can re-circulate back into the workplace. Moreover, by nature of their duties, non-smoking employees may be required to enter DSRs and DSAs to carry out their work. Cleaning staff would also be expected to enter these areas. Refer to the table below for specific examples of the activities covered under the Act:

Workplace	Designated Smoking Rooms	Designated Smoking Areas
Airports and Marine Passenger Terminals		-DSAs permitted in passenger terminals -any interior public portion of the terminal can be designated as a smoking area, up to 30% of the total surface area
Aircraft (domestic and international)	-Smoking prohibited as of September 1994	
Railway and Interurban Bus Stations (does not apply to provincially-owned commuter trains)		-DSAs permitted in areas to which the public is admitted if: a) there is at least 112m ² of surface area to which the public is admitted, and b) the DSA does not exceed 30% of that surface area

Workplace	Designated Smoking Rooms	Designated Smoking Areas
Trains	-DSRs permitted (no ventilation requirements)	-DSAs permitted in passenger seating areas provided that: a) not more than 33.3% of seats on the train are in a DSA, and b) not more than 33.3% of the passenger cars contain DSAs
Ships	-DSRs permitted on passenger ships in passenger cabins (no ventilation requirements)	-DSAs permitted in passenger common areas provided the total surface area of the DSA does not exceed 30% of the common areas -On non-passenger ships, any area used by employees for leisure or recreation can be designated as smoking
Motor Vehicles, lighthouses, crane cabs, cabooses, locomotives	-DSAs or DSRs permitted provided ventilation system is not shared, only one person has access during a shift and the DSA or DSR is not incorporated within any other work space	-DSAs or DSRs permitted provided ventilation system is not shared, only one person has access during a shift and the DSA or DSR is not incorporated within any other work space
Other indoor, federally-regulated workplaces	-Buildings built after 1990: employer can designate a DSR but must be independently ventilated to outside (in accordance with ASHRAE Standard 62-1989) -Buildings built before 1990: DSRs permitted, however, air can re-circulate back into the workplace	

In addition to the 5 issues noted above that highlight the need for change, there is another problem with the Act that has seriously hampered its usefulness. From a complaints process point of view, the Act is a weak piece of legislation. In contrast, the *Canada Labour Code*, the legislation that addresses federal workplace occupational health and safety, is clear and strong. For example, the government releases Operations Program Directives (OPDs) and Interpretation, Policies and Guidelines (IPGs), which are really consolidations of various procedures, to assist employers, employees and safety officers interpret and apply

certain provisions of the Code.¹ Unfortunately, the *Non-Smokers' Health Act* has none of these, which leaves a lot of room for individual discretion by safety officers. However, there is a possibility that this could be rectified in the future², perhaps in response to complaints and pressure from safety officers themselves.

Once a formal complaint of exposure to SHS has been received and investigated by a federal safety officer under the *Non-Smokers' Health Act*, an *Assurance of Voluntary Compliance* can be issued. Essentially, this assurance is a warning, and is up to the discretion of the safety officer. If after two weeks the problem persists, the safety officer can issue fines. The *Non-Smokers' Health Act* indicates that for employers found guilty of a first offence, a fine of \$1,000 can be issued. For a subsequent offence, the fine is not to exceed \$10,000.³ Similarly, a fine of \$50 can be issued to an employee for a first smoking offence, and a fine not to exceed \$100 can be issued for subsequent offences.⁴ However, in the 17 years that the Act has been in force, only twice have employees been fined \$50, and no employer has ever been fined, let alone prosecuted.⁵ With employers left to their own devices to deal with the smoking issue, some employees must fight for their rights through an exhaustive procedure of official complaints, work refusals, appeals and counter-appeals to have what most other workers in Canada already have: clean air at work. Such a system can make the work environment doubly-poisonous. Not only are certain employees exposed to second-hand smoke, but they must also risk friction and ostracism from their employers for standing up for their rights.

A federal *Access to Information* request revealed that since the year 2000, 68 complaints of exposure to SHS have been made to the NSHA.⁶ Under the Canada Labour Code, there have been 43 “activities” including complaints and work refusals.⁷ These statistics may not be entirely reliable, as a differently-worded request could have yielded higher numbers. The sources of these complaints and work refusals remain unknown. However, anecdotally it has been reported that under the *Non-Smokers' Health Act*, the majority of complaints of SHS exposure relate to smoking outside around building entrances, in underground parking garages, and in prisons. Unfortunately, outside smoking is not addressed in the Act.

