

A Landlord's Guide to **No-Smoking Policies** in Ontario

SAVE YOUR MONEY, PROTECT YOUR INVESTMENT.
YIELD HAPPIER TENANTS AND A HEALTHIER BUILDING.



“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 ENVIRONMENTAL TOBACCO SMOKE FROM INDOOR AIR; REMOVE THE SOURCE.”

Health Canada website. "Smoking and Indoor Air Quality." www.hc-sc.gc.ca/hl-vs/tobac-tabac/second/fact-fait/air-eng.php#control. Accessed October 3, 2008

“SINCE WE OPENED IN 2006 WE HAVE ONLY EVER HAD ONE PERSON WALK AWAY WHEN THEY FOUND OUT WE HAD A NO-SMOKING POLICY. WE HAVE A WAITING LIST FULL OF PEOPLE WHO WANT TO LIVE HERE.”

Evelyn Robertson, President, Newtonbrook United Church – Taiwanese United Church Toronto (NUC-TUCT) Non-Profit Homes Corporation

AS A LANDLORD, WHY SHOULD I BE CONCERNED ABOUT SMOKING?

There are some very compelling reasons to adopt a no-smoking policy for your building:

SECOND-HAND SMOKE COSTS MONEY: Landlords report that it typically costs two to three times more to turn over a unit where heavy smoking has occurred than a non-smoking unit.¹ A no-smoking policy eliminates burn marks in carpets and countertops, reduces costs related to frequent repainting and general maintenance and alleviates the problem of lingering second-hand smoke odours.

INCREASED MARKETABILITY: The majority of Ontarians (83%) don't smoke, and smoke-free homes are already a social norm—approximately 75% of all Canadian households do not permit smoking indoors. A smoke-free environment is a valuable amenity to offer tenants.

REDUCED RISK OF FIRE: Smokers' materials (cigarettes, cigars, pipes) remain the #1 ignition source of fatal residential fires in Ontario.²

A HEALTHIER INDOOR ENVIRONMENT: Second-hand smoke is a toxic mix of more than 4,000 chemicals. In 1992 the U.S. Environmental Protection Agency (EPA) classified it as a "Group A" carcinogen—a category reserved for the most dangerous compounds proven to cause cancer in humans. More recently, the California EPA identified second-hand smoke as a toxic air contaminant. Over 50 cancer-causing chemicals have been found in second-hand smoke. Health Canada advises that the only way to remove second-hand smoke from indoor air is to eliminate the source.

IS THERE A DEMAND FOR SMOKE-FREE HOUSING?

Yes. Surveys indicate that if given the choice, **two-thirds of Ontarians living in multi-unit dwellings would prefer a smoke-free building.**³ The vast majority of Canadians do not smoke, and most people prefer not to be exposed to second-hand smoke. There is also increasing demand for 100% smoke-free hotels—a recent survey found that 79% of North American hotel guests prefer a smoke-free environment that extends beyond their own private room.⁴

HOW DOES SECOND-HAND SMOKE MOVE FROM UNIT TO UNIT?

Second-hand smoke can infiltrate a unit from various sources:

- from a neighbour's patio or balcony, or from outdoor common areas
- through open windows or doors
- through electrical outlets, cable or phone jacks, or ceiling fixtures
- through cracks and gaps around sinks, countertops, windows, doors, floors, walls or dropped ceilings
- through the ventilation or forced air system

Research has shown that, depending on the age and design of a building, up to 65% of the air in a unit can come from other units in the building.⁵

IS IT LEGAL TO INCLUDE A NO-SMOKING CLAUSE IN A LEASE?

Yes. It is legal in Ontario for a landlord to ban smoking in private units. Legal opinions state that landlords have the right to impose additional obligations or restrictions on tenants beyond the standard lease agreement, as long as these requirements do not conflict with the *Residential Tenancies Act, 2006*, the *Ontario Human Rights Code* or any other federal law.^{6,7} The right to insert a no-smoking policy into a lease was recently confirmed in a 2008 Landlord and Tenant Board decision.⁸ You have the right to protect your investment.

