Protection from second-hand tobacco smoke in Canada: Current legislative and case law trends

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Table of Contents

Executive Summary

Most jurisdictions in Canada have indirectly addressed exposure to environmental tobacco smoke ("ETS") through occupational health and safety legislation. Some provincial jurisdictions, such as British Columbia, Ontario and Newfoundland, have enacted legislation that is exclusively devoted to the regulation of ETS in the workplace.

The federal, provincial and territorial legislation is lacking in that it is not a clear prohibition of workplace exposure to ETS. It generally bestows a broad range of decision-making power on employers, such as the right to designate a smoking area or a smoking room at work. It is qualified by only requiring reasonableness in implementing controls. Furthermore, chemicals and substances that derive from ETS are classified by provincial and territorial legislation as being "no exposure" substances, but the same legislation excludes tobacco smoke from the list of prohibited workplace substances. Employees who do not wish to work in close proximity of areas where smoking is allowed do have statutory rights according to the legislation. They can exercise their right to refuse work, they can ensure that the ventilation requirements are being upheld through occupational health and safety representatives, and they can demand to be placed away from workplace smoking areas.

A survey of the applicable case law reveals that Canadian court and administrative tribunals have been responsive in upholding employees' rights to have limited or no exposure to ETS in the workplace. Many leading cases specifically speak to the hazards of exposure to ETS, and consequently, there is a general judicial trend to find in favour of the employee and not the employer. Case law also confirms that employers have the right to enact non-smoking policies that are workplace wide. In almost all circumstances, whether they be based on safety in the workplace or not, the courts will uphold these policies despite the wishes of employees who smoke.

Many municipal jurisdictions, such as The City of Ottawa, have passed by-laws that completely restrict smoking in the workplace and / or public places. Thus far, the courts have affirmed that municipalities have the statutory right to do so.

In the face of legislation that is not absolute and lacks sufficient worker protection with regard to ETS, employers and employees may exercise rights available to them to ensure that employees are protected against exposure to ETS.

The Legal Implications Of Exposure To Environmental Tobacco Smoke In The Workplace:

Current Legislative And Case Law Trends In Canada

Introduction

Exposure to second-hand smoke is hazardous. Reliable scientific studies have demonstrated environmental tobacco smoke ("ETS") causes cancers, respiratory problems, and heart disease in non-smokers.

Most workplace hazards, such as the handling of dangerous equipment and exposure to dangerous chemicals, are regulated by government through legislation. Indeed, federal, provincial and territorial jurisdictions have all implemented statutes governing occupational health and safety matters, with a view to ensuring that workers in Canada are guaranteed basic safety in their workplace and are afforded certain rights that flow from the legislation.

What has lagged behind in the protection of workers utilizing occupational health and safety legislation is protection against ETS.

Canadian legislation generally falls short of supplying employees with a clear statutory legal basis for protection from exposure to ETS in the workplace. It can be argued that ETS in the workplace constitutes a danger under the legislation, but in many cases it is a matter of interpretation whether the legislation applies to ETS. The courts and administrative tribunals have, however, generally been responsive to interpretations of health and safety controls in the workplace that uphold employees' rights to be free of ETS in the workplace. But, a further complication is that tobacco smoke, or chemicals deriving from the smoke, are specifically excluded from some workplace health and safety legislative restrictions.

This paper is intended to provide a legal analysis of federal, provincial and territorial laws as they apply to the protection of workers from exposure to ETS. The paper compares and contrasts the legislation and accompanying regulations in various jurisdictions in Canada. For ease of reference, the results of this comparison are set out in table format in Schedule 1 of the paper. The paper also deals with interpretive guidelines provided by government that are designed to assist in clarification of the legislative requirements and allowances. To some extent it goes into government enforcement practices. Using a municipal case study, the paper attempts to underline how a municipality can successfully enact by-laws that assist in the reduction of workers' exposure to ETS.

Canadian case law in provincial and federal courts is analysed in an effort to determine the judiciary's general position with regard to the interpretation of workplace health and safety legislation and the protection of employees from ETS exposure. This analysis of common law is intended to point out various legal avenues which employees may utilize to protect themselves from workplace exposure to ETS.

A conclusion to be drawn from this paper is that, while courts and tribunals have often been persuaded to interpret health and safety controls in such a way as to protect workers from ETS, it would be a significant advantage to have clearer and less equivocal legislation in this area. Precise and clear legislation would benefit both workers, now somewhat unsure of their rights to avoid ETS in the workplace, and employers that now must struggle to determine their duties in order to comply with workplace health and safety provisions. It is now time for the legislation to expressly state what many of our courts and labour tribunals have concluded about the right of workers to be free of ETS.