¹ **Harrison M**, Hill D. *Protection from second-hand tobacco smoke in Canada: Current legislative and case law trends*, 2002. Physicians for a Smoke-Free Canada. URL: <http://www.smoke-free.ca/Second-Hand-Smoke/2002-03%20Workshop%20CDROM/Harrison-Hill%20Paper.pdf>

² **Marion, S.** Federal Safety Officer, Human Resources and Social Development Canada. Personal communication, April 18, 2006.

³ **Non-Smokers' Health Act.** *Revised Statutes of Canada*. Chapter N-23.6 (R.S., 1985, c.15 (4th supp.)).

⁴ *ibid*

⁵ **Marion, S.** Federal Safety Officer, Human Resources and Social Development Canada. Personal communication, April 7, 2006.

⁶ **Human Resources and Social Development Canada.** Access to Information request. *Investigations of complaints under the Non-Smokers' Health Act by Region- from 2000-2006*. Available upon request.

⁷ **Human Resources and Social Development Canada.** Access to Information request. *Toabacco (sic) smoke in air by region date issued 2000 to 2006*. Available upon request.

Discussion

1. Second-hand Smoke and Its Health Effects

Seventeen years ago when the NSHA was passed, the weight of evidence implicating second-hand smoke as being damaging to health was starting to mount. The landmark report of the U.S. Surgeon General entitled *The Health Consequences of Involuntary Smoking*¹ had been published in 1986, just three years prior. The first major report on the health effects of SHS, it warned that involuntary smoking is a cause of disease, including lung cancer, in healthy non-smokers. It also advised that separating smokers from non-smokers within the same air space would not eliminate non-smokers' exposure to SHS. All other major landmark SHS studies and reports were published after the *Non-Smokers' Health Act* was brought into force.

An interpretive bulletin of the NSHA published by Labour Canada² in 1990 indicates that, “prolonged exposure to second-hand tobacco smoke may also increase incidences of lung cancer and heart disease.” Today, it is scientifically proven that SHS does indeed cause lung cancer and heart disease. There is an estimated overall 24% increased risk of lung cancer in non-smokers and an estimated overall 25% increased risk of heart disease.³ Other long-term health effects associated with SHS exposure include breast cancer, cervical cancer, stroke, exacerbation of cystic fibrosis, decreased lung function and miscarriage.⁴ Health Canada estimates that every year, some 700 non-smokers will die of heart disease,⁵ and 300 will die of lung cancer as a result of prolonged exposure to second-hand smoke.⁶

There are also short-term consequences of exposure to SHS, particularly irritation of the eyes, nose, throat, and respiratory system. Many non-smokers also report headache, dizziness, and nausea when exposed to cigarette smoke. However, the impact on health in the short-term is more serious than mere irritation. Brief exposure increases carbon monoxide levels in the blood, which can trigger angina in people with coronary heart disease. Research shows that brief exposure can also produce noticeable changes in the cardiovascular system of people with no history of heart problems.⁷

¹ **U.S. Department of Health and Human Services.** *The health consequences of involuntary smoking. A report of the Surgeon General, 1986.* Rockville, Maryland: Public Health Service, Centers for Disease Control, Office on Smoking and Health. (U.S. Government Printing Office Publication No. DHHS(CDC)87-8398.

² **Labour Canada.** *The non-smokers' health act.* Catalogue No. L151-2088/90B.

³ **Scientific Committee on Tobacco and Health (SCOTH).** *Secondhand smoke: Review of evidence since 1998.* Department of Health, 2004. URL: <http://www.dh.gov.uk/publications>.

