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Smoking in Condos

How Many Laws Can Dance on the Head of a Cigarette?

Smoking, and the dangers posed by exposure to second-hand smoke, is a very contentious issue in modern society. This issue is contentious, in part, because smoking is not only a matter of personal choice but also a matter of public health and well-being. It is a social issue fraught with legal implications, and, in this regard, it is instructive to examine the legal treatment of smoking and of second-hand smoke.

Legislative Treatment

An argument often made by smokers or advocates of smokers' rights is that smokers have a right to smoke if they choose to do so. While this is true in the abstract, it is also subject to ever-increasing limitations. Thanks to a variety of federal, provincial and municipal laws and by-laws, smoking is now prohibited in most public places, most workplaces, office buildings, and motor vehicles in which children under 16 are riding, to name a few. One such law is the Smoke Free Ontario Act, which prohibits the smoking of tobacco or the holding of lighted tobacco in any enclosed public place. "Enclosed public place" is defined as the inside of any building, structure or vehicle that is covered by a roof, and to which the public is ordinarily invited or permitted access. In addition, the Smoke Free Ontario Act specifically prohibits smoking in any common area in a condominium, including elevators, hallways, parking garages, party or entertainment rooms, laundry facilities, lobbies and exercise areas. Smoking prohibitions can also be found in a number of municipal codes, such as Toronto, where it is an offence to smoke within a 9 meter radius surrounding any entrance or exit of a public building. Note the definition of "public building" includes a condominium building. As such, in addition to any provision in the declaration or rules which may prohibit smoking on certain common elements, Ontario provincial and municipal law also prohibits smoking in these places.

The Law of Nuisance

But what of those people who wish to smoke in their own units or balconies, and not in the corridors or lobby? A fundamental principle of property ownership in Canadian law is that owners of real property are entitled to the quiet enjoyment of their property. As such, any person who is held to be responsible for an act indirectly causing physical injury to property or substantially interfering with the use or enjoyment of property, where this injury or interference is held to be unreasonable, is liable for a claim in the tort or civil wrong of nuisance. This claim can arise whether the interference takes the form of excessive noise, offensive odours, drifting smoke, or any other form, and can arise even if the interference emanates from another property owner's activity on his own property, if the interference that such activity causes is unreasonable. It is a cliché, but true nonetheless, that a person's right to swing his fist ends at his neighbour's nose.

Cartwright v. Gray, an 1866 Upper Canada (later Ontario) Court of Chancery case, dealt with a claim in nuisance for drifting smoke. The plaintiff, Richard Cartwright, had sold a part of his land near his residence to Mr. Gray, who subsequently set up a carpenter's shop on that land. As part of the operation of

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the carpenter's shop, Mr. Gray burned the wood shavings and other refuse of his business, and the prevailing winds tended to carry the smoke toward Mr. Cartwright's house. Mr. Cartwright and his family found that the smoke was sufficiently thick so as to interfere with their use and enjoyment of their land, and independent witness accounts at trial supported this. The court in that case held that Mr. Gray was entitled to operate his shop on his land, but not in a way that interfered with Mr. Cartwright's reasonable enjoyment, stating that "A man may not use his own property so as to injure his neighbour. When he sends on the property of his neighbour noxious smells, smokes, &c., then he is not doing an act on his own property only, but he is doing an act on his neighbour's property also...". This issue of drifting smoke that was addressed by the court in this case, by necessity, factors significantly in many discussions regarding second-hand smoke. How does a smoker's right to do as he chooses balance with his neighbours' rights to not be subjected to his second-hand smoke?

Smoking in Condominiums

The court has had reason to consider the issue of smoking in a condominium context. Raith v. Coles, a 1984 British Columbia case, concerned owners of two abutting condominium units. John and Gloria Raith, an elderly couple, owned a condominium unit that was above another unit owned by George and Lydia Coles. Mr. Coles (and possibly Mrs. Coles, although neither the applicants nor the court were sure of this) was a cigar-smoker who frequently smoked in his unit. The cigar smoke drifted upward and into the Raiths' unit, despite the Raiths' efforts to prevent it from doing so. These efforts included installing fans and keeping their doors and windows closed. Unfortunately, the Raiths were unable to stop the cigar smoke from drifting into their unit. As a result of the constant infiltration of smoke, Mr. and Mrs. Raith stated that they both had suffered emotional strain and health problems. They finally felt that they had no option but to bring a court application for an injunction preventing Mr. Coles from smoking in his unit.

