Non-Smokers' Rights Association
Smoking and Health Action Foundation

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Can the Smell of Second-hand Smoke in an Apartment Constitute Damage?

In a recent decision handed down by the Landlord and Tenant Board (LTB) in Toronto (Cebula v. Davidson, 2008), an adjudicator determined that second-hand smoke (SHS) does indeed constitute damage, and that such damage is not normal wear and tear. At issue was the breach of a no-smoking clause in a rental agreement. The landlord, who is in the business of renting short-term, furnished luxury smoke-free apartments, applied for an order to terminate the tenancy and evict the tenant. The tenant had knowingly entered into the lease, as the landlord had explicitly pointed out her no-smoking policy. Not only was the landlord successful in evicting her tenant, but the board also ordered that the tenant compensate her for her losses—to the tune of $10,000, the maximum amount allowable. However, the case was appealed based on the compensation awarded, and the final decision has not yet been issued.

This case is important and could mark the beginning of a watershed in Ontario for landlords who wish to offer smoke-free accommodations. First, the adjudicator determined that it is lawful to include a no-smoking clause in a rental agreement. No-smoking clauses are neither expressly prohibited by the *Residential Tenancies Act, 2006* nor contrary to the Act. Second, the adjudicator determined that once a lease containing a no-smoking clause is signed by the parties, the landlord gains a lawful right and a breach of the clause may constitute a substantial interference with that right. Third, the adjudicator determined that the smell of SHS in the apartment and its furnishings constituted damage which is not normal wear and tear but is due to negligence of the tenant. The tenant disagreed with the landlord on this point, stating that there were no signs of tar or discolouration on the walls or ceiling. However, the adjudicator correctly identified that the definition of damage can also mean that something becomes less useful, valuable, or in some way becomes impaired. By smoking in the unit, the tenant effectively changed its status from non-smoking to smoking and thereby substantially interfered with the right of the landlord to engage in and protect her business of renting furnished luxury accommodation to a wider clientele of non-smokers.

In terms of evidence, this case was relatively easy. The landlord's cleaning service was able to provide concrete evidence that smoking was going on. The tenant did not deny it, although there was a dispute regarding *how much* smoking was occurring. However, to the credit of the adjudicator, the case did not wade into or hinge on the murky question of what constitutes excessive smoking. Indeed, if an apartment is impregnated with SHS, how relevant is the number of cigarettes that caused it? There is no known

safe level of exposure to SHS, and most people who do not want to be exposed will not tolerate it at all, period. In addition, the adjudicator accepted written testimony from third parties attesting to the smell of SHS. This is contrary to at least one previous LTB case which was dismissed, in which there was a denial about smoking but which included letters written by third parties confirming they could smell SHS.

It is hard to determine how this case will influence the outcome of future LTB applications dealing with SHS, as board decisions are not bound by precedent. It should be noted that this case did not deal with the health effects of involuntary exposure to SHS. Most of the SHS cases known to the Non-Smokers' Rights Association are applications for a recognition of the breach of the covenant of reasonable enjoyment due to the infiltration of SHS. Furthermore, this case focused on the damage to the landlord's interests based on the smell of SHS in the furnishings. Although the adjudicator did recognize the necessity of having the apartment walls washed and painted, there is no guarantee that similar future applications pertaining to unfurnished units will yield comparable results. Finally, it is hoped that adjudicators in future SHS cases will take notice of this one and be satisfied with third party evidence attesting to the smell of SHS. Nonetheless, this case is very encouraging for landlords who are interested in adopting no-smoking policies, as it confirms that such a policy inserted into a lease is legal and enforceable, at least under certain circumstances.