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July 31, 2008

Ontario Tobacco-free Network
1639 Yonge Street
Toronto Ontario M4T 2W6

Attention: Ms. Irene Gallagher

Dear Sirs:

Re: Prevention of Smoking in Multi-Unit Dwellings in Ontario

You have requested we provide you with an opinion related to the legal right, in Ontario, to create smoke-free apartments, condominiums and housing cooperatives under legislation existing as of the date of this opinion letter and, in particular, pursuant to the *Residential Tenancies Act, 2006* (S.O. 2006, Chapter 17); the *Social Housing Reform Act, 2000* (S.O. 2000, Chapter 27); the *Condominium Act, 1998* (S.O. 1998, Chapter 19); and the *Co-operative Corporations Act* (R.S.O. 1990, Chapter c. 35).

For purposes of this opinion, we assume throughout that smoke-free relates to a prohibition against smoking within the residential unit. It does not, therefore, mean a prohibition against leasing or selling an interest in real property to a smoker. It also does not refer to smoking prohibition in public places, such common areas of condominiums and apartments, including elevators, hallways, parking garages, party rooms, laundry facilities, lobbies and exercise rooms, as such public place smoking controls are provided in Ontario by provincial legislation (*Smoke-Free Ontario Act*, S.O. 1994, Chapter 10, section 9 (2) 3).

You have specifically raised questions to be covered in the opinion as set out in "Questions for Legal Opinion" which you provided to us and a copy of which is attached as Schedule "A" to this opinion letter. By the use of boxes in the text of this opinion we have cross-referenced parts of our opinion to the questions you have raised in Schedule "A".

Constitutional and Human Rights Protections:

The *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982* [Schedule B to the *Canada Act* 1982, (U.K.), 1982, c.11] (the "*Charter*") protects the rights of Canadians from all levels of government but only applies to government laws and actions and not to private activity.

Section 15 (1) of the *Charter* provides:

> Every individual is equal before the law and under the law has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The *Charter* does not provide constitutional protection for smokers as a class prohibiting discrimination against a smoker. The Court, in *McNeil v. Ontario (Ministry of the Solicitor General and Correctional Services)* [(1998) 126 C.C.C. (3d) 466 (Ontario Court General Division) O'Connor J.], held:

> Smokers are not part of a group "suffering social, political and legal disadvantage in our society," a criteria for a s. 15 claim as described by Wilson J. at page 1333 of *R. v. Turpin* [1989] 1 S.C.R. 1296. A person claiming a violation of s. 15 (1) must first establish that because of a distinction drawn between the claimant and others, the claimant has been denied "equal protection" or "equal benefit" of the law. Secondly, the claimant must show that the denial constitutes discrimination on the basis of one of the enumerated grounds listed in s. 15 (1) or analogous thereto.

The *Charter* also does not accept smoking as a physical disability. In *Ample Annie's Itty Bitty Roadhouse v. The Corporation of the City of Guelph* (2001) O.J. No. 5968, the Court held:

> Addiction to nicotine, insofar as it can be considered a disability at all, falls far short of the types of disabilities intended to be included in the section.

The section being referred to was section 15 of the *Charter.*

The Ontario *Human Rights Code* (R.S.O. 1990 c. H-19) provides in section 1 that:

> Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or handicap.

Similar to the *Charter* the *Human Rights Code* does not explicitly protect smokers as a class.

It is well accepted in law (see *Quebec (Commission des droits de la personne & des droits jeunesse) c. Montreal (Ville)* [2000] 1 R.C.S. 665; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 S.C.R. 3; and *Entrop v. Imperial Oil Ltd.* (2000) 2 C.C.E.L. (3d) 19 (Ont. C.A.)), that the interpretation of section 15 of the *Charter* should inform the interpretation of human rights codes in Canada. As such the *Human Rights Code* must be interpreted in a manner consistent with the *Charter*.

In our opinion, neither the *Charter* nor the *Human Rights Code* prevents either government at any level or a private person (including a corporation) imposing restrictions on smokers as tenants, occupiers or owners prohibiting them from smoking within an apartment, condominium or housing cooperative unit.

Leased Premises:

The Ontario legislation controlling the leasing of premises within the province is the *Residential Tenancies Act, 2006* and, for social housing, the *Social Housing Reform Act, 2000.*

Question 1 a

Neither the *Residential Tenancies Act, 2006* nor the *Social Housing Reform Act, 2000*, or indeed, any other Ontario legislation, prohibits a landlord from instituting a smoke-free policy prohibiting persons, whether tenants or guests of tenants or anyone else, from smoking inside a leased residential unit. In the absence of any legal restriction on landlords, they are free to control activities that take place on their property. Accordingly, landlords have the right to impose, by lease, contractual obligations upon tenants as long as those obligations do not conflict with federal or Ontario law (such as the *Charter* and the *Human Rights Code*). It is, therefore, perfectly legal for a smoke-free policy, prohibiting smoking in a residential unit leased by a tenant, to be included in the lease agreement between a landlord and a tenant as an obligation of the tenant.

Question 1 b

The owner of real estate in Ontario is free to completely control that real estate and to prevent any person without a legal right to be on the property, such as a member of the general public, from going onto the property or carrying out any particular activity on the property. Accordingly, it is quite clear, in law, that an owner can prevent a member of the general public from smoking on his or her property. If a member of the general public goes onto the property without the consent of the owner it is a trespass and the owner can utilize both civil and criminal remedies to prevent this from happening. Even if a member of the general public has the permission of the property owner to go onto the property but such

permission is conditional upon that person not smoking on the property, a breach of the condition terminates the permission and, by smoking on the property, trespass is committed.

A landlord, however, in leasing a residential unit to a tenant, often includes as part of the leased premises the right of the tenant to use, non-exclusively and in common with other tenants, common areas, including outdoor areas such as gardens, patios, laneways, etc. In such a case, the tenant has a legal right to be on the property and entry onto the property by the tenant would not amount to trespass. However, the landlord-tenant relationship is formed pursuant to the lease agreement between the landlord and the tenant, whether written or oral, and the landlord is free to provide in such a lease agreement that the tenant can not smoke anywhere on the landlord's property. If, as we have opined, it is legal for a landlord to prohibit smoking inside residential units exclusively leased to tenants, it is also legal for a landlord to prohibit smoking anywhere on the landlord's property outside of the leased residential units in relation to which property tenants have a non-exclusive right to use in common with other tenants.

Despite the legal right of landlords to impose a smoke-free policy prohibiting smoking in exclusively leased residential units and on common areas shared by tenants, such a policy will only be effective if it can be enforced. Landlords must rely upon their rights under Ontario statute law to enforce lease agreements with tenants.

Question 1 c

Section 37 (1) of the *Residential Tenancies Act, 2006* provides: " A tenancy may be terminated only in accordance with this Act." There is, however, no explicit provision in the *Residential Tenancies Act, 2006* allowing for termination of a tenancy based on a tenant breaching a policy of the landlord or an express lease provision prohibiting smoking in the leased residential unit. Accordingly, the enforcement of smoking restrictions imposed by a landlord by policy or in a lease has to rely upon provisions in the *Residential Tenancies Act, 2006* allowing a landlord to terminate a tenancy because of damage caused by a tenant or because the conduct of a tenant substantially interferes with the reasonable enjoyment or lawful rights of the landlord or another tenant.