⁴ **Ontario Tobacco Research Unit.** *Protection from second-hand smoke in Ontario: A review of the evidence regarding best practices,* May 2001. URL: http://www.otru.org/pdf/special/special_ets_eng.pdf

⁵ **de Groh M, Morrison HI.** Environmental tobacco smoke and deaths from coronary heart disease in Canada. *Chronic Diseases in Canada* 2002; **23**(1). URL: http://www.phac-aspc.gc.ca/publicat/cdic-mcc/23-1/b_e.html

⁶ **Makomaski Illing EM, Kaiserman MJ.** Mortality attributable to tobacco use in Canada and its regions, 1994-1996. *Chronic Diseases in Canada* 2002; **20**(3). URL: http://www.phac-aspc.gc.ca/publicat/cdic-mcc/20-3/b_e.html

⁷ **Otsuka R, et al.** Acute effects of passive smoking on the coronary circulation in healthy young adults. *Journal of the American*

In January of this year, the California Environmental Protection Agency Air Resources Board (ARB) formally identified SHS as a “Toxic Air Contaminant” (TAC) that may cause and/or contribute to serious illness or death.¹ This classification puts SHS in the same category as the most toxic automotive and industrial air pollutants, and will trigger increased action to reduce exposures. The report that led to classifying SHS as a TAC is just one of the latest to join an impressive group of reports built on sound science. The bottom line is that today, the message from a sea of authoritative reports is clear, consistent and unanimous - all exposure to SHS is harmful, and therefore involuntary exposure should be eliminated. Clearly, the allowances for designated smoking areas and designated smoking rooms within the *Non-Smokers' Health Act* are incongruous with today's vast body of knowledge on SHS.

2. Ventilation and Designated Smoking Rooms

The *Non-Smokers' Health Act* regulations cite ASHRAE *Standard 62-1989* for ventilation requirements. ASHRAE, *The American Society of Heating, Refrigeration Air Conditioning Engineers*, is the world authority on ventilation, setting standards for ventilation rates that are widely adopted as industry norms. *Standard 62-1989* does not give special consideration to SHS but merely recommends exhausting the smoke with no recirculation. Furthermore, ASHRAE indicates that tobacco smoke is a complex mixture and that “...to some degree, adequacy of control must rest upon subjective evaluation.”² *Standard 62-1989* has been revised many times and is no longer recognized by ASHRAE as current. In other words, the *Non-Smokers' Health Act* cites an out-of-date standard for ventilation.

There is no acceptable level of exposure to SHS. No scientific authority or regulatory health body in the world to date has established an exposure limit. ASHRAE's *Addendum 62o to Standard 62-2001- Ventilation for Acceptable Indoor Air Quality* states that smoking areas should have increased rates of ventilation, based on comfort, but asserts that “*specific ventilation rate requirements cannot be determined until cognizant authorities determine the concentration of smoke that achieves an acceptable level of risk.*”³ As such, ASHRAE states that indoor smoking bans are the only way to effectively eliminate the health risks associated with exposure to SHS.⁴

3. Federal versus Provincial/Territorial Jurisdiction

Over the past few years, most provinces and territories have passed smoke-free legislation

Medical Association 2001; **286**: 436-441.

¹ **California Environmental Protection Agency Air Resources Board.** January 26, 2006 *News release: California identifies second-hand smoke as a “Toxic Air Contaminant”*. URL: www.arb.ca.gov/newsrel/nr012606.htm

² **American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc.** *ASHRAE standard 62-1989- ventilation for acceptable indoor air quality*, 1989.

³ **American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc.** *Addendum 62o to ANSI/ASHRAE standard 62-2001*, 2002. URL: <http://www.ashrae.org/template/PDFDetail?assetID=24653>

⁴ **American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc.** *Environmental tobacco smoke position document*, 2005. URL: <http://www.ashrae.org/template/SecondaryLinkLanding/category/5385>

that is much more comprehensive than the protection offered by the NSHA. These pieces of provincial and territorial legislation reflect current scientific evidence on second-hand smoke, as well as society's concerns regarding exposure. Refer to the table below:

