

Smoking, Second-Hand Smoke and the Landlord and Tenant Board: Observations from 2010 - 2014

Introduction

When it comes to standing up for smoke-free air in private homes, the Smoking and Health Action Foundation is happy to report that despite smoking prevalence having decreased over the years, cases at the Ontario Landlord and Tenant Board (LTB) involving smoking are much more common than a decade ago. This is likely a function of heightened public awareness about exposure to second-hand smoke (SHS) in multi-unit buildings, and increasing demand for smoke-free housing.

The LTB, created under the *Residential Tenancies Act*, has a mandate to provide information about the *Act* and to resolve disputes between landlords and tenants. Problems that cannot be settled amicably can be taken before the LTB by landlords or tenants for mediation and/or adjudication. In 2007 when we last reported on cases involving smoking and SHS intrusion, we could only find 5 from Ontario.ⁱ Today, we have dozens posted online, equally represented by landlords with and without no-smoking policies, as well as tenants.ⁱⁱ This resource highlights some of our observations noted from these cases that date from 2010 to the present that involve smoking and exposure to SHS.

If you are thinking about filing an LTB application, we recommend that you first read our Landlordⁱⁱⁱ or Tenant Guide,^{iv} as well as applicable sections of our Smoke-Free Housing Ontario website.^v

Observations

1. There are no guarantees at the Landlord and Tenant Board

Decisions made at the LTB are not bound by precedent and with no guidelines in place for adjudicators on how to handle cases involving smoking and exposure to SHS, sometimes similar cases can have very different outcomes. The good news is that unlike a decade ago, there is generally a better appreciation of the toxicity of SHS, even when it infiltrates one unit from another. Applicants typically do not need to bring forward proof to this effect. Applicants can realize best possible outcomes by understanding the legal process and the various forms involved, filling out the paperwork correctly, and requesting orders within the jurisdiction of the LTB. It's also important to pay close attention to time requirements on an application, as a case can be dismissed based on violation of this alone. The LTB has excellent instructions available online to accompany the various different forms for landlords and tenants.^{vi}

2. Inclusion of a no-smoking policy in a lease has been determined to be a landlord's right, privilege or interest to live smoke-free and/or to provide a smoke-free environment

No longer a question of whether or not it is even legal, adjudicators have determined in recent years that inclusion of a no-smoking clause in a lease amounts to a landlord exercising his or her right to live smoke-free, and/or provide a smoke-free environment for tenants. In many instances this right has been recognized regardless of any health problems brought forward. We currently have 11

cases online dating back to 2010 that involve landlords enforcing their no-smoking policies; in 10 of them the landlords were successful.

3. Adjudicators often determine that exposure to SHS constitutes substantial interference with reasonable enjoyment

This is a conclusion that has been made with or without a no-smoking policy in place, with or without health concerns cited, and is often the case if a landlord does not respond to or act on a tenant's complaints. In addition, most cases dating from 2010 have not seen adjudicators attempt to determine an acceptable threshold of exposure to SHS, presumably recognizing that there is none. However, in cases where the landlord does act on a SHS complaint, as ineffective as the response may be, an adjudicator may determine that the tenant is being unreasonable. For example, in a case from 2011, a landlord installed door sweeps in response to a tenant's complaints about SHS, as well as ask the other tenants not to smoke. After which the smoke allegedly continued to infiltrate, the adjudicator dismissed the case, noting that *"a reasonable person who moves into a multi-tenanted building would find it acceptable and expect a reasonable level of intrusion of odours. A standard of absolute non-permeation of odours in a multi-tenanted building cannot be expected nor is it reasonable to expect."*^{vii}

4. You don't need scientific evidence to prove the presence of SHS in your home

Going back 5 years, we are not aware of any cases in which an adjudicator required an applicant to produce scientific evidence of SHS intrusion. This does not mean that you need not worry about providing evidence at all. Past cases demonstrate that such things such as log books documenting the frequency of SHS intrusion and its effects, records of complaints made to the landlord or property manager, testimony from third parties as well as records of doctor visits and medications have all been successfully used as evidence of smoke intrusion. However, note that without a witness appearing before the LTB to testify in person, an adjudicator may dismiss the evidence as hearsay.