Section 62 (1) of the *Residential Tenancies Act, 2006* provides:

> A landlord may give a tenant notice of termination of the tenancy if the tenant, another occupant of the rental unit or a person whom the tenant permits in the residential complex wilfully or negligently causes undue damage to the rental unit or the residential complex.

The tenant can, under section 62 (3) of the *Residential Tenancies Act, 2006,* void the termination notice if the tenant repairs the damage or pays the landlord the costs of repairing the damage within seven days of receiving the notice.

Section 64 (1) of the *Residential Tenancies Act, 2006* provides:

> A landlord may give a tenant notice of termination of the tenancy if the conduct of the tenant, another occupant of the rental unit or a person permitted in the residential complex by the tenant is such that it substantially interferes with the reasonable enjoyment of the residential complex for all usual purposes by the landlord or another tenant or substantially interferes with another lawful right, privilege or interest of the landlord or another tenant.

The tenant can, under section 64 (3) of the *Residential Tenancies Act, 2006*, void the termination notice if the tenant within seven days of receipt of the notice "... stops the conduct or activity or corrects the omission."

Sections 63 and 65 of the *Residential Tenancies Act, 2006* allow a termination notice with a shorter notice period and the inability of the tenant to remedy the situation if, for section 63, the damage is caused "wilfully" and is "significantly greater" than that required for a termination notice under section 62 (1) and, for section 64, if interference is of the landlord's enjoyment or rights in a building which contains not more than three residential units.

Following the remedy period if the tenant does not effect the remedy a landlord may apply to the Landlord and Tenant Board for an order terminating the tenancy and evicting the tenant. The Landlord and Tenant Board is established pursuant to section 168 (1) of the *Residential Tenancies Act, 2006* and is the successor to the Ontario Rental Housing Tribunal which was the name of the agency prior to the coming into force in 2006 of the *Residential Tenancies Act, 2006.* Under section 168 (2) the Landlord and Tenant Board is given exclusive jurisdiction to determine all applications under the *Residential Tenancies Act, 2006.* A termination of tenancy and eviction order issued by the Landlord and Tenant Board will be enforced, upon request of the landlord, by the Court Enforcement Office (Sheriff), which has the power to forceably remove a tenant from rental premises.

It is interesting to note that the only remedy available to a landlord when a tenant has caused damage or has interfered with the enjoyment or rights of the landlord or another tenant by smoking in a residential unit contrary to a non-smoking policy or express lease provision is to terminate the tenancy. While such a termination order may be accompanied by an order requiring

the tenant to pay the landlord the cost of damages, The *Residential Tenancies Act, 2006* does not provide for a landlord to seek an enforcement order from the Landlord and Tenant Board against a tenant. In a period of high vacancy in residential units it forces the landlord to use a remedy which might well put the landlord in the position of carrying a vacant unit.

One must be aware that the Landlord and Tenant Board, as an administrative tribunal as opposed to a Court, is less bound by precedent, particularly precedent of another Landlord and Tenant Board decision. Without being bound by precedent and with the obligation to consider every case individually on its own merits, there is no assurance that the result in one Landlord and Tenant Board case will be applied to another case. There are several factors that, in our view, will be taken into account by the Landlord and Tenant Board - how the complainant landlord presented himself or herself and how credibly he or she is perceived to be, the kind of evidence introduced, what the parties did to try to solve the problem before seeking the remedy before the Landlord and Tenant Board, etc. Eviction of tenants for smoking is quite rare as the Landlord and Tenant Board appears to not easily be persuaded to make such an order. Indeed the Landlord and Tenant Board has, in some cases, applied a presumption that tenants have a right to smoke in their units. One decision by the Ontario Rental Housing Tribunal, the predecessor of the Landlord and Tenant Board, in 2003, held: "Since the terms of his tenancy also do not prohibit smoking, I find that he has a *prima facie* right to do so" (Ontario Rental Housing Tribunal, 2003 File Number TSL-52189).

Whether or not the building was advertised as smoke-free, whether or not the tenant application to lease the unit indicated the unit and/or building was smoke-free and whether or not there was a no smoking clause included in the lease will hold some weight in decision-making by the Landlord and Tenant Board. The Landlord and Tenant Board has, however, also taken the position that the right to smoke in a leased unit is not absolute and does not extend to interfering with the enjoyment or rights of others even though not prohibited under the lease.

In the Ontario Rental Housing Tribunal case of *Feaver v. Davidson* (2003, O.R.H.T.D. No. 103, File Number TSL-52189) there was no written lease and no oral agreement related to smoking. The Tribunal determined that the tenant had interfered with the reasonable enjoyment of the landlord (who also lived in the building) and ordered there could be an eviction order if the tenant did not stop smoking in his unit. The Tribunal held:

> It is not reasonable for the Tenant to expect to continue smoking in this unit where he shares the air with other occupants of the complex, when another occupant of the complex perceives a threat to their health. Although the Tenant may chose [*sic*] to accept the risks associated with smoking, he has no right to require the

> Landlord to share them... I find the Tenant's smoking has substantially interfered with the Landlord's reasonable enjoyment of the residential complex ...

In the 2008 Landlord and Tenant Board case of *Cebula v. Davidson* (2008 L.T.B., Files Numbered TSL-01010; TST-00092; and TST-00096) the tenant had signed a lease for a furnished apartment which contained a no smoking clause. With regard to the inclusion of a no smoking clause in a lease the Board held:

> I agree that it is lawful to include a no smoking clause in a rental agreement. I do not know of any public policy that is against putting no smoking clauses in tenancy agreements. The Act contemplates tenancy agreements and provides for their enforcement ... for most part, the contents of tenancy agreements are left to the parties. No smoking clauses are neither expressly prohibited by the Act nor contrary to the Act. Indeed, Tenants have been evicted under section 64, where their smoking interfered with the reasonable enjoyment of the Landlord or Tenants ...

The position of the Board as to the legality of a landlord imposing a no smoking policy in this case is the same as our opinion, as indicated above in this letter.

In this case the landlord applied for an order terminating the tenancy and evicting the tenant because the tenant caused undue damage to the leased unit and substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the landlord or another tenant by smoking in the unit. The landlord also applied for an order requiring the tenant to compensate the landlord for the damage caused by the smoking in the unit.

The Board held that the "... persistent smell of cigarette smoke would constitute damage within the meaning of subsection 62 (1) of the Act." The Board awarded the landlord compensation for the damages to cover re-painting the unit, re-upholstering furniture, carpet cleaning, cleaning of hard surfaces, replacement of mattress and box spring and replacement of linens and towels, a total of $ 10,958.85. As section 207 (1) of the *Residential Tenancies Act, 2006* limits the jurisdiction of the Board to order payment to a maximum amount of $ 10,000.00 this was the amount ordered by the Board.

The Board in this case dealt with the right to enforce a no smoking provision in a lease and, referring to *Standbar Properties Limited v. Rooke* (2005 Hamilton Docket Number 04-212DV (Divisional Court)), held:

> Section 64 is not limited to the enjoyment of the residential complex by the Landlord or other tenants. It also protects other lawful rights, privileges or interest of the landlord or another tenant ... 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.