100% Smoke-free	Province/Territory	Workplace Legislation or Regulation	Nature of Protection for Employees in Workplaces
No	British Columbia	British Columbia Occupational Health and Safety Regulation (WCB) (2002)	Smoking permitted in DSRs
No	Alberta	Smoke-Free Places Act (amended) (2006)	Smoking permitted in DSRs anywhere minors are prohibited, including offices and factories
No	Saskatchewan	Occupational Health and Safety Regulations (1996)	Smoking permitted in both DSAs and DSRs
Yes	Manitoba	Non-Smokers' Health Protection Act (Various Acts Amended) (2004)	100% smoke-free in virtually all workplaces (group-living facilities exempt); legislation explicitly excludes federally-regulated airports, prisons, lands reserved for First Nations, etc.
Yes	Ontario	Smoke-Free Ontario Act (2006)	100% smoke-free in virtually all workplaces (residential care facilities exempt)
Yes	Québec	Tobacco Act (2006)	100% smoke-free in virtually all workplaces (long-term care facilities exempt)
Yes	New Brunswick	Smoke-free Places Act (2004)	100% smoke-free in virtually all workplaces (group living facilities exempt); legislation explicitly excludes federally-regulated airports, prisons, etc.
Yes	Nova Scotia	Smoke-free Places Act (Amended) (2006)	100% smoke-free in virtually all workplaces (residential care facilities exempt)
No	Prince Edward Island	Smoke-free Places Act (2002)	Smoking prohibited in many workplaces; DSRs permitted in others

100% Smoke-free	Province/Territory	Workplace Legislation or Regulation	Nature of Protection for Employees in Workplaces
No	Newfoundland and Labrador	Smoke-free Environment Act (2005)	DSRs permitted in some workplaces to which the public does not have access
No	Yukon	Smoke-free Work Environment (1994) (government policy)	100% smoke-free workplaces only for government employees under the <i>Public Service Act</i> and the <i>Education Act</i> .
Yes	Nunavut	Safety Act (WCB)-Environmental Tobacco Smoke Work Site Regulations (Section 25) (2004); Tobacco Control Act (2004)	100% smoke-free workplaces with very few exceptions such as residential care facilities, underground and fly-in mine sites. DSRs permitted where workers live at an enclosed work site.
Yes	Northwest Territories	Safety Act (WCB)-Environmental Tobacco Smoke Work Site Regulations (Section 25) (2004); Tobacco Control Act (2006)	100% smoke-free workplaces with very few exceptions such as residential care facilities, underground and fly-in mine sites. DSRs permitted where workers live at an enclosed work site.

As can be seen from the table, seven jurisdictions have 100% smoke-free protection for virtually all workers: Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, Nunavut and the Northwest Territories. Although federally-regulated jurisdictions are implicitly exempt from provincial and territorial legislation, Manitoba and New Brunswick are explicit in this respect. This schism in legislation is problematic for two reasons. First, it demonstrates that employees under federal jurisdiction are unfortunate second-class workers. Second, it exposes the federal government to potential litigation for failing to provide a healthy workplace for its employees. A recent addition to the *Criminal Code*, Section 217.1, could potentially expose employers to criminal liability for failing to provide clean air in the workplace.

Strong and consistent federal legislation avoids a patchwork approach to occupational health and safety and eliminates second-class workers. At present, many federal employees work under partial, complete, or quasi-smoking bans that were created by their employers. For example, Canada Post has no official smoking policy. The organization has a “corporate practice” of no indoor smoking and no DSRs.¹ VIA Rail trains and offices are entirely non-smoking. However, smoking is currently permitted in designated areas of train stations in Montreal, The Pas and Prince George. All other stations are entirely non-

¹ Canada Post, personal communication, April 3, 2006.

smoking.¹ Canadian Broadcasting (CBC) buildings adhere to local by-laws.² Therefore, employees in smoke-free cities such as Toronto or Ottawa enjoy a smoke-free workplace. Unfortunately, some of their colleagues in the Yukon, British Columbia, Alberta, Saskatchewan, Prince Edward Island, and Newfoundland and Labrador do not. Employees at Canadian National (CN) enjoy a 100% smoke-free workplace, both on trains and in offices.³ Correctional Service Canada (CSC) has a 100% smoke-free policy on paper; however, the Union of Canadian Correctional Officers describes it as a partial ban and an inside source reports significant second-hand smoke exposure for employees.⁴

There is no reason why some federal employees should have to suffer while others enjoy a smoke-free workplace. Workplace smoking has been successfully banned in 7 provinces and territories, in many municipalities, and even in entire countries, such as Ireland. As an employer with a duty to protect its employees, the federal government is lagging. Banning smoking in the workplace would bring it up to par with most of the rest of the country.