Part I - Federal legislation governing smoking in the workplace

a) Federal legislation governing smoking and the workplace:

The Canadian *Constitution Act*[1] stipulates that labour legislation is primarily a provincial matter. Nevertheless, nothing in the *Constitution* precludes the federal government from regulating particular areas of labour. The federal government administers labour affairs in sectors that have an extra-provincial character. These industries include such areas as railways, bus operations, trucking, ferries, tunnels, bridges, canals and various shipping services. Air transport, telecommunications, banking industries and federal Crown corporations or agencies are also included.[2]

The federal government regulates and oversees the monitoring of several pieces of applicable legislation. The Labour Program of Human Resources Development Canada ("HRDC") has as its mission "to promote a fair, safe, healthy, stable, cooperative and productive work environment that contributes to the social and economic well-being of all Canadians."[3] Thus, HRDC is the department of the federal government that will be the most strictly tied to the development, implementation and monitoring of smoking in the workplace legislation and policies. In fact, the Labour Program focuses specifically on developing legislative and policy changes affecting the workplace and the needs of employers and employees.[4] The Labour Program was previously an independent federal department, and it became a program within the HRDC department in 1993.[5]

The structure of the Labour Program is hierarchical in nature. Indeed, there are currently four Directorates reporting to the Assistant Deputy Minister of the Labour Program: the Federal Mediation and Conciliation Service; Operations; Strategic Policy and Partnerships; and Workplace Information.[6] Each Directorate is managed by a Director General.[7] For the purposes of this paper, it is the Operations Directorate that will be of concern.

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[1] *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter "*Constitution*"].

[2] The federal labour regulation of these areas is in accordance with: *Constitution Act, 1867*, (U.K.), 30 & 31 Vict. c. 3, s. 91, reprinted in R.S.C. 1985, App. II, No. 5.

[3] Labour Program, *Working For You*, online: Human Resources Development Canada, <http://labour-travail.hrdc-drhc.gc.ca/apropos_about/index.cfm/doc/english> (last modified: 29 January 2002).

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] Ibid.

The legislation that will be of paramount consideration in the federal jurisdiction is the *Canada Labour Code*[8], its accompanying *Occupational Safety and Health Regulations*, and the *Non-Smokers' Health Act*. The mandate of the Operations Directorate is to ensure cost-effective and consistent implementation of Parts II and III of the *Canada Code*, Occupational Safety and Health and labour standards, as well as the *Non-Smokers' Health Act*[9]. The Directorate's mandate is facilitated through headquarters operations and provides functional direction and support to offices in the ten HRDC districts.[10] Another Directorate, the Workplace Information Directorate, provides the government, in addition to employers and employees, with information addressing workplace conditions, recent workplace trends, publications and services to assist the Labour Program of HRDC.[11]

Occupational health and safety federal work issues are addressed by the Labour Program, pursuant to Part II of the *Canada Code*. Regional and district offices maintain the administration and provide enforcement of the *Canada Code* provisions.[12] Although the HRDC operations are extensive and well-structured, they address the implementation of legislation that accounts for approximately 10% of the Canadian workforce.[13] Thus, provincial laws and regulations concerning employment account for 90% employees. The federal and provincial codes are separate and distinct legal controls.

The federal government has been active in releasing interpretive texts in the form of Operations Program Directives ("OPDs"), and Interpretation, Policies and Guidelines ("IPGs"). The group of OPDs and IPGs constitute consolidations of various procedures associated with Part II of the *Code*. The consolidation is issued under the authority of the Assistant Deputy Minister of the Labour Program, falling under the general auspices of HRDC.[14] The majority of the OPDs and the IPGs are designed to assist the government, employers, employees, and safety officers interpret and apply certain provisions of the occupational health and safety legislation, part of the *Canada Code*.

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[8] *Canada Labour Code*, R.S. 1985, c. L-2. [hereinafter *Canada Code*].

[9] *Non-Smokers' Health Act*, R.S. 1985, c. 15 (4th Supp.) [hereinafter *Non-Smokers' Health Act*].

[10] *Supra* note. 3.

[11] Ibid.

[12] Labour Operations, *Occupational Health and Safety Labour Operations*, online: Human Resources Development Canada, <http://info.load-otea.hrdc-drhc.gc.ca/~oshweb/homeen.shtml> (last modified: 19 December 2000).

[13] Labour Operations, *Labour Standards, Canada Labour Code, Part III*, online: Human Resources Development Canada, <http://info.load-otea.hrdc.drhc.gc.ca/labour_standards/home.shtml> (last modified: 10 December 2001).