It ordered termination of the tenancy and eviction of the tenant for interfering with the landlord's lawful rights in the business of renting furnished luxury accommodation to a clientele of non-smokers.

The tenant in *Cebula v. Davidson* filed a request for a review of the order of the Landlord and Tenant Board. Such a request can be made pursuant to Rule 29.1 of the *Rules of Procedure* of the Landlord and Tenant Board and section 21.2 (1) of the *Statutory Powers Procedure Act* (R.S.O. 1990, Chapter s-22) on the basis that the order contains a serious error or that a serious error may have occurred in the proceedings. A review request can result in a hearing by a Member of the Landlord and Tenant Board other than the Member who made the order (Rule 29.9 of the *Rules of Procedure* of the Landlord and Tenant Board) and after the hearing the order under review may be confirmed, varied, suspended or cancelled (Rule 29.19 of the *Rules of Procedure* of the Landlord and Tenant Board). In *Cebula v. Davidson* the tenant has only requested a review in relation to the method of calculating the damages and, accordingly, even if the amount of the damages awarded is varied, the reasons for the order, including awarding of some damages, the termination of the tenancy and the eviction of the tenant because of the breach of the no smoking provisions in the Lease will remain unchanged. The Landlord and Tenant Board had scheduled the review hearing for May 20, 2008, but that date was changed and the review hearing took place on July 4, 2008. No decision on the review has been released as of the date of this letter. Decisions of the Landlord and Tenant Board may also be appealed to the Divisional Court, but only on a question of law (section 210 (1) of the *Residential Tenancies Act, 2006*). So far there has been no appeal of *Cebula v. Davidson* to the Divisional Court.

The Landlord and Tenant Board case of *Wariach v. Castillo and Minnitt* (Files Numbered CEL-09021 and CEL-10081) is also of interest with regard to the enforcement of a no smoking policy by a landlord. In this case the apartment unit was advertised as a no smoking unit and the tenants smoked in the apartment. It was argued that the landlord's notice to terminate the tenancy was deficient because the landlord did not state the dates and times that the smoking occurred. The landlord, however, took the position that he was unable to state the times and dates of the smoking by the tenants because the smoking takes place in the apartment area under the exclusive possession and control of the tenants. The landlord argued that, while he does not see the activity to determine the exact times and dates, he is adversely impacted by its effect. The

Landlord and Tenant Board agreed with the landlord, ordered the termination of the tenancy and the eviction of the tenants (although there were other reasons for the order in addition to the infringement of the landlord's no smoking policy).

Question 1 d

It is clear from the decision of the Landlord and Tenant Board in *Cebula v. Davidson* that termination of a tenancy and eviction of a tenant for breaching a smoke-free provision in a lease can be achieved in the complete absence of a complaint from any other tenant.

Such termination and eviction can be based upon the landlord's "lawful right" acquired by the signing of the lease with a no smoking provision. It is, however, in our opinion, necessary for a landlord attempting to terminate a tenancy and evict a tenant on this basis to be able to show that the breach of the lease "substantially interferes" with a "lawful right, privilege or interest of the landlord." In *Cebula v. Davidson* the landlord demonstrated that his business was to market furnished luxury units to those needing short-term accommodation and who insist upon non-smoking premises and that smoking in the unit in breach of the lease substantially interfered with the tangible economic business interest of the landlord.

While the complaint of another tenant is not necessary for a landlord to terminate a tenancy and evict a tenant for breaching a no smoking provision in a lease, it is not clear that if the landlord was marketing non-furnished units to the general public, as opposed to furnished units to non-smokers as in *Cebula v. Davidson*, whether the Board would consider the breach of a no smoking lease provision a "substantial" interference with the lawful right of the landlord. The breach of the lease provision against smoking would, of course, be interference with the landlord's lawful rights but it is unclear whether the Board would consider it "substantial" interference.

As well, smoking in a leased residential unit in breach of a lease which causes "undue damage" can, on its own without a complaint from another tenant, be sufficient grounds for termination of a tenancy and eviction. Whether a landlord leasing unfurnished accommodation and not particularly marketing to non-smokers would be successful in demonstrating that smoking resulted in "undue" damage is at this time a moot point.

We would, again, caution against placing too much reliance on one Landlord and Tenant Board decision, such as *Cebula v. Davidson*. Whether the Board with a different Member presiding and somewhat different facts would follow all of the results of *Cebula v. Davidson* is not yet clear. While we are optimistic this 2008 case will basically be followed in the future it is too early to firmly arrive at that conclusion with regard to all aspects dealt with by the Board in the case.

Question 1 e

Should a landlord decide to transform an existing building of residential units into a completely smoke-free building the *Residential Tenancies Act, 2006* forces a statutory 'grand-fathering' for existing tenants. An existing tenant, without a no smoking provision in his or her lease, does not have to sign a new lease at the end of the term of the lease. Section 38 (1) of the *Residential Tenancies Act, 2006* provides:

> 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 and subject to any increases in rent charged in accordance with this Act.

Accordingly, if an existing tenant refuses to sign a new lease containing a no smoking provision, upon expiry of the existing lease there is a monthly tenancy on the same terms as the expired lease, that is, with no smoking prohibition in the lease. Despite the new tenancy being a monthly tenancy the landlord can only terminate the monthly tenancy for reasons as set out in the *Residential Tenancies Act, 2006* (see section 37 (1) of the *Residential Tenancies Act, 2006* quoted above). Those reasons are: if property is sold and purchaser requires possession (section 49); the landlord is going to demolish, extensively renovate or convert premises for non-residential use (section 50); the property is being converted to a condominium (section 51); if tenant persistently fails to pay rent on time or no longer qualifies for social housing (section 58); if tenant in social housing has materially misrepresented income (section 60); if tenant commits an illegal act or carries on an illegal trade (section 61); if tenant seriously impairs safety of any person (section 66); and if number of occupants is in contravention of health, safety or housing standards (section 67).

The two other basis for a landlord terminating a tenancy under the *Residential Tenancies Act, 2006* are where a tenant causes damage (sections 62 and 63) or interferes with reasonable enjoyment and lawful rights (sections 64 and 65). Accordingly, a monthly tenancy could be terminated for the reasoning used in the *Cebula v. Davidson* and *Feaver v. Davidson* cases referred to above. However, the landlord would be in the position of not having a lease that prohibits smoking in the unit on which to base the application (which was the situation in the *Feaver v. Davidson* case) and, in our opinion, the Landlord and Tenant Board may well feel inhibited from ordering a tenancy termination and eviction, especially of a long term tenant, caused by the landlord's wish to alter the lease terms to include a smoking prohibition and to change the type of building to a non-smoking building.

In a 2006 case at the Ontario Rental Housing Tribunal (2006 File Number SWT-08000) a tenant had requested the enforcement of a smoke-free policy throughout the rental building. The Tribunal refused on the basis it did not have jurisdiction and indicated that for an order involving all the units in a building all tenants would have to be parties to the proceedings. From this Tribunal decision it appears clear that a landlord will have difficulty imposing a smoke-free policy on existing tenants within a set time frame. It would be interesting, however, to see the reaction of the Landlord and Tenant Board to such an application which does name all the tenants as parties.