The following areas deserve particular attention:

Airports

In 1992 the federal government passed the *Airport Transfer (Miscellaneous Matters) Act*⁵ that enabled it to divest responsibility for financial and operational management to designated airport authorities. In other words, the legislation allowed the government to change its role from airport owner and operator to that of owner and landlord. Nevertheless, for matters of occupational health, it is clear that airports remain under federal jurisdiction. The *Airport Transfer (Miscellaneous Matters) Act* did not transfer any authority or jurisdiction with respect to smoking in the workplace or any question of occupational health and safety. The *Non-Smokers' Health Act* applies to every federal work, undertaking or business, as described in greater detail in the *Canada Labour Code*, which states in part, *"In this Act, federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including...(e) aerodromes, aircraft, or a line of air transportation...*⁶

Ninety-four percent of all air passengers and cargo are handled at 26 Canadian airports. Currently, all 26 airports have been transferred and are operating under long-term leases from the federal government. A quick email poll of the busiest airports in Canada's 7 smoke-free provinces and territories indicated that 6 airports continue to provide DSRs for passengers and/or employees. They are:

¹ **VIA Rail**, personal communication, March 29, 2006

² **Canadian Broadcasting Corporation**, personal communication, March 28, 2006.

³ **Canadian National**, personal communication, March 28, 2006.

⁴ **Page H**. Federal correctional officer, personal communication, March 29, 2006.

⁵ **Airport Transfer (Miscellaneous Matters) Act**. *Revised Statutes of Canada*. (R.S., 1992, c.5).

⁶ **Canada Labour Code**. R.S. 1985, c. L-2. URL: <http://laws.justice.gc.ca/en/L-2/248610.html>

Airport	Number of DSRs	Details
Toronto	4	1 in a food court 3 past the gate in secure passenger departure lounges
Ottawa	2	For passengers, both past the gate
London	1	For passengers in passenger lounge
Thunder Bay	1	For both passengers and employees
Québec City	1	In a restaurant (passengers and employees)
Halifax	1	In a restaurant/bar for patrons only

Although it is better that all the airports listed above have DSRs instead of DSAs that the legislation currently allows for, the situation is by no means ideal. The real world of DSRs is full of reports of poorly maintained ventilation systems, clogged vents, inadequate air flows, over-crowding, and doors being propped open. Moreover, because the DSRs are not required by law, one can question how often they are inspected. Even for DSRs that are required by law under the Act (see table pages 3-4), the regulations governing their existence are scant.

In contrast, the new *Smoke-Free Ontario* regulations set out detailed requirements for DSRs, including monthly visual inspections, quarterly routine maintenance visits, and annual engineering inspections including air flow testing. Moreover, the Ontario regulations stipulate that a DSR must be cleaned daily, and that smoking is not permitted for 2 hours prior to cleaning, or while it is being cleaned. Employees are also permitted to refuse entry under the new regulations.¹ By contrast, there is nothing in the *Non-Smokers' Health Act* regulations that treat DSRs to the same degree. Revision to federal legislation or regulation is needed to guarantee that all airports will be smoke-free, now and in the future.

Canadians breathe clean air in many public places and workplaces. Most provinces and territories have SHS legislation that goes beyond what is offered under the federal *Non-Smokers' Health Act*. For many travellers and visitors to Canada, airports are the first point of contact that they have. It is most unfortunate that these first points of contact communicate a smoking message that is not reflective of the rest of the country.

Prisons

In January 2006 a smoke-free policy for all 54 federal correctional institutions was issued under the authority of the Commissioner of the Correctional Service of Canada (CSC).² On

¹ **Ontario Regulation 48/06 made under the Smoke-Free Ontario Act.** *The Ontario Gazette*: March 18, 2006. URL: http://www.e-laws.gov.on.ca/DBLaws/Source/Regs/English/2006/R06048_e.htm

² **Correctional Service Canada.** *Commissioner's directive 259 – exposure to second hand smoke*, 2006. CSC/SCC 1-10 (R-94-02).

paper, the policy prohibits smoking indoors, including private family visiting units and CSC vehicles. One exemption is made for indoor smoking in existing Community Correctional Centres where there is no outdoor access. In these cases, smoking is permitted in a designated smoking area that meets the *Non-Smokers' Health Act* regulations on ventilation. Under the policy smoking is permitted outside. Despite the national smoke-free policy being instituted, cigarettes and lighters continue to be available for sale once every 2 weeks at the prison canteen.