ISN'T IT DISCRIMINATORY TO DENY SOMEONE A PLACE TO LIVE?

A no-smoking policy is not a no-smoker policy that prevents smokers from renting accommodation. Just as smokers step outside public places and workplaces for a cigarette, so too would they for a no-smoking residential building. Smokers can live in smoke-free multi-unit dwellings as long as they follow the rules like everyone else.

BUT COULDN'T SMOKING BE CONSIDERED A DISABILITY?

No. Smoking is not identified in either the *Canadian Charter of Rights and Freedoms* or the *Ontario Human Rights Code* as grounds for protection. These Acts do not recognize smokers as a group suffering social, political or legal disadvantage in our society.⁹

- 1 Non-Smokers' Rights Association. *Smoke-free Policies Make Good Dollars and Sense: The Business Case for Smoke-free Multi-unit Housing*. March 2008. http://www.nsr-aadnf.ca/cms/file/pdf/Business_Case_S-F_MUDs.pdf
- 2 The Ontario Office of the Fire Marshal. *Fire Loss in Ontario 2002-2006: Causes, Trends and Issues*. <http://www.ofm.gov.on.ca/english/publications/Statistics/fireloss/default.asp>
- 3 Ontario Tobacco-Free Network. News release. *Ontario majority wants smoke-free apartments*. March 27, 2007.
- 4 J.D. Power and Associates. Press release. "No smoking" at hotels could be the latest marketing strategy, as a vast majority of travelers prefer a smoke-free hotel environment. July 25, 2006.
- 5 Center for Energy and Environment. *Reduction of environmental tobacco smoke transfer in Minnesota multifamily buildings using air sealing and ventilation treatments*. 2004. <http://www.mncee.org/pdf/research/finalreport.pdf>.
- 6 Doumani, RG and Harrington, PJ. *Ontario perspectives on drifting second-hand smoke in residential buildings: Where we are and where we could go*. Aird & Berlis LLP. Delivered at the National Forum on Drifting Second-hand Smoke in Multi-unit Dwellings. March 20, 2007.
- 7 Hill, DH. Perley-Robertson, Hill & McDougall LLP. *Legal Opinion: Prevention of Smoking in Multi-Residential Buildings in Ontario*. July 31, 2008.
- 8 Ontario Landlord and Tenant Board file # TSL-01010, TST-00092, TST-00096
- 9 Hill, DH. Perley-Robertson, Hill & McDougall LLP. *Legal Opinion: Prevention of Smoking in Multi-Residential Buildings in Ontario*. July 31, 2008.
- 10 For example, SWL-10698, TSL-52189, TST-04047
- 11 <http://www.nsr-aadnf.ca> in the second-hand smoke in multi-unit dwellings section.
- 12 http://www.ltb.gov.on.ca/en/Forms/STEL02_111310.html
- 13 Ontario Landlord and Tenant Board file # TSL-01010, TST-00092 and TST-00096.

“WHEN THE SMOKE-FREE IDEA WAS PRESENTED TO US FOR THE LIVE/WORK STUDIOS IN OUR NEW ARTSCAPE WYCHWOOD BARNs DEVELOPMENT, WE WERE VERY ENTHUSIASTIC AND VOTED UNANIMOUSLY TO ADOPT IT AS A REGULATION, WHICH IS NOW IN OUR LEASES. A NO-SMOKING POLICY MAKES SENSE FOR ECONOMIC, ENVIRONMENTAL, HEALTH, AND SOCIAL REASONS; IT IS WHAT OUR TENANTS ARE ASKING FOR.”

Peter D.R. Brown, President and Treasurer, Artscape Non-Profit Homes Inc.



DON'T SMOKERS HAVE A RIGHT TO SMOKE IN THEIR OWN HOMES?