In any event, the 'grand-fathering' has no specific duration and will continue indefinitely under a monthly tenancy unless the tenant wishes to terminate the tenancy or the landlord can terminate the tenancy based on one of the grounds for such termination enumerated in the *Residential Tenancies Act, 2006*.

Question 1 f

A landlord should be cognisant of the litigation risks from non-smoking tenants exposed to second-hand smoke drifting from a leased residential unit where smoking is occurring to the non-smoking tenant's leased residential unit. This risk is the same whether the landlord has done nothing to restrict smoking in the leased residential units or whether the landlord is attempting to convert a building that allowed smoking in the leased residential units to a completely non-smoking building.

In our opinion, in the absence of other factors, the landlord has virtually no risk of liability for health consequences, loss or damage to the non-smoking tenant. It is, after all, not the landlord who has caused any damage to the non-smoking tenant.

However, if the non-smoking tenant is led to believe the building is completely non-smoking by advertising, the tenant application to lease form that tenant is asked to complete and the lease form presented to the tenant and the building is not yet completely non-smoking because it is in the process of conversion, there may be liability that attaches to the landlord. A tenant who relies upon such representations by a landlord when the representations are untrue and becomes ill or suffers other damage as a result may have a right to seek compensation for his or her damages from the landlord.

In addition, the landlord may have a litigation risk based on a non-smoking tenant seeking repairs and improvements in the leased premises to block smoke drifting between units and rent reductions until smoke has been stopped from infiltrating the non-smoking tenant's unit.

In every lease there is a covenant, either express or implied, by the landlord in favour of the tenant for "quiet enjoyment" which means the tenant has the right to take possession, use, enjoy the premises and be protected against interference by the landlord or others claiming under the landlord (see Shelley, J. *Environmental Tobacco Smoke as a Breach of the Covenant for Quiet Enjoyment* at http://www.nsra-adnf.ca/cms/file/pdf/2007quiet_enjoyment.pdf). Tenants have been able to claim tobacco smoke drifting from one unit to another is a breach by the landlord of the covenant for quiet enjoyment. To use this basis a tenant must demonstrate the drifting smoke renders the premises uninhabitable as a residence and is more than a temporary inconvenience (although it can be intermittent and not continuous).

In one 2002 case the Ontario Rental Housing Tribunal required the landlord to renovate a floor in an attempt to prevent smoke drifting between floors (*Satchithananthan v. Cacciola,*2002, Docket Number TST-04047, Carswell Ontario 5023). In another case the Tribunal required the landlord to obtain a report confirming that the ventilation system was in working order and suitable for the building (2006, File Number SWT-08000). In the 2002 case the Tribunal made the floor renovation order even though it found no health, safety or building codes were violated and the Tribunal also ordered a rent reduction of approximately 5% effective throughout the time the tenant was exposed to drifting smoke and prior to completion of the floor repairs by the landlord.

Accordingly, the migration of smoke from one unit to another may put the landlord at risk of being on the receiving end of requirements to undertake construction to prevent such migration and to reduce the rent.

The 2002 case went back to the Ontario Housing Tribunal in 2003 (*Satchithananthan v. Cacciola,*2003, Docket Number TNT-03370, [2003] O.R. H.T.D. [No. 91]). This time the Tribunal held that the tenant had not demonstrated that the occasional odour of tobacco in the air substantially interfered with the tenant's reasonable enjoyment of the unit for all usual purposes. The Tribunal also held the landlord had made reasonable efforts to protect the tenant's enjoyment of the unit by investigating, speaking to the smoker tenant and providing the smoker tenant with a large air purifier to use while smoking in the unit. The Tribunal indicated that in some cases the appropriate thing for the landlord to do is commence an application against the tenant who is engaging in disruptive conduct and let the Tribunal decide whether or not to evict that tenant. In this case, however, the Tribunal said the landlord was correct not to commence an application against the smoker tenant because he was a tenant before the complainant tenant, he has always been allowed to smoke in his unit, he had no prior complaints about his smoking, he was rarely home in the unit and the landlord correctly came to the conclusion that the complainant has a tendency to exaggerate.

A landlord attempting to convert a property to a no smoking property would be well advised to make the situation perfectly clear to all tenants and prospective tenants. Marketing material and advertising, the tenant application to lease a unit form and the lease itself should all include statements that the building is in transition from one in which smoking is allowed in leased units to one where there is no smoking. The documentation should clearly indicate that although smoking in the unit being newly leased will be prohibited that existing tenancies are grand-fathered, pursuant to the effect of the *Residential Tenancies Act, 2006*, and that smoke could move from a grand-fathered smoking unit to a no smoking unit and that the landlord assumes no responsibility should this happen. This transparency of the situation clearly provides the new tenant with the opportunity to make an informed decision as to whether or not to rent the unit.

It is, in our view, unlikely a new non-smoking tenant would succeed in litigating against a landlord who has made this clear to the tenant, either for health and other damages sought by the tenant or for construction changes to stop migrating smoke or for a rent abatement. This still leaves it open to the landlord to ask the Landlord and Tenant Board to terminate the tenancy of and evict the smoking tenant because the smoke is causing undue damage or interfering with the reasonable enjoyment or lawful rights of the non-smoking tenant.

A Manitoba case is of interest with regard to the conversion of a building to a no smoking building. In this case the landlord adopted a no smoking policy which states, in part:

> ... effective October 1st, 2006, all of our buildings will have a non smoking policy ... All existing tenants will be 'grandfathered' during their length of tenancy. This means that you, your visitors or guests will continue to be allowed to smoke inside your rental unit, balconies or patios ... All new tenants, visitors, or guests will not be permitted to smoke in any of the rental units, balconies and patios as well as on the property.

A tenant asked the Manitoba Residential Tenancies Branch to determine whether the landlord's policy was reasonable. Such a request may not be within the jurisdiction of the Ontario Landlord and Tenant Board.

The Branch held:

> The landlord's argument is persuasive, and I conclude that the rule will improve people's access to peaceful enjoyment of their units and of the complex, it will improve the safety, comfort and welfare of tenants, their guests, and workers at

> the complex, and it will reduce and eventually eliminate cleaning and replacement expenses brought on by the prevalence of tobacco smoke...

and determined that the landlord's policy was reasonable.

While this is a Manitoba case and the governing legislation is different it does provide some guidance to landlords as to how they should convert a smoking building into a no smoking building by using a 'grand-fathering' system.

A social housing unit is treated somewhat differently under the *Residential Tenancies Act, 2006* and is subject to the *Social Housing Reform Act, 2000.*

Question 1 g

Section 7 (1) of the *Residential Tenancies Act, 2006* sets out a series of sections in the *Residential Tenancies Act, 2006* that do not apply to social housing. None of these exempt sections, however, relate to the issue of smoking in multi-residential dwellings as set out in this opinion.

The *Social Housing Reform Act, 2000* proposes to provide efficient and effective administration of housing programs. Pursuant to sections 4 (1) and (2) of the *Social Housing Reform Act, 2000,* the Minister of Municipal Affairs and Housing designates, by Regulation, service managers and their geographic service area. It is the service managers who manage the wait lists for social housing and not the landlords. In many cases a municipality or municipal organization is designated as service manager.