In Ontario, provincial prisons are 100% smoke-free inside and out with no tobacco sold on the premises. Smoke-free prisoners from Ontario institutions transferred to federal prisons such as Millhaven are not only entering a facility where smoking is still widespread, but are also given a \$30 advance for the canteen where they can stock up on cigarettes and lighters!

Prisons, especially those that house maximum security inmates, present a complex problem of exposure to second-hand smoke in the workplace. According to Howard Page, a federal correctional officer at the maximum security Millhaven Institution, approximately 70-80% of inmates smoke.¹ Prisoners have a 90 minute window per 24 hour period during which they are permitted to smoke outdoors, and for some the window is even less. However, they are allowed to have cigarettes and lighters in their cells. Prison guards' observations indicate that inmates continue to smoke in their cells, simply extinguishing their cigarettes when the prison guards perform their predictable and routine rounds. Page reports that on canteen days at Millhaven, the smoke inside the living area of the facility is so thick that it hangs in a haze.²

Sylvain Martel, president of the Union of Canadian Correctional Officers, is quoted in the Toronto Sun as saying that *"the ban is too tricky to enforce because cigarettes are still permitted on premises and smoking is allowed outdoors. The half-policy creates a logistical nightmare for guards who must police sneaky smokers and escort inmates outdoors to light up."*³

For the 20-30% of non-smoking inmates who don't have the luxury of leaving the prison after each shift to go home, their prospects are even more grim. In many cases, prisons are over-crowded, and sometimes non-smokers are even bunked in with smokers.⁴ Inmates can't readily complain about their exposure to SHS, because with the smoking policy now in place, their complaints translate into "ratting" on their fellow inmates, which brings with it valid reasons to fear for their lives. However, a legal precedent was set in 2005 when an inmate at Fenbrook medium security penitentiary was awarded \$5,000 in a federal court for being exposed to second-hand smoke. His lawyer was quoted as saying, *"If the federal*

URL: http://www.csc-scc.gc.ca/text/plcy/cdshtm/259-cd_e.shtml

¹ **Page H.** Federal Correctional Officer, Millhaven Penitentiary. Personal communication, March 29, 2006.

² Personal communication, March 29, 2006.

³ **Harris K.** *Cons break feds' butt ban.* The Toronto Sun, Tuesday March 28, 2006.

⁴ **Page H.** Federal Correctional Officer, Millhaven Penitentiary. Personal communication, March 29, 2006.

government had spent more time watching its own anti-smoking commercials... I think everybody including the taxpayer would have been ahead of the game.”¹

As for employees within the prisons, the Union of Canadian Correctional Officers has filed a mass grievance against Corrections Canada. There have been so many complaints and work refusals to go out on the smoky “range” by guards that shift supervisors have had to fill in.² However, CSC notes that under the *Non-Smokers' Health Act*, it can legally require employees to perform their duties in DSRs or DSAs, which in the prison context translates into the “range” and individual cells.³ Corrections Canada has appealed these work refusals, citing dangerous circumstances, and appears to be using its new smoke-free policy as a way to maintain the status quo.

4. *Framework Convention on Tobacco Control (FCTC)*

Article 8 of the FCTC, *Protection from exposure to tobacco smoke*, requires that:

“Each party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.”⁴

Canada has long been seen internationally as a leader in tobacco control, and was one of the first 40 countries to ratify the treaty. It is a political embarrassment that something as basic as protecting workers from second-hand smoke has not been done. Under the treaty, Canada is legally obligated to act on this issue. Morally, it is reprehensible that something has not yet been done.

5. *Public Opinion favours 100% Smoke-free Workplaces*

In jurisdiction after jurisdiction, the battle for smoke-free workplaces and public places has been fought and won, first in municipalities, then in provinces and territories, and now in entire countries. This domino effect is creating impressive momentum across Canada. Public opinion definitely favours smoke-free workplaces. When participants from the *National Population Health Survey* were asked whether non-smokers should have smoke-free work areas, an astonishing 88% of current smokers and 95% of non-smokers agreed.⁵ Heather Crowe, an Ottawa waitress diagnosed with lung cancer from exposure to SHS,

¹ **Canadian Press.** *Inmate wins lawsuit over second-hand smoke.* 2005-10-14.

² **Page H.** Federal Correctional Officer, Millhaven Penitentiary. Personal communication, March 29, 2006.