[14] Labour Operations, Operations Program Directives (OPDs), Interpretation, Policies and Guidelines (IPGs), online: Human Resources Development Canada, <http://info.load-otea.hrdc-drhc.gc.ca/labour_operations/opd_ipg/menu.htm> (last modified: 5 April 2001).

There are some IPGs and OPDs in particular that are useful in the analysis of federal legislation and its applicability with regard to smoking in the workplace. The following is a synopsis of the government releases that are most useful.

b) Operations Program Directives and Interpretation, Policies and Guidelines:

IPG No.: 905-IPG-028, Date: 18-08-89[15]

This IPG was released as a result of the controversy surrounding s. 128 of the *Canada Code*. Before it was amended, it prevented an employee to refuse work if, although dangerous, the function to be performed was an "inherent" part of the employment. Now, the term "normal" has replaced the term "inherent" in the *Canada Code*. The legislation currently reads:

> S. 128.
> (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that
>
> (a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
>
> (b) a condition exists in the place that constitutes a danger to the employee; or
>
> (c) the performance of the activity constitutes a danger to the employee or to another employee.
>
> (2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if
>
> (a) the refusal puts the life, health or safety of another person directly in danger; or
>
> (b) the danger referred to in subsection (1) is a *normal* condition of employment. [emphasis added].[16]

In order to facilitate the understanding of the term "inherent" in s. 128 of the Canada Code the HRDC released the IPG designed to instruct those who may be affected by the legislation. IPG No. 905-IPG-028, dating back to 1989 addresses how one would determine if a danger were an inherent part of the employment. It is likely that the courts would still utilize similar interpretation of the current term "normal".

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[15] Canada, Human Resources Development Canada, *IPG, Inherent Danger - Canada Labour Code Part II*, No.: 905-1-IPG-028 (Ottawa: Human Resources Development Canada, 1989).

[16] *Supra* note 8.

The IPG expounds that employees may not refuse work under this section when the danger is inherent in their job. For instance, the IPG states as an example that a fire fighter would not be permitted to refuse to participate in fire fighting by virtue of the fact that it is dangerous work.[17] The very essence of the employment includes circumstances whereby the health and safety of the worker might and will be put at risk while he / she is carrying out the functions of his / her employment.
The IPG clarifies:

> While it is not easy to determine what dangers are inherent to a particular job, a danger is likely to be inherent when:
>
> - it is a permanent attribute or quality of a job;
> - it is an essential character or element of a job;
> - it is likely or probable to cause injury unless special precautions are taken;
> - it exists regardless of the method used to perform the work.[18]

Thus, it appears clear that exposure to tobacco smoke in the workplace was not be sheltered under the umbrella of "inherent". Indeed, as will be later discussed, the courts have heard matters in which an employee has refused to work due to his / her belief that exposure to tobacco smoke constitutes a "danger" within the meaning of the *Canada Code*.

IPG No.: 905-1-IPG-043, Date: 02-09-91[19]

Because previously released IPGs and OPDs did not address the procedures to be followed in circumstances whereby two or more employees refuse to work for the same reason, the HRDC released an IPG in 1991 for clarification purposes.

The IPG explains that the health and safety officer, when confronted with a situation involving two or more employees refusing to work for the same reason, ought to follow various steps as set out by the Assistant Deputy Minister.[20]

First, it is suggested that the health and safety officer set up a meeting with the employees to determine the exact reasons for the refusal of work, and to determine if the employees are indeed refusing to work for the same reasons.[21] HRDC suggests for

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[17] *Supra* note 15 at 1.

[18] Ibid.

[19] Canada, Human Resources Development Canada, *IPG, Multiple Refusals to Work in Case of Danger - S. 128 of Part II of the Canada Labour Code*, No.: 905-1-IPG-043 (Ottawa: Human Resources Development Canada, 1991).

[20] Ibid. at 1.

[21] Ibid.

efficiency purposes, the employees appoint a spokesperson who can act as representative of the employees.[22] The spokesperson can also act as the communication link between the employees, the employer, and the health and safety officer.[23]

Second, the IPG notes that after the health and safety officer has completed the investigation and has rendered a decision, he / she is to make the spokesperson aware of the decision, who may in turn alert the other employees involved of the decision.[24] Following the oral notification, the decision is to be sent to each employee by registered mail.[25]

Third, after the usual filing procedures are completed, the identification of the spokesperson should be included in a document to be added to the file.[26]

No.: 905-1-IPG-031, Date: 20-10-89[27]

The application of s. 128 of the *Canada Code* has also been addressed by a federal Interpretation, Policies and Guideline release that deals with an employee's right to refuse work because he / she holds a medical certificate. It is clear that the jurisprudence was closely monitored to ascertain how the courts would interpret the meaning of s. 128 of the *Canada Code*, specifically the statutory sections that permitted employees to refuse work based on a perceived danger. The HRDC, no doubt in reaction to a rising number of employees submitting medical certificates indicating that they were not fit to perform the work as demanded, has instructed employees, employers, and health and safety officers to follow its conclusions regarding the weight to be given to medical certificates in a refusal to work issue.