Service managers must establish and administrate waiting lists for both rent-geared-to-income units pursuant to section 68 of the *Social Housing Reform Act, 2000* and special needs units pursuant to section 74 of the *Act.* Those on the special needs list rank in priority to those on the rent-geared-to-income list. A centralized waiting list must be established by the service manager, in accordance with section 35 of *Ontario Regulation 298-01* made pursuant to the *Social Housing Reform Act, 2000.* Additionally, a subsidiary list is maintained for every rent-geared-to-income housing project for households having indicated a preference for a particular housing project (section 36 (2) of *Regulation 298-01*).

It is, however, optional for those on the rent-geared-to-income waiting list to express a preference for a housing project and be placed on a subsidiary list.

Those who have priority for a unit are, first, those longest on the special needs list that match the size of unit available for their requirements (section 45 (3.2) of *Regulation 298-01*), then those longest on the rent-geared-to-income list that match the size of unit available for their requirements (section 41 (2) of *Regulation 298-01*).

If those on the special needs list refuse a unit when it is offered, they maintain their position on the special needs list (unless they, for other reasons become, ineligible or request to be removed from the special needs list). If those on the rent-geared-to-income list refuse a unit when it is offered, they maintain their position on the rent-geared-to-income list but if they have indicated a preference for a particular housing project, are on a subsidiary list and refuse a unit offered that matches the preference list three times they cease to be eligible for rent-geared-to-income housing units (section 39 (1) of *Regulation 298-01*).

If the social housing unit that becomes available is smoke-free, it must be offered to those on the waiting list with the most priority whether or not they are smokers and, for those on the rent-geared-to-income waiting list, regardless of an expressed preference. If a smoker with waiting list priority is offered and accepts a non-smoking unit, that smoker must adhere to the no smoking requirements.

If the smoker with waiting list priority is offered a non-smoking unit and refuses, the waiting list is maintained as required by *Regulation 298-01.*

It is, therefore, quite possible that a smoker with waiting list priority will be offered a non-smoking social housing unit. However, that does not mean that smoker, should he or she accept the offered non-smoking unit, can disregard the smoking controls in place for that unit. Any refusal to adhere to no-smoking controls can be dealt with as with any other tenant under the *Residential Tenancies Act, 2006.*

Condominiums:

Condominium corporations are created by the registration by the owner of the property of the declaration and description and, prior to such registration, do not exist in law. Condominium corporations are, in Ontario, subject to the *Condominium Act, 1998*. The declaration deals with the framework of the condominium corporation: it is the equivalent to its constitution. It may specify conditions or restrictions with respect to the occupation and use of the units or common elements (section 7 (4) (b) of the *Condominium Act, 1998*). Once registered, the declaration can only be changed with regard to conditions and restrictions on the occupation and use of the units or common elements by the condominium corporation board of directors enacting the change and

the owners of at least 80 per cent of the units consenting to the change The description includes the plans which focus on the boundaries of the units and common elements.

Once created, a condominium corporation is governed by a board of directors elected by the members of the corporation. The condominium corporation board of directors enacts by-laws which tend to deal with matters of corporate governance and management issues. Before taking effect a by-law enacted by the condominium corporation board of directors must be approved by a majority of the condominium unit owners. Section 56 (1) of the *Condominium Act, 1998* provides that the by-laws may "govern the maintenance of the units and common elements" (paragraph (j)) and "govern the management of the property" (paragraph (l)).

The board of directors of a condominium corporation may also, pursuant to section 58 (1) of the *Condominium Act, 1998*, make rules respecting the use of the common elements and the units to:

> (a) promote the safety, security or welfare of the owners and of the property and assets of the corporation; or
>
> (b) prevent unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation.

Section 58 (2) of the *Condominium Act, 1998* provides: "The rules shall be reasonable and consistent with this Act, the declaration and the by-laws." Rules made by a condominium corporation board of directors take effect 30 days after notice of them is given to the unit owners unless the unit owners require a meeting of owners which can amend or repeal Rules.

Accordingly, a condominium corporation could conceivably establish no smoking restrictions in any of the declaration, the by-laws or the rules.

The declaration is usually registered by the owner of the property at the time it is first developed and marketed as a condominium and it would be rare for that developer to insert a no smoking provision in the declaration. While tobacco control advocates have recently asked a builder in Ottawa who constructed a "green" condominium building to do so, they have been unsuccessful to date.

A 54 unit condominium corporation in Kenora, Ontario was successful in amending its declaration pursuant to section 107 of the *Condominium Act,* 1998 in 2007 to prohibit smoking within any unit or upon the common elements with the exception of the balconies. (Kenora Condominium Corporation No. 4 (operating as Lakeview Condominiums), November 19, 2007

Instrument Number LT-245 425 added section (k) to Article III of its declaration: "No owner or occupant shall permit smoking within the unit nor upon or within any of the common elements in accordance with the smoke-free clean air environment policy in force pursuant to the Laws of Ontario and in accordance with this Amendment to the Declaration of the Corporation named herein, EXCEPTING that the balconies adjoining each unit are designated as smoker friendly with all other proposed amendments to remain 'as is' ").

We are unaware of any other condominium corporation declaration in Ontario that includes a no smoking provision.

Even in the Kenora Condominium situation balconies were excepted from the restriction and could still result in smoke drifting into units. The wording of the declaration amendment for the Kenora Condominium is also of concern and could lead to a legal challenge of the validity of the amendment. By providing the restriction is "...in accordance with the smoke-free clean air environment policy in force pursuant to the Laws of Ontario ..."enforcement problems could result. There is no indication as to any specific "policy" or "law" in the wording. As well as being very general in wording, which could in itself be a ground for legally attacking the restriction, policy and laws can change.

By-laws are most commonly used to deal with governance matters of the condominium corporation and, again, it would be rare to find no smoking controls in the by-laws and we are unaware of any Ontario condominium corporation by-laws that have included no smoking provisions.

Declarations and by-laws may become more popular methods to eliminate smoking in condominium buildings in the future but the process to change a declaration or even to amend by-laws is somewhat onerous and may inhibit using these tools. If the wording of such declaration or by-law amendment is a problem, correcting the problem by changing the wording is just as onerous a process as the original amendment.

Accordingly, it is most likely that the rules, which are much easier to enact and amend than the declaration or by-laws, would be used by a condominium corporation to effect a smoke-free building. A rule prohibiting smoking in the units of a condominium, in our opinion, would not be held by the courts to be unreasonable or contrary to the legislative scheme of the *Condominium Act, 1998*, although we have found no judicial precedent on this point. If, as is the case, a landlord can enforce a no smoking provision in leases we do not believe a court would find a no smoking provision in the rules of a condominium corporation to be unreasonable.

The condominium corporation has a duty to enforce its rules even if there are not complaints by owners (see *Metropolitan Toronto Condominium Corp. No. 850 v. Oikle* (1994) 44 R.P.R. (2d) 55 (Ont. Gen. Div.)).

In *York Condominium Corp. No. 382 v. Dvorchik* ((1997) 12 R.P.R. (3d) 148 (Ont. C.A.)) the Court decided Courts should not substitute their own opinion about the propriety of a rule enacted by a condominium corporation board unless the rule is clearly unreasonable or contrary to the legislative scheme. In the absence of such unreasonableness, the rules should be deemed appropriate when enacted by a board charged with the responsibility of balancing the private and communal interests of the unit owners. The court determined that in making its rules, the board is not performing a judicial role, and no judicialization should be attributed either to its function or process.