³ **Lepage, T.** Senior Project Manager, Correctional Service of Canada. Personal communication, April 12, 2006.

⁴ **World Health Organization.** *WHO framework convention on tobacco control*, 2005. URL: <http://www.who.int/entity/tobacco/framework/download/en/index.html>

⁵ **Public Health Agency of Canada.** National population health survey highlights. *Smoking behaviour of Canadians*. No. 1, Jan. 1999. URL: http://www.phac-aspc.gc.ca/ccdpc-cpcmc/cancer/publications/nphs-sboc/nphs19_e.html

became known in 2003 when she courageously appeared in a Health Canada mass media campaign. Despite her debilitating illness, she has since campaigned tirelessly coast to coast for smoke-free workplaces, raising public awareness on the issue. As she simply states, *"I want to be the last person to die from second-hand smoke."* Today, Heather is sadly losing her battle with cancer. There is no time to waste. The time is right for change.

Options

1. Revise the *Non-Smokers' Health Act Regulations*

There is no acceptable level of exposure to SHS. As previously mentioned, ASHRAE recognizes this and asserts that indoor smoking bans, not ventilation, are the only way to effectively eliminate the health risks associated with exposure to SHS. ASHRAE's *Standard 62-1989* needs to be removed from the regulations. Health Canada also recognizes the problem with ventilation, stating, *"increasing ventilation will dilute the smoke but will not make it safe, since there is no known safe level of exposure to carcinogens... there is only one way to eliminate ETS from indoor air; eliminate the source."*¹ The government of Canada is therefore inconsistent in its position. Health Canada recognizes the most up-to-date research on ventilation; Human Resources and Social Development Canada and Transport Canada are still operating under indoor air standards that date back 17 years.

Smoking in the workplace could be banned by simply repealing certain sections of the NSHA regulations. For example, the definition of ASHRAE could be repealed, as could the paragraphs dealing with DSRs and DSAs in the workplace, smoking on trains, ships, passenger terminals and railway stations.

2. Amend the *Non-Smokers' Health Act*

The NSHA could be amended to completely prohibit smoking in indoor workplaces. For example, definitions of DSRs and DSAs could be removed, as could paragraphs dealing with ventilation, aircraft, trains, ships and motor vehicles. The Act could be further strengthened by explicitly noting the inclusion of indoor parking garages as a workplace, and by adding an outdoor provision for banning smoking around entrances. A complete smoking ban would eliminate employer wiggle room afforded by the language *"to the extent reasonably practicable"* relating to ventilation standards, as found in section 3(4) of the Act.

3. Repeal the *Non-Smokers' Health Act* and Revise the *Canada Labour Code*

The *Canada Labour Code* is the other piece of legislation that is designed to protect federally-regulated employees in the workplace. The Code is very broad in scope. Part II deals with occupational health and safety, and is meant to *"prevent accidents and injury to*

¹ **Health Canada.** *Smoke-free public places: You can get there. Fact sheet #2: Second-hand smoke.* URL: http://www.hc-sc.gc.ca/hl-vs/tobac-tabac/second/fact-fait/air/index_e.html.#control

health arising out of, linked with or occurring in the course of employment..."¹ Furthermore, the Code delineates the order of preventive measures to be taken in the workplace: "Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials..."²

Second-hand smoke is not explicitly mentioned in the Code. In fact, a governmental interpretive text, Interpretation, Policies and Guidelines (IPG) #700-9-IPG-036, indicates that indoor air quality complaints related to second-hand smoke should be handled under the *Non-Smokers' Health Act*.³ However, the *Canada Labour Code* implicitly recognizes SHS as a workplace hazard. In the Code, a hazardous substance is defined as "a controlled product and a chemical, biological or physical agent that, by reason of a property that the agent possesses, is hazardous to the safety or health of a person exposed to it."⁴ There are over 4,000 chemicals that have been identified in second-hand smoke. Sixty-nine of them are carcinogens, including benzene, cadmium, formaldehyde and toluene. Of these 69, 11 are known human (group A) carcinogens, 7 are probable human carcinogens (group 2A), 49 are animal and possibly human carcinogens (group 2B), and two suspected carcinogens have yet to be evaluated by the International Agency for Research on Cancer (IARC).⁵ Two group A carcinogens in particular, 2-aminonaphthalene and 4-aminobiphenyl, have no safe exposure limit as determined by the American Conference of Governmental Industrial Hygienists.⁶ The *Canada Occupational Health and Safety Regulations*, Section 10.19: Control of Hazards, states that, "An employee shall be kept free from exposure to a concentration of an airborne chemical agent... in excess of the value for that chemical agent adopted by the American Conference of Governmental Industrial Hygienists (ACGIH), in its publication entitled *Threshold Limit Values (TLVs) and Biological Exposure Indices*, dated 1994-1995, as amended from time to time."⁷