5. Smoking-related damage to a unit may be beyond what is considered normal wear and tear

Citing "excessive smoking" as the cause of a unit's discoloured walls and ceilings, one adjudicator ordered tenants to wash and prepare the surfaces for painting.^{viii} Interestingly, there was no discussion noted regarding how many cigarettes were smoked per day, or what constituted "excessive." In another case from 2013, an adjudicator determined that smoking had caused wilful or negligent "undue damage" to the walls and ceiling of a unit, and terminated the tenancy (the tenant had also been consistently late in paying the rent).^{ix} However, in a third example in which the landlord specified that damage from smoking was wilful as opposed to negligent, the case was dismissed.^x

6. The LTB has no tolerance for safety breaches, such as tenants tampering with smoke detectors

Of all the cases we have posted online that involve the tampering of a smoke detector or fire wall, complainants were successful in arguing safety threats. However, applicants have had a harder time establishing a safety breach based on their exposure to SHS alone—perhaps because the LTB does not tend to take a long-term view with safety. For example, a landlord with emphysema who lived in the same building as his tenants successfully argued that SHS substantially interfered with his reasonable enjoyment and right to live smoke-free. However, the adjudicator was not satisfied that

the smoke posed an imminent threat to his personal safety, and dismissed that portion of his application.^{xi}

7. Sometimes ethics and LTB decisions clash

In an unfortunate case from 2014, a landlord who did not prohibit smoking sought an order to have a tenant evicted because their SHS was infiltrating the unit next door. The landlord had unsuccessfully tried a number of measures to try to stop the smoke, and had ultimately lost the neighbouring tenant because of it. Knowing that the smoke was continuing to infiltrate the unit, and not wanting someone else have to endure it, the landlord did not attempt to re-rent or list the condo for sale. Although the adjudicator agreed that the SHS had substantially interfered with the tenant's reasonable enjoyment as well as the landlord's lawful right, privilege or interest, the point was deemed moot because the unit was now vacant. Further, the adjudicator was not satisfied that the smoke would be a problem for the next occupant and dismissed the application.^{xii}

Conclusion

Much more common than just a decade ago, cases involving smoking and exposure to SHS are being taken before the LTB, and many have favourable outcomes. Applicants can boost their prospects by doing their homework, completing the paperwork correctly and requesting orders within the LTB's jurisdiction. Smoke-Free Housing Ontario has dozens of cases posted online for reference, as well as many resources for tenants and landlords who are experiencing problems related to SHS infiltration. For more information, visit www.smokefreehousingon.ca.

ⁱ Non-Smokers' Rights Association. *A Review of Second-Hand Smoke Decisions Made by Adjudicators of Landlord and Tenant Boards*. December 2007. http://www.nsr-aadnf.ca/cms/file/files/pdf/Board_decisions_Dec2007.pdf.

ⁱⁱ Non-Smokers' Rights Association. *Case Law Summaries*. <http://www.smokefreehousingon.ca/sfho/tenants-case-law-summaries.html>.

ⁱⁱⁱ Non-Smokers' Rights Association. *A Landlord's Guide to Smoke-Free Housing in Ontario*. August 2010. http://www.smokefreehousingon.ca/cms/file/files/Landlord_Guide_Aug2010.pdf.

^{iv} Non-Smokers' Rights Association. *When Neighbours Smoke: A Tenant's Guide*. March 2013. http://www.smokefreehousingon.ca/hsfo/file/files/Tenant_Guide_2013-FINAL.pdf.

^v Smoke-Free Housing Ontario. *Landlords: Enforcement*. <http://www.smokefreehousingon.ca/sfho/landlords-enforcement.html> and *Tenants: Apply to Landlord and Tenant Board*. <http://www.smokefreehousingon.ca/sfho/tenants-landlord-and-tenant-board.html>.

^{vi} Landlord and Tenant Board. *Forms: About the Board's forms*. http://www.ltb.gov.on.ca/en/Forms/STEL01_079132.html.

^{vii} Smoke-Free Housing Ontario. LTB case # CET-11536-11. <http://www.smokefreehousingon.ca/hsfo/file/files/CET-11536-11.pdf>.

^{viii} Smoke-Free Housing Ontario. LTB case # EAL-28438-12. <http://www.smokefreehousingon.ca/hsfo/file/files/EAL-28438-12.pdf>.

^{ix} Smoke-Free Housing Ontario. LTB case # NOL-10401-12. <http://www.smokefreehousingon.ca/hsfo/file/files/NOL-10401-12.pdf>.

^x Smoke-Free Housing Ontario. LTB case # TSL-23092-11-RV. <http://www.smokefreehousingon.ca/hsfo/file/files/TSL-23092-11-RV.pdf>.

^{xi} Smoke-Free Housing Ontario. LTB case # TNL-62490-14. <http://www.smokefreehousingon.ca/hsfo/file/files/TNL-62490-14.pdf>.

^{xii} Smoke-Free Housing Ontario. LTB case # TSL-51247-14. <http://www.smokefreehousingon.ca/hsfo/file/files/TSL-51247-14.pdf>.