Some condominium corporation rules include a general restriction prohibiting a unit owner from creating any "nuisance" which disturbs the comfort or quiet enjoyment of the property by other owners.

Question 2 a

"Nuisance", in law, has a particular meaning - it is an unreasonable interference with the use and enjoyment of property (see Linden, A.M. *Canadian Tort Law,* 7th Edition, Toronto; Butterworths, 2001 at pp. 525-526). The appropriate test to determine whether there is an actionable nuisance involves a balancing between the plaintiff's interest against the defendant's interest (*Execote Hotel Corp. v. E.B. Eddy Forest Products Ltd.* [1988] O.J. No. 1905, Donnelly J.). In this Supreme Court of Ontario case the court recognized: "although the test of nuisance is generally whether the defendant's use of its land interfered with the beneficial use and enjoyment of the plantiff's lands and whether that interference was unreasonable, there is authority for the proposition that where actual physical damage occurs; the interference is unreasonable." To prove nuisance it is not necessary to prove the intent, negligence or fault of the person causing the nuisance.

Whether or not a condominium corporation could prevent smoking in units because such smoking is a "nuisance" which disturbs other owners will very much depend upon the exact wording of the condominium rule relating to "nuisance".

Very often the "nuisance rule", while including general language, is part of a specific issue such as fire hazards or noise. Whether or not a "nuisance" exists which is covered by the "nuisance rule" is many times specifically left in the discretion of the condominium corporation board of directors to determine.

For example, one often sees a rule, such as: "No owner shall create or permit the creation of or continuation of any noise *or nuisance* (italics are ours) which, in the opinion of the Board or the Manager, may or does disturb the comfort or quiet enjoyment of the property by other owners, their families, guests, visitors, servants and persons having business with them" (Ottawa-Carleton Standard Condominium Corporation No. 734 Rules).

When the "nuisance rule" is combined with a specific issue, such as noise, there is a risk a court will interpret the entire rule as relating only to noise and not relating to any other type of nuisance, such as smoking. The exact wording of the "nuisance rule" may, therefore, be very important in determining if a condominium corporation can use it to prevent smoking in units.

In our opinion, a general "nuisance rule" is unlikely to be enforced to prevent smoking in condominium units without there being unit owners complaining. To prove "nuisance" under these circumstances, in our view, will require other unit owners to provide evidence that the smoking does disturb their comfort and quiet enjoyment of their units.

The Ontario courts have certainly upheld as reasonable and enforceable a "nuisance rule" prohibiting "... the causing of noise and the creation of a nuisance which disturbed the comfort and quiet enjoyment of the property by other people in the condominium" (see *York Condominium Corp. No. 332 v. Navratil* (1979) Webb J.). Although we have been unable to find a specific case where the "nuisance" being dealt with was the drifting of smoke between condominium units, in our opinion a court would consider drifting smoke to be as much of a nuisance as noise and, if the "nuisance rule" was worded widely enough to cover any "nuisance" that disturbs the other owners we believe it could be enforced to prevent smoking in units.

Clearly, however, it would be much better and leave less room for debate and argument before the Court for the condominium corporation rules (or declaration/by-laws) to deal specifically with prohibiting smoking in the condominium units. A clearly worded prohibition against smoking in the condominium units in the declaration, by-laws and/or rules would, in our opinion, be enforceable. Such a specific prohibition could be enforced by the board of directors of the condominium corporation and would not require specific complaints from other owners as it is the duty of the condominium corporation board to enforce the declaration, by-laws and rules whether or not other unit owners complain.

The *Condominium Act, 1998* sets out how a declaration, by-laws and rules of a condominium corporation are to be enforced.

Question 2 b

Section 132 (4) of the *Condominium Act, 1998* provides:

> Every declaration shall be deemed to contain a provision that the corporation and the owners agree to submit a disagreement between the parties with respect to the declaration, by-laws or rules to mediation and arbitration in accordance with clauses (1) (a) and (b) respectively.

The duty of the mediator is to "... endeavour to obtain a settlement with respect to the disagreement ..." (Section 132 (5)) and if a settlement is not possible the matter will be sent to binding arbitration pursuant to the *Arbitration Act, 1991* (section 132 (1) (b)). An arbitrator's decision will be enforced by the courts if it is not complied with by the parties.

Section 134 (1) and (2) of the *Condominium Act, 1998* go even further. They provide:

> (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant ... of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules ...
>
> (2) If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes.

Pursuant to section 134 (3) of the *Condominium Act, 1998* the court is given jurisdiction to issue a compliance order, to order payment of damages for non-compliance, to order the costs of the applicant to be paid and to grant "... other relief as is fair and equitable in the circumstances."

Of course, a court has the right to enforce its orders, whether it is an order to comply with an arbitrator's decision or is an order made by the court itself pursuant to section 134 of the *Condominium Act, 1998* and can do so by holding anyone that disobeys a court order in contempt which exposes such a person to a fine or imprisonment or both.

In addition, there are precedents for requiring the unit owner who does not comply with a Court order, or even does not comply with the condominium rules, to sell his or her unit.

In *York Condominium Corp. No. 275 v. Mueller* (February 1, 1991, Doc. M0335/90 (Ont. Gen. Div.)) a unit owner failed to comply with a court order to comply with several rules of the

condominium corporation and the condominium corporation obtained an order from the court that the unit be sold. In *York Condominium Corp. No. 202 v. Redican* (Doc. RE 3905/94, O'Brien J. (Ont. Gen. Div.)) the condominium corporation obtained an order restraining an owner who had behavioural problems from a long list of activities, including the creation or continuation of noise, throwing objects off the balcony, and causing physical damage; and an order requiring the owner to sell her unit within six months. The condominium corporation, in *Peel Condominium Corp. No. 148 v. Patrick* (July 18, 1977 Doc. A5053/97 (Ont. Gen. Div.)) was given an order requiring the owners to list their unit for sale and sell within six months because the owners had been noisy, caused physical damage to the common elements and harassed and directed profanity at other residents.

Accordingly, if any of the declaration, by-laws or rules include a prohibition against smoking in the condominium units the Courts will enforce that prohibition and could order a non-complying owner to sell his or her condominium unit.

Question 2 c and d

If the condominium declaration (by-laws or rules) is amended to add a prohibition against smoking in the condominium units, it will, immediately be effective in accordance with the terms of the amendment. In other words, such an amendment could include a 'grand-father' clause allowing existing owners to continue smoking in their units for a period of time. The period of time would be fixed by the wording of the amendment and could be while the unit continued to be owned by the existing unit owner or for a fixed time period. There is no legal requirement for there to be a 'grand-father' provision or to have such a provision extend for any particular time. If such a 'grand-father' clause was not a part of the amendment to the declaration (by-laws or rules) the condominium corporation would be under a duty to enforce the declaration (by-laws and rules) immediately. The declaration (by-laws and rules) would apply equally to all unit owners whether or not they had voted in favour of the amendment to the declaration (or by-laws or rules if the members required a meeting with regard to the rules.