The very idea of such an action may seem far-fetched at first blush, and the court acknowledged as much, stating that one might initially wonder "whether such an application was bordering on the frivolous...". However, the court treated the matter seriously, and thoroughly examined the evidence that Mr. and Mrs. Raith brought before it. The court found that the Raiths had done everything that they reasonably could have done to prevent the smoke from entering their unit, but that their attempts had not been successful. Of great importance, the court found, was the fact that Mr. and Mrs. Raith's complaint was based on health problems that both had suffered as a result of the cigar smoke, and not merely on "a simple dislike of the smell".

In the end, the court granted the injunction, with County Court Judge Selbie stating that he "consider[ed] it to be unreasonable if a person, knowing that the smell is deleterious to others, persists, unless, of course, it can be shown that he has no control over its presence. There is no such suggestion here." The judge went on to say that "There are many things a person may not do in his house or castle – in the case of these respon-

dents, one of these things now is that he may not allow there to be emitted or discharged a noxious substance, in this case, cigar smoke and odour, from his premises...".

In 2014, second–hand smoke in a condominium context was also considered in the Ontario case of Mackay v. Metropolitan Toronto Condominium Corp. No. 985. This was an application by the Mackays for an order that the condominium corporation had failed to maintain and repair its common elements, and for other relief. In this case, the Mackays became aware of the smell of cigar smoke in their unit. The smoke continued to infiltrate their suite through the very many openings in the common elements between their unit and the unit above to the point that their insurer concluded that their unit was uninhabitable. The Mackays moved out of their unit, and a substantial amount of testing and work ensued. The Mackays eventually brought an application because the issue had not been resolved. After the application was commenced, but before the hearing, the issue was eventually addressed. However, the court held that even though at the time of the hearing the corporation was in compliance with its obligations, the Mackays should nonetheless have their costs of the application which were awarded in the amount of $32,500.

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Listen to Part I of a two part podcast by Brian Horlick with fellow CCI Director Bob Girard as they further discuss the issue of Smoking in Condominiums. This is a follow up to the article by Lynda Leaf, which appeared in the Winter 2015 condovoice and to the extremely well attended CCI Seminar on Smoking in Condos which was held on March 31st, 2016. Their extended audio interview is available at www.condopodcasts.ca

Second-hand smoke was further considered in Strata Plan NW 1815 v Aradi, a 2016 British Columbia case. Aradi was a 70 year old life-long smoker who persisted in smoking in his unit despite the corporation's by-law prohibiting smoking in units and on common elements. Due to complaints by some owners that Aradi's smoke was negatively affecting their health and the use and enjoyment of their property, the corporation brought an injunction application. Aradi opposed the application and claimed, amongst other things, that he had a disability resulting from his addiction to cigarettes. He also brought a human rights complaint on the basis that the corporation should accommodate his disability. The judge, after hearing the evidence, stated that even if Aradi had an addiction to cigarette smoking, which was not proven, he had to consider Aradi's wish to smoke in the context of the condominium legislation which included the right of other owners to enjoy their units without being exposed to nuisances such as smoking. In the end, the court ordered Aradi to immediately cease and desist from smoking cigarettes within his unit.

Smokers' Rights

Smokers are subject to a variety of restrictions on where they may smoke, as set out above. One argument that has been raised from time to time is that certain of these restrictions on smoking violate the equality

rights of smokers. The Canadian Charter of Rights and Freedoms guarantees certain fundamental rights of Canadians. Section 15(1) of the Charter states that "Every individual is equal before and under the law and 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 equality rights violation argument states that smokers smoke because they are addicted to nicotine, and that nicotine addiction should be considered to be a physical disability. As such, according to this equality rights violation argument, prohibitions on smoking discriminate against smokers based on their disability, and in so doing violate the Charter.

