
DATE: October 2, 2009

REPORT TITLE: **SECOND-HAND SMOKE IN MULTI-UNIT DWELLINGS**

FROM: Janette Smith, Commissioner of Health Services
David L. Mowat, MBChB, MPH, FRCPC, Medical Officer of Health

RECOMMENDATION

That the Minister of Health Promotion and the Minister of Health and Long-Term Care be requested to enact provincial legislation to protect residents in multi-unit dwellings from exposure to second-hand tobacco smoke;

And further that, the Medical Officer of Health be directed to develop educational resources, including a website, to provide information on this issue to landlords and residents of multi-unit dwellings.

REPORT HIGHLIGHTS

- The *Smoke-Free Ontario Act (SFOA)* bans smoking in all enclosed public places and workplaces.
- The *Municipal Act* contains no explicit provisions to regulate smoking in private multi-unit buildings.
- A by-law regulating smoking in private apartment units within multi-unit dwelling would have to define "public place" to include private apartments.
- This type of by-law is very likely to be challenged in court for being inconsistent with the intent of the *SFOA*.
- Regulating smoking in multi-unit dwellings is better left to the provincial government via amendments to the *SFOA*.
- Peel Public Health recognizes that drifting of second-hand smoke in multi-unit dwellings may be a health issue and should provide relevant information and education to landlords and residents of multi-unit dwellings.

DISCUSSION

1. Background

While Ontarians are protected through the *Smoke-Free Ontario Act (SFOA)* from second-hand smoke at work and in enclosed public places, people living in multi-unit dwellings are not currently protected from second-hand smoke entering their living space from adjacent units.

Peel Public Health has received several complaints from tenants of such dwellings about the potential adverse health effects and nuisance of second-hand tobacco smoke drifting into their living space. In response to a resident concern raised in April 2009, Regional Council

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requested the Medical Officer of Health to investigate whether or not the Region of Peel has the authority to regulate smoking in multi-unit buildings.

Tobacco smoke can seep from various openings in a multi-unit dwelling, including electrical outlets, plumbing, ductwork for heating and air conditioning, ceiling light fixtures, cracks in walls, floors or doors and through common areas, such as hallways. It is also common for smoke to seep into units through open windows, from balconies and outdoor smoking areas. Some units may share ventilation or heating systems which can further spread the smoke throughout a building.

A 2006 IPSOS Reid poll found that 46 per cent of Ontarians living in multi-unit dwellings had tobacco smoke enter their unit from elsewhere in the building. The same survey found that 64 per cent of Ontarians living in multi-unit dwellings would likely choose a smoke-free building over one where smoking is permitted. Unfortunately, the demand for smoke-free housing greatly exceeds the supply.

Second-hand smoke is a Class A carcinogen linked to cancer and increased risk of heart disease and respiratory illness. There is no known safe level of exposure to second-hand smoke. Children and people who suffer from pre-existing health conditions like emphysema or heart disease are particularly vulnerable to the effects of second-hand smoke. Second-hand smoke has twice as much nicotine and tar as direct tobacco smoke and five times more carbon monoxide.

2. Findings

a) Overview of Applicable Legislation

Municipal Act

Under the *Municipal Act, 2001* the Region of Peel is empowered to enact by-laws with respect to the "health, safety and well-being of persons". While the *Act* contains no explicit provision to regulate smoking within private dwellings within multi-unit buildings, express powers to prohibit or regulate smoking are conferred under subsection 115(1) of the *Municipal Act*, which states: "Without limiting sections 9, 10, 11 a municipality may prohibit or regulate the smoking of tobacco in public places and workplaces." No other municipality in Ontario has enacted a by-law regulating smoking in multi-unit dwellings pursuant to this authority in the *Municipal Act*.

Smoke-Free Ontario Act

The *Smoke-Free Ontario Act (SFOA)* is the provincial legislation that regulates smoking in Ontario. It provides that if there is a conflict between the *Act* and other laws, the most restrictive provision prevails.

Under subsection 9 (2) of the *Smoke-Free Ontario Act* it is prohibited to smoke tobacco in the common areas of condominiums, apartment buildings and university or college residences. Common areas include elevators, hallways, parking garages, party or entertainment rooms, laundry facilities, lobbies and exercise areas. The *SFOA* does not prohibit or regulate smoking inside any private dwellings in multi-unit buildings. The *SFOA* defines "private dwelling" as, "private self-contained living quarters in any multi-unit building or facility". Furthermore, private dwellings are specifically excluded from the definition of an "enclosed workplace".

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Section 9 (7) of the *Act* permits smoking in indoor rooms in certain residences, such as nursing homes, provided that the room meets certain conditions such as having a proper ventilation system.

b) Potential Challenges of Implementing a Regional By-Law

Section 115 of the *Municipal Act* clearly empowers the Region to define a “public place” for the purposes of a by-law regulating smoking. However, since the definition of an “enclosed workplace” in the *Smoke-Free Ontario Act* specifically excludes private, self-contained living quarters in multi-unit buildings from smoking prohibitions, defining a “public place” to include precisely what was excluded in another *Act* is patently inconsistent. Such a by-law would quite likely be challenged in court, at some expense to the municipality. There is also a good possibility that the courts would not uphold the by-law.

A by-law regulating smoking in multi-unit dwellings would also be difficult for the Region to enforce. Entering a person’s private residence to conduct an inspection is much more difficult than entering public places and workplaces. The homeowner or tenant could refuse entry, resulting in the need to obtain a warrant.

Currently, there are four public health inspectors employed by the Region to enforce the *Smoke-Free Ontario Act*. Assuming that the duty of enforcing the by-law would also be their responsibility, workload challenges would have to be addressed.

3. Proposed Direction

Rather than enacting a Regional by-law, it is recommended that Council advocates for the province to enact legislation governing smoking in the private units of multi-unit dwellings. Concurrently, Peel Public Health should develop educational resources, including a webpage, to provide information to landlords and residents on this issue. By proactively highlighting the issue, it is anticipated that smoke-free housing options in Peel Region will increase.

Many landlords are under the mistaken impression that smoke-free housing is illegal or discriminatory. In fact, landlords have the option of declaring their building(s) smoke-free and there are a number of reasons for doing so, including:

- Reduced costs for preparing units for re-rent (It costs an estimated two to three times more to prepare to re-rent a unit in which heavy smoking has occurred compared to a non-smoking unit);
- Decreased risk of fire, and
- Increased appeal of the property to the larger non-smoker population.

Non-smoking residents of multi-unit dwellings have the right to enjoy their residence without enduring the negative health effects and nuisance associated with second-hand smoke. In a small number of cases, Canadian courts have been sympathetic to non-smokers unwillingly exposed to second-hand smoke in their own homes. Cases have been won on the premise of nuisance, as well as the breach of the covenant of quiet and peaceful enjoyment of their home.

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CONCLUSION

The non-smoking public is increasingly intolerant of breathing second-hand tobacco smoke. In the past, there has been considerable resistance to regulating activities in private homes. However, since second-hand smoke in multi-unit dwellings may adversely impact others, it is reasonable to consider government intervention. The Region of Peel, and other municipalities, should advocate that the provincial government increase the protection afforded to non-smokers by regulating smoking in private units of multi-unit dwellings. In the interim, Peel Public Health should develop educational materials to raise awareness of the issue and assist landlords and residents of multi-unit dwellings.

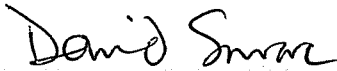


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Approved for Submission:



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