Yes, in the absence of a no-smoking policy, smokers have a right to smoke in their own homes. However, judges and adjudicators presiding over second-hand smoke cases have come to the conclusion that if the smoke is seriously affecting other tenants or the landlord, the smoker can be ordered to stop. Second-hand smoke has been identified as a breach of the covenant of reasonable enjoyment at the Ontario Landlord and Tenant Board.¹⁰ Just because someone exercises their *freedom* to smoke does not mean they have an absolute right to smoke. There is no “right to smoke” enshrined anywhere in Canadian law.

HOW DO I INTRODUCE A NO-SMOKING POLICY?

The easiest way to go smoke-free is to start smoke-free—if you have an empty building (either new or newly renovated), you can declare it 100% smoke-free from the beginning and have all new tenants sign a lease that includes your no-smoking policy. As part of your policy you will need to decide if you want a smoke-free buffer zone around doorways, operable windows and air intakes, or if you want the entire property to be no-smoking.

Advertise your units as no-smoking, include your policy in the lease and be sure to post ample signage reminding your tenants of the rules. If you have a waiting list, future tenants will need to be informed of the policy, too.

If you have a building with existing tenants, you will have to gradually go smoke-free through attrition. In other words, your current tenants who smoke (and are not supportive of the policy) will be grandfathered, and thus will be permitted to continue smoking as long as they live in the building. All new tenants will sign a new lease that includes the no-smoking policy. As existing tenants move out, their units can be cleaned up and declared no-smoking too. Note that upon expiration of a one-year lease, you cannot make an existing tenant sign a new lease containing the no-smoking policy. As per section 38(1) of the *Residential Tenancies Act, 2006*,

If a tenancy agreement for a fixed term ends and has not been renewed or terminated, the landlord and tenant shall be deemed to have renewed it as a monthly tenancy agreement containing the same terms and conditions that are in the expired tenancy agreement...

A tenant survey to assess interest in smoke-free accommodation is a good place to get started. A sample survey is available from the Non-Smokers' Rights Association online.¹¹

Sample Lease Language for a No-Smoking Policy

Due to the known health risks of exposure to second-hand smoke, increased risk of fire and increased maintenance costs:

- a) No tenant, resident, guest, business invitee, or visitor shall smoke cigarettes, cigars, or any similar product whose use generates smoke within the building. This prohibition includes all residential units within the building, all balconies and patios, enclosed common areas, as well as outside within 9 metres of doorways, operable windows and air intakes.
- b) “Smoking” shall include the inhaling, exhaling, burning, or carrying of any tobacco or similar product whose use generates smoke.
- c) “Business invitee” shall include but is not limited to any contractor, agent, household worker, or other person hired by the tenant or resident to provide a service or product to the tenant or resident.



“THIS IS JUST ALL PART OF PROVIDING A SAFE AND HEALTHY ENVIRONMENT FOR OUR TENANTS. MANY BUSINESSES, LIKE BARS, RESTAURANTS AND HOTELS, HAVE FOUND THAT NO-SMOKING RULES ARE GOOD FOR BUSINESS. DOING THE SAME FOR MULTI-UNIT DWELLINGS IS JUST PART OF THAT TREND.”

Richard Morantz, President, Globe General Agencies

“THE DEBATE IS OVER. THE SCIENCE IS CLEAR: SECONDHAND SMOKE IS NOT A MERE ANNOYANCE, BUT A SERIOUS HEALTH HAZARD.”

U.S. Surgeon General, 2006

HOW DO I ENFORCE A NO-SMOKING POLICY? DO I PERSONALLY HAVE TO ‘CATCH’ A TENANT SMOKING?

Experience from other jurisdictions indicates that most people who seek out smoke-free housing follow the rules. You do not have to personally witness a tenant smoking to enforce your policy. In all likelihood your tenants will be the biggest advocates of your policy and will readily let you know when someone is not following the rules. In past cases adjudicators have accepted evidence in the form of log books detailing the dates and times that second-hand smoke infiltrated another apartment, in addition to testimony from third parties confirming the smell of second-hand smoke and its impact on health and well-being.