This argument was advanced in McNeill v. Ontario (Ministry of Solicitor General & Correctional Services), a 1998 decision. In that case, Peter McNeill was a prison inmate who, the court noted, made "frequent attendances at the Wellington Detention Centre." Mr. McNeill brought this application in response to smoking ban imposed by the prison. The prison imposed the ban in accordance with a City of Guelph by-law which prohibited smoking in public places, and in order to protect the health of inmates and staff. Mr. McNeill felt that this ban was discriminatory; he claimed that nicotine addiction was a disability included under s. 15 of the Charter and, as such, the prison was violating his Charter rights.

In response to this claim, the court stated that "Nicotine addiction and the symptoms of withdrawal that result when one discontinues smoking are not a mental or physical disability within the meaning of s.15(1) of the Charter." It further stated that smokers make up "a significant segment of society who have not been discriminated against historically based on their addiction." Accordingly, Mr. McNeill's application was dismissed.

The Condominium Act

Given that the body of case law (such as it is) seems to weigh in favour of the rights of non-smokers, one might ask how a condominium corporation that wishes to do so might prohibit smoking in its units. The answer seems relatively simple: by amending the corporation's declaration or by passing a rule.

Section 58 of the Act states that a board of directors may make rules respecting the use of the common elements and of units to promote the safety, security or welfare of the owners and of the property and assets of the corporation, or to prevent unreasonable interference with the use and enjoyment of the units. These rules must be reasonable and consistent with the Act as well as the corporation's declaration and by-laws. It is because of the requirement of reasonableness in a rule that grandfathering of existing smokers may be appropriate. A board that wishes to make or alter any rules can only do so after giving notice to the owners and giving those owners an opportunity, if requested, to approve those rules at a meeting of the owners. As such, the passage of a no-smoking rule in an existing condominium may require majority support of the owners. There is nothing in the Act with respect to smoking, and it has not in the past been a typical subject that is addressed in a declaration or in by-laws. However, more and more condominiums are now moving forward with rules prohibiting smoking

in units and the common elements.

Although a non-smoking provision is not typically found within a condominium corporation's declaration, one certainly could be inserted, and this too, is now becoming more prevalent. If the condominium wished to amend its declaration, it would require the support, in writing, of the owners of 80% of the units in order to do so.
What of new condominiums? Section 7 of the Act states that a condominium declaration may contain conditions or restrictions with respect to the use of the units. As such, a declarant who wished to develop and market a smoke-free condominium corporation could do so by including a blanket no smoking provision in the declaration. Such an idea has already gained traction in Ottawa, where a number of condominium developments have come to market as entirely smoke-free condominiums.

Emerging Trends – Electronic Cigarettes

Electronic cigarettes or E-cigarettes are an emerging trend in Ontario and concerns have been raised about their potential negative effect. Accordingly, in May 2015, the Making Healthier Choices Act, 2015 created new legislation in the form of The Electronic Cigarettes Act, 2015. This legislation deals with vaporizer or inhalant-type devices and has been proclaimed into force in part. Among the parts that have received Royal Assent but have not yet been proclaimed into force is section 10, which contains a general prohibition on use of electronic cigarettes in any enclosed public place or enclosed workplace, and a specific prohibition on the use of electronic cigarettes in, among other places, condominium common areas.

However, until such time as section 10 of the legislation is proclaimed into force, smoking of electronic cigarettes, or "vaping" will be allowed in enclosed public places, including the common elements of condominiums.

Marijuana

Presently, possession (including smoking) of marijuana is a criminal offence. However, the federal government provides access to legal sources of marijuana for medical purposes under regulations to the Controlled Drugs and Substances Act. To obtain medical marijuana, a person must have a medical document from a doctor and obtain the marijuana from a licensed producer.

The Future?

The Ministry of Health is presently considering further legislative and regulatory amendments that would strengthen smoking and electronic cigarette laws. The proposals being considered include expanding the Smoke-Free Ontario Act to include smoking of marijuana and other substances, the prohibition of electronic cigarettes in all enclosed public places and expanding the definition of electronic cigarettes to include electronic substances.

Given the importance being placed on governments' continuing efforts to improving everyone's health and wellness and of its continuing effort to lower smoking rates, it seems likely that more condominium residents and the corporations in which they live will soon be butting out.