¹ **Canada Labour Code, Part II, Occupational Health and Safety**. R.S. 1985, c. L-2. URL: <http://laws.justice.gc.ca/en/L-2/248827.html>

² *ibid*

³ **Harrison M, Hill D.** *Protection from second-hand tobacco smoke in Canada: Current legislative and case law trends*, 2002. Physicians for a Smoke-Free Canada. URL: <http://www.smoke-free.ca/Second-Hand-Smoke/2002-03%20Workshop%20CDROM/Harrison-Hill%20Paper.pdf>

⁴ **Canada Labour Code, Part II, Occupational Health and Safety**. R.S. 1985, c. L-2. URL: <http://laws.justice.gc.ca/en/L-2/248827.html>

⁵ **Hoffmann D, Hoffmann I.** The changing cigarette: Chemical studies and bioassays. In National Cancer Institute. *Risks associated with smoking cigarettes with low machine-measured yields of tar and nicotine*. Smoking and Tobacco Control Monograph No. 13, 2001. Bethesda, MD: U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute, NIH Pub. No. 02-5074.

⁶ **Collishaw N, Meldrum H.** *Protection from second-hand tobacco smoke in Canada: Applying health science to occupational health and safety law*, 2003. Physicians for a Smoke-Free Canada. URL: <http://www.smoke-free.ca/Second-Hand-Smoke/2002-03%20Workshop%20CDROM/2003Collishaw-Meldrum.pdf>

⁷ **Canada Occupational Health and Safety Regulations**. SOR 86/304. URL: <http://lois.justice.gc.ca/en/L-2/SOR-86-304/235367.html>

Second-hand smoke, with its 4,000 chemical constituents, is a complex and dynamic mixture. Collishaw and Meldrum assert that due to the zero TLV of the 2 carcinogenic chemicals noted above, calculations to determine the TLVs for chemical mixtures would be undefined. As such, “*the formula for mixtures... of the ACGIH list of TLVs cannot be used for regulatory decision-making with respect to tobacco. Elimination of tobacco smoke remains the only option for full regulatory compliance.*”⁸ Clearly, recognizing second-hand smoke in the workplace as a hazardous substance is required to not only protect employees, but also to bring internal consistency and greater integrity to the *Canada Labour Code*.

As previously mentioned, the *Canada Labour Code* is very clear and comprehensive in matters of occupational health and safety. Safety officers rely on *Operations Program Directives* and *Interpretation, Policies and Guidelines* to interpret and apply provisions of the Code. Revising the Code to ban tobacco would have all the monitoring and enforcement provisions already in place and legislatively, and would not require exhaustive amounts of work. However, to ensure a successful transition of the NSHA being repealed and the Code being revised, it is hoped that additional *Canada Labour Code* human resources would be allocated to handle SHS issues. It would be most unfortunate if this important responsibility ended up at the bottom of any occupational health and safety priority list.

Conclusion

All Canadian workers, regardless of whether they are employed federally, provincially, privately or otherwise, deserve to breathe clean air at work. The current situation of second-class employees under federal jurisdiction is unacceptable and needs rectifying immediately. Not only that, Canada is obligated to act under the legally-binding *Framework Convention on Tobacco Control* treaty. The *Non-Smokers' Health Act* regulations could be revised, the Act itself could be amended, or the Act could be repealed and the *Canada Labour Code* revised. Regardless of how it is done, the federal government is legally and morally obligated to move on this pressing issue.

⁸ Collishaw N, Meldrum H. *Protection from second-hand tobacco smoke in Canada: Applying health science to occupational health and safety law*, 2003. Physicians for a Smoke-Free Canada. URL: <http://www.smoke-free.ca/Second-Hand-Smoke/2002-03%20Workshop%20CDROM/2003Collishaw-Meldrum.pdf>