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Smoke-free Movement Makes Inroads in Condos

BY JAMES KATZ

LAST YEAR, the Ontario Superior Court of Justice ruled that a condominium board failed to handle complaints about smoke infiltration fast enough. The case concerned two Toronto condominium owners who had been forced out of their highrise unit due to the pervasive infiltration of a neighbour's cigar smoke. Repairs eventually blocked the tobacco smoke from wafting into the owners' unit but, due to the delay, the court found that the corporation had neglected its statutory duty under the *Condominium Act* to carry out repairs to its common elements. As a result, the

court ordered the corporation to pay the owners \$32,000 toward their legal costs.

The case is more than another cautionary tale for condominium boards about the pitfalls of failing to exercise their statutory duties. The decision's broader impact is this: condominium owners can now, in certain cases, insist on living smoke-free inside their units.

The movement to make Ontario smoke-free, already well established in public places and the workplace, has also made significant inroads into condominium living, as this recent

court case demonstrated. Given the almost universally accepted facts that tobacco smoke is toxic, harmful to those who breathe it, and can ultimately be lethal, this is not surprising. What is surprising, however, is that establishing smoke-free condominiums has taken so long. The tools to accomplish this have been around for many years. They include the rule-making authority vested in condominium boards by the *Condominium Act*, as well as statutory and other legal remedies.

Tools to Establish Smoke-free Condominiums

A condominium board can make rules that promote the welfare and safety of owners and property, or that prevent unreasonable interference with an owner's use of their unit and common elements. Tobacco smoke likely falls under both categories, although there is no court decision to confirm this interpretation of the *Condominium Act*. Many condominium boards have already taken the prohibition-by-rule approach. Procedurally, it's fairly easy to do: All the board has to do is pass a rule and provide notice of it to owners. As long as the rule is reasonable, it should be enforceable, but again, there is no case law to confirm this.

To meet the test of being reasonable, such rules generally grandfather in existing owners who smoke in their units, allowing for a gradual transition to a completely smoke-free condominium. Although likely not legally required, a grandfathering provision serves two purposes. For one, the board avoids having to immediately enforce the new rule against existing owners who smoke. For another, the board pre-empts possible legal action from existing owners who smoke and feel the new rule infringes on their property rights.

A more concrete but procedurally difficult approach is for the condominium board to amend the corporation's declaration to prohibit smoking in units and all common elements. Under the *Condominium*

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Act, the declaration can regulate how units and common elements are used. However, the board requires the approval of 80 per cent of unit owners to make such an amendment. If the board obtains consent, then the amendment prohibiting smoking becomes effective and enforceable as soon as it's registered on title. A grandfathering provision need not be considered, nor is the amendment required to be "reasonable" in scope.

Despite the challenges of this approach, it has been used in a few condominiums since at least 2007. Some developers have also set out smoking restrictions in the declarations of new condominiums, catering to the increasingly popular smoke-free lifestyle.

Legal Remedies for Second-hand Smoke Problems

Even in the absence of no-smoking rules, condominium dwellers have laws at their disposal to prevent tobacco smoke problems. As discussed earlier, the recent court decision established that second-hand smoke problems are to be confronted, not ignored.

In that case, an investigation revealed the cigar smoke in question was seeping into the complainants' unit through openings left by defective construction. The *Condominium Act* requires corporations to repair common elements. The openings were in the communally owned concrete slab floor, which provided the court with an enforceable legal remedy.

In that case, the owners also cited the *Condominium Act* provisions that require condominium corporations to prevent health and safety risks generally. However, the court only required the one remedy. What this all means is that if common element defects are to blame for smoke migration, then the condominium corporation may have to locate the problems and fix them.

Condo owners can also turn to the *Smoke Free Ontario Act*, which prohibits smoking in indoor common elements, which likely includes exclusive-use common elements. This law applies to

hallways, enclosed patios or balconies, and parking garages, but not outdoor areas and inside units.

Unit dwellers affected by smoke infiltration from another unit that is unrelated to defective construction can consider a complaint under the Ontario Human Rights Code. In situations involving proven medical conditions exacerbated by tobacco smoke, the Code has been effectively used to force condominiums to take immediate action to protect such owners and, in some cases, to pay damages.

Finally, owners who deal with excessive and frequent tobacco smoke problems may be able to rely on the common law tort of nuisance, which exists to stop others from substantially and unreasonably preventing owners' use and enjoyment of their property. However, it is difficult to gauge the likelihood of this tool's success at trial, as there is no published court decision on this issue.

Residing in a smoke-free condominium is now an increasingly popular lifestyle choice. Prospective condominium owners can expect to see more and more developers codifying this in their condominium declarations or rules. In the meantime, current owners will have to seek support from their board and other owners if they want to convert their established condominium into a smoke-free dwelling, or rely on other legal rights for protection from the harm that tobacco smoke is known to cause. ♦

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