However, smoking in violation of a no-smoking policy is not considered a material breach of the lease. As a landlord, you would therefore likely issue a series of warnings followed by notice of termination of the tenancy for one of the following:

- **Damage**—The tenant, the tenant’s guest or another occupant of the rental unit willfully or negligently damaged the rental unit or the residential complex as per section 62(1) of the *Act* (Form N5).
- **Damage**—The tenant, the tenant’s guest or another occupant of the rental unit willfully damaged the rental unit or the residential complex as per section 63(1a) of the *Act* (Form N7).
- **Reasonable enjoyment**—The tenant, the tenant’s guest or another occupant of the rental unit substantially interfered with the reasonable enjoyment of the residential complex by the landlord or another tenant, or substantially interfered with another lawful right, privilege or interest of the landlord or another tenant as per section 64(1) of the *Act* (Form N5).
- **Reasonable enjoyment of landlord in a small building** (landlord must reside in a building containing not more than three residential units)—The tenant, the tenant’s guest or another occupant of the rental unit substantially interfered with the reasonable enjoyment of the building by the landlord, or substantially interfered with another lawful right, privilege or interest of the landlord as per section 65(1) of the *Act* (Form N7).

These forms are available online from the Ontario Landlord and Tenant Board.¹²

Past Ontario Landlord and Tenant Board decisions have recognized second-hand smoke as a breach of the covenant of reasonable enjoyment, and in one case the smell of second-hand smoke was deemed to constitute damage due to negligence (not normal wear and tear) on the part of the tenant.¹³



RESOURCES

When Neighbours Smoke. Non-Smokers’ Rights Association. November 2006. http://www.nusra-adnf.ca/cms/file/pdf/NSRA_DriftingSHS_Jan2007update.pdf

A Review of Second-hand Smoke Decisions made by Adjudicators of Landlord and Tenant Boards. Non-Smokers’ Rights Association. December 2007. http://www.nusra-adnf.ca/cms/file/pdf/Board_decisions_Dec2007.pdf

Smoke-free Policies Make Good Dollars and Sense: The Business Case for Smoke-free Multi-unit Housing. Non-Smokers’ Rights Association. March 2008. http://www.nusra-adnf.ca/cms/file/pdf/Business_Case_S-F_MUDs.pdf

Second-hand Smoke in Multi-Unit Dwellings. Fact Sheet. Ottawa Council on Smoking and Health. 2007. <http://www.smokefreeottawa.com/2006-en/fact-sheet.pdf>

Prevention of Smoking in Multi-Residential Buildings in Ontario. Legal Opinion. David H. Hill, C.M., Q.C. Perley-Robertson, Hill & McDougall LLP. July 31 2008.

The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General. Executive Summary. United States Department of Health and Human Services. 2006. <http://www.surgeongeneral.gov/library/secondhandsmoke/report/executivesummary.pdf>

Help for Landlords. Ontario Landlord and Tenant Board. http://www.ltb.gov.on.ca/en/STEL02_111286.html

Smoking and Indoor Air Quality. Health Canada <http://www.hc-sc.gc.ca/hl-vs/tobac-tabac/second/fact-fait/air-eng.php#control>

“I ADOPTED A NO-SMOKING POLICY 21 YEARS AGO. IT IS IMPOSSIBLE TO REMOVE TOBACCO SMOKE ODOUR FROM CARPET, DRAPERY AND SOFT FURNISHINGS. MOST CANADIANS DON’T SMOKE AND DON’T WANT THEIR HOMES TO SMELL LIKE SMOKE EITHER. THE BOTTOM LINE IS THAT A NO-SMOKING POLICY JUST MAKES GOOD BUSINESS SENSE.”

Chris Cebula, Landlord

The Non-Smokers’ Rights Association is a non-profit organization with a mission to promote public health by reducing illness and death caused by tobacco, including second-hand smoke.

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