Question 2 e

There is, in our opinion, no liability in ordinary circumstances on a condominium corporation for damages suffered by a unit owner caused by the infiltration of smoke from another unit. The fact that the condominium corporation is moving towards a smoke-free environment indicates an intention to improve the situation over time but there is no statutory or other legal duty on the condominium to do so. There is a duty on the condominium corporation to maintain the common elements (section 90 (1) of the *Condominium Act, 1998*) unless the declaration provides otherwise and, a failure of the condominium corporation to undertake maintenance that results in the incursion of smoke from one unit to another could conceivably leave the condominium corporation open for damages. If

the condominium corporation fulfills its maintenance duties there should be no liability. It would still be wise for the condominium corporation to be completely transparent with new owners that the building is being transitioned into a no smoking building under the 'grand-fathering' terms and that during the 'grand-father' period there could be smoke infiltration into the new owner's non-smoking unit from a 'grand-fathered' smoking unit for which the condominium corporation accepts no liability.

Question 2 f

A condominium corporation has a duty to enforce the condominium declaration, by-laws and rules whether or not there are complaints from owners. Accordingly, if any of the declaration, by-laws or rules prohibit smoking in units they must be enforced by the condominium corporation even if no owner considers a breach of the prohibition to be a nuisance or hazard. The duty of a condominium corporation in this regard, in our opinion, does not extend as far as treating smoking as a nuisance and enforcing a "nuisance rule" in the absence of complaining owners.

Question 2 g

The developer of the condominium property who registers the declaration must deliver to every person who purchases a unit from the developer a disclosure statement (section 72 (1) of the *Condominium Act, 1998*). Section 72 (3) of the *Condominium Act, 1998* sets out what a disclosure statement must contain. There is nothing specified indicating the disclosure statement has to indicate the smoking or no smoking status of the condominium. It does have to contain a copy of the declaration, by-laws and rules and if one or more of these documents contain a smoking prohibition the purchaser must read them to determine that. There is a requirement that the disclosure statement include a table of contents which indicates whether the declaration, by-laws or rules deal with restrictions or standards with respect to the occupancy or use of the units that are based on the nature or design of the facilities and services and, if so, where the matters are dealt with. This could assist in leading the recipient of the disclosure statement to the place in the declaration, by-laws or rules where the smoking prohibition is located. It is, however, the responsibility of the purchaser to determine the status of the property as prohibiting smoking in the units or otherwise.

If the vendor is not the developer and the transaction is a re-sale of the unit, the purchaser can request a status certificate from the condominium corporation. It is, however, up to the purchaser to make the request. Section 76 (1) of the *Condominium Act, 1998* sets out what a status certificate must contain. While it is required that the status certificate include a copy of the current declaration, by-laws and rules there is nothing specified requiring it to indicate the status of the condominium as prohibiting smoking or otherwise. Similar to the disclosure statement, it

is up to the purchaser to read these documents to see if they contain anything regarding smoking in the condominium units.

Accordingly, there is no legal responsibility on the seller or the condominium corporation to communicate with potential buyers about the smoke-free status of the condominium other than providing copies of the declaration, by-laws and rules.

Question 2 h

If a developer of a new condominium wished to prohibit smoking in the units the developer could put that restriction in any or all of the declaration, by-laws and rules. Prior to the sale of any units the developer is the sole owner of the property, is responsible to prepare and register the declaration and can then form a board of directors and enact the by-laws and the rules. Implementing a decision to make the condominium development smoke-free is quite straight forward.

Housing Co-operatives:

Housing co-operatives are non-profit corporations without share capital and are governed by the *Co-operative Corporations Act*. They are structured to operate "... as nearly as possible at cost ..." (Section 1 (1) (d) of the *Co-operative Corporations Act*) and have as their primary object the provision of housing to their members (section 5 (3.1) (a) of the *Co-operative Corporations Act*).

The housing units owned by a housing co-operative can be divided into "member units" and "non- member units". The board of directors of the housing co-operative may designate and may revoke the designation of one or more housing units as non-member units under sections 171.5 (1) and (2) of the *Co-operative Corporations Act*. Only a member of a housing co-operative has the right to occupy a member unit of the co-operative and upon ceasing to be a member ceases to have any occupancy rights but such a member, subject to the co-operative's by-laws, may allow other persons to occupy the unit (sections 171.4 (1) and (2) of the *Co-operative Corporations Act*).

Section 171.7 (1) of the *Co-operative Corporations Act* provides that the *Residential Tenancies Act, 2006* and the common law relating to landlord and tenant relationships do not apply with respect to member units of a non-profit housing co-operative. It, therefore, appears that non-member units are subject to the *Residential Tenancies Act, 2006* and our opinion with regard to leased residential units subject to this legislation would apply also to non-member units of a housing co-operative. Accordingly, our opinions in this area of housing co-operatives are directed at member units.

A co-operative may be incorporated under the *Co-operative Corporations Act* "... for any lawful objects to which the authority of the Legislature extends ..." (section 4 (1)). It is incorporated by five or more persons applying for articles of incorporation which articles shall set out "all restrictions on the business that the co-operative may carry on or on the powers that the co-operative may exercise" (sections 5 (1) and (2)). The articles may set out any provision authorized by the *Co-operative Corporations Act* or that "...could be the subject of a by-law of the co-operative" (section 5 (4)). Question 3 a

Although we are unaware of any co-operative corporation in Ontario that has been incorporated specifically to provide no smoking accommodation to its members and so there is no legal precedent we can rely upon, it is our opinion that the articles of incorporation for a housing co-operative could specifically state that its object is to provide no smoking accommodation and that the restrictions on the business that it may carry on are that it can not allow smoking on its property.

Section 21 of the *Co-operative Corporations Act* provides: "Subject to this Act and the articles, the directors may pass by-laws that regulate the business and affairs of the co-operative." Such by-laws, before they are effective, must be confirmed by a two-thirds vote at a general meeting of members of the co-operative (section 23 (b) of the *Co-operative Corporations Act*). There is nothing in the *Co-operative Corporations Act* and, normally, nothing in the articles of incorporation that restrict a co-operative's by-law from indicating that in operating its business it shall do so based on its housing units being non-smoking. While co-operative by-laws generally regulate the governance and management of the co-operative, in our opinion, nothing would prevent the by-laws from mandating the cooperative housing units to be non-smoking.

In our opinion, therefore, it would be legal for a new housing co-operative to be wholly or partially smoke-free and that could be achieved by including appropriate provisions in the articles of incorporation or the by-laws or both.

Under section 151 (1) of the *Co-operative Corporations Act* the articles of incorporation of a co-operative can be amended to "extend, limit or otherwise vary its objects" (section 151 (1) (c)); "delete or vary any provision in its articles" (section 151 (1) (j)); or "provide for any other matter or thing that is authorized by this Act to be set out in the articles or that could be the subject of a by-law of the co-operative" (section 151 (1) (k)) [see also sections 153 (1) and 154 (1) and (2) of the *Co-operative Corporations Act*]. Question 3 b

Of course, the by-laws of a housing co-operative can also be amended by the same process the by-laws were originally enacted.

Accordingly, it would, in our opinion, be entirely legal for an existing housing co-operative to become wholly or partially smoke-free and it could do so by amending its articles of incorporation or its by-laws or both. There is no legal requirement that smokers be 'grand-fathered' in this process so any 'grand-fathering' would depend upon the wording of the amendment to the articles of incorporation and the by-laws which would also determine the length of such 'grand-fathering'.

Question 3 c

The *Co-operative Corporations Act* provides a process for terminating the membership and the occupancy rights of a co-operative member. Similar to a landlord terminating a tenancy and evicting a tenant, this would be the tool used by the co-operative to enforce its smoke-free policy.

Section 171.8 (2) of the *Co-operative Corporations Act* sets out the procedure for terminating membership and occupancy rights of a member of a non-profit housing co-operative. They may be terminated on a ground set out in the by-laws provided such ground is not unreasonable or arbitrary (section 171.8 (2) 2). The termination is decided by a majority of the board of directors of the co-operative (section 171.8 (2) 1) and the member terminated can appeal the decision of the board to a meeting of members of the co-operative (section 171.8 (2) 9) and the appeal is decided by a majority vote of the members (section 171.8 (2) 14). The co-operative may regain possession of a member unit by obtaining a writ of possession from the Superior Court of Justice (sections 171.12 and 171.13 of the *Co-operative Corporations Act*).

Question 3 d

A member unit of a co-operative, not subject to the *Residential Tenancies Act, 2006* or the common law relating to the landlord and tenant relationship, is only governed by the terms of the articles of incorporation and by-laws of the co-operative. It is not subject to the requirement that an occupant must have reasonable enjoyment of his or her unit or freedom from nuisance. The board of directors of a co-operative is, in our view, under a legal duty to enforce the articles of incorporation and by-laws of the co-operative and, if those documents set out that the member units are to be no smoking units, must comply with this duty even under circumstances where no one is complaining or affected by the infiltration of smoke from one unit to another.

Question 3 e

If a co-operative converts from a smoking allowed property to a no smoking property by providing for a 'grand-fathering' system, the co-operative would be well advised to make the situation as clear as possible to any new co-operative members who will occupy member units. The best protection for the co-operative is transparency so that no one becomes a member and occupies a unit without knowing of the conversion situation and the 'grand-fathering' terms. We are not convinced that, even in the absence of such transparency, the

co-operative would be held liable for damages suffered by a member due to exposure to drifting smoke from one unit to another but a transparency strategy would add protection to the co-operative.

Question 3 f

In the absence of a housing co-operative also coming within the terms of the *Social Housing Reform Act, 2000,* there is no legal requirement for handling waiting lists to become a co-operative member and occupy a member unit. Presumably the co-operative would only accept persons on any waiting list it maintained who would be eligible to become members, that is, who would commit to adhere to the no smoking policy. Under section 60 (1) of the *Co-operative Corporations Act* membership in a co-operative is governed by the co-operative by-laws, subject to the Act and the articles of incorporation. A person must apply for membership and be approved by the co-operative's board of directors and must have "... complied fully with the by-laws governing admission of members" (section 61 (2) of the *Co-operative Corporations Act*).

Conclusion:

In our opinion, restrictions on smoking in units in multi-unit dwellings can be legally imposed and enforced in Ontario whether the properties are subject to the *Residential Tenancies Act, 2006*, the *Social Housing Reform Act, 2000*, the *Condominium Act, 1998* or the *Co-operative Corporations Act*. This, in our view, is true both for newly constructed units just being organized for residential occupancy and for existing properties that may wish to convert to a non-smoking property.

Yours very truly,

David H. Hill, C.M.,Q.C.
3:gd

SCHEDULE "A"

Questions for Legal Opinion

With the goal of creating smoke-free apartments, condominiums and housing cooperatives under existing legislation, we are seeking an Ontario-specific legal opinion pursuant to four pieces of legislation: the *Residential Tenancies Act, 2006;* the *Social Housing Reform Act, 2000;* the *Condominium Act, 1998;* and the *Co-operative Corporations Act.*

1. Apartments (both private and social housing)
    a. Is it legal for a landlord to institute a smoke-free policy that would prevent tenants, tenants' guests and anyone else from smoking inside private units? (Note: a smoke-free policy is not a smoker-free policy).
    b. Is it legal for a landlord to institute a smoke-free policy that would prevent tenants and members of the general public from smoking anywhere on the property?
    c. Could a landlord evict a tenant for breaching a smoke-free policy that was included in the lease if the second-hand smoke was causing a disturbance to other tenants?
    d. Could a landlord evict a tenant for breaching a smoke-free policy that was included in the lease if no one in the building was complaining of a negative effect related to second-hand smoke?
    e. In the case of a building gradually becoming smoke-free through attrition, how long would an existing tenant have to be grandfathered? Would it necessarily be until they chose to move out, or could the grandfathering period be for a specified number of months?
    f. In a grandfathering scenario, what would be the recommended strategy in terms of the landlord protecting himself from possible litigation based on tenants' interim exposure to second-hand smoke?
    g. In the case of smoke-free social housing, what would be required for a landlord to handle waiting lists? In other words, what would be the best course of action if some units/buildings designated as smoke-free became available, but a smoker who desired a smoking unit was at the top of the waiting list?

2. Condominiums
    a. In the absence of an explicit smoke-free policy, could a condominium corporation enforce its rules regarding nuisance to stop second-hand smoke infiltrating into neighbouring units?
    b. If a minimum of 80% of a condominium corporation's members voted in favour of a smoke-free amendment to the declaration, how would the smoke-free policy of that condominium corporation be enforced? Could a condominium owner be forced to sell his unit if he was found in breach of the policy?
    c. Would condo owners who opposed a smoke-free amendment to the declaration necessarily be grandfathered and permitted to continue smoking, or could the condominium corporation require all units to be smoke-free?
    d. If grandfathering is necessary, would it have to be until the owner chose to sell the unit, or could it be for a specified length of time? If it could be for a specified length of time, what might that be?
    e. In a grandfathering scenario in which a condominium would gradually become smoke-free through attrition, what would be the recommended strategy in terms of the condominium corporation protecting itself from possible litigation based on owners' interim exposure to second-hand smoke?
    f. Does a condominium corporation have jurisdiction over behaviours that are not causing a nuisance or hazard? In other words, would a condominium corporation have the power to enforce its smoke-free policy in a situation where no one was complaining of being negatively affected/disturbed by the infiltration of second-hand smoke?
    g. Who would be responsible for communicating with potential buyers about the smoke-free status of a condominium?
    h. For new condominiums, what would be required for a developer to declare a condominium development 100% smoke-free?
3. Housing Cooperatives
    a. Would it be legal for a new housing cooperative to be wholly or partially smoke-free? How would that process work?
    b. Is it legal for an existing housing cooperative to become wholly or partially smoke-free? How would that process work? Would existing smokers necessarily be grandfathered? If so, for how long?
    c. How would a housing cooperative enforce its smoke-free policy?
    d. Could a smoke-free policy be enforced in a situation where no one was complaining of being negatively affected/disturbed by the infiltration of second-hand smoke?

e. In a grandfathering scenario in which a cooperative would gradually become smoke-free through attrition, what would be the recommended strategy in terms of the housing cooperative protecting itself from possible litigation based on members' interim exposure to second-hand smoke?
f. How would waiting lists have to be handled with respect to a smoke-free policy?