The HRDC concluded that:

> The employee, while at work, who has reasonable cause to believe that a machine or condition constitutes a danger, may refuse to work. The jurisprudence indicates that the danger perceived by the employee "...must relate to a machine, thing or to the physical condition of the work place." The *Code*, therefore, protects the employee from dangers that exist in the work place. The *Code* does not appear to go so far as to protect the employee in cases where the danger is caused by his / her own medical condition.
>
> Therefore, medical certificates should be taken into consideration, along with all the other relevant facts, in order to determine whether the

[22] Ibid.

[23] Ibid.

[24] Ibid.

[25] Ibid.

[26] Ibid.

[27] Canada, Human Resources Development Canada, *IPG, Refusals to Work and Medical Certificates - Canada Labour Code Part II*, No.: 905-1-IPG-031 (Ottawa: HRDC, 1989).

> danger was caused by a machine or condition at the work place or by the employee's own medical condition.[28]

The reasons for the importance of this IPG are two-fold. First, it is clear that the federal government has adapted its suggested implementation of the *Canada Code* based on jurisprudence. This is instrumental for those seeking to persuade the federal government to banish smoking from the workplace all together, since the courts have appeared, on the whole, fairly sympathetic to that cause. If the government is truly interested in following the common law lead, then it would be beneficial to rely upon recent cases that suggest that smoking is a hazard in the workplace and ought to be banned.

Second, since the Guideline specifically states that the *Canada Code* "does not appear to go so far as to protect the employee in cases where the danger is caused by his / her own medical condition"[29], the scope of employee protection under the *Canada Code* might be considered narrowed. It is essential, however, to consider whether or not the courts would agree to this apparent narrow interpretation by the federal government of the *Canada Code*. It is interesting to note, for example, that although the federal government issued this Guideline in 1989, labour arbitrations have recently held that medical conditions, as proven by medical certificates, can and will be readily applied in the analysis of a safe or unsafe work environment, as will be later discussed. Thus, although such federal Guidelines and interpretive tools are useful for general information, their applicability in legal analysis should always be questioned.

No.: 920-IPG-055, Date: 1993/05/04[30]

Among the most intriguing IPGs this relates to the interpretation of "reasonably practicable" as stated in the Canada *Occupational Safety and Health Regulations*, that form part of the collection of Regulations under the *Canada Code*. This statement is located in the Regulation close to forty times, thus allowing for a broad and perhaps arbitrary interpretation. For this reason, the Labour Program set out criteria for the interpretation of the term, in an effort to assist health and safety officers, in addition to employers, interpret the legislation and subsequently apply it properly.

The considerations that must be born in mind according to the interpretive Guideline in assessing whether or not an adjustment to the employer's workplace set-up is "reasonably practicable" are critical. Important issues such as ventilation requirements as set out in the Regulation are required as "reasonably practicable" in various circumstances. Critics of the legislation suggest that this window essentially permits employers who had established their business operations before the legislation took effect to

[28] *Ibid*. at 1.

[29] *Ibid*.

[30] Canada, Human Resources Development Canada, *IPG, Criteria for "Reasonably Practicable" - General*, No.: 920-IPG-055 (Ottawa: Human Resources Development Canada, 1993).

usurp the requirements if they can prove that adjustments are not practicable in their circumstances.

In the case of ventilation requirements, for example, the Regulation stipulates:

> 10.17
> (1) Every ventilation system installed on or after January 1, 1997 to control the concentration of an airborne hazardous substance shall be so designed, constructed, installed, operated and maintained that
>
> (a) the concentration of the airborne hazardous substance does not exceed the values and levels prescribed in subsections 10.19(1) and 19.20(1) and (2); and
>
> (b) it meets the standards set out in
>
> (i) Part 6 of the National Building Code,
>
> (ii) the publication of the American Conference of Governmental Industrial Hygienists entitled Industrial Ventilation, 20th edition, dated 1988, as amended from time to time, or,
>
> (iii) ANSI Standard ANSI A9.2-1979 entitled Fundamentals Governing the Design and Operation of Local Exhaust Systems, dated 1979, as amended from time to time.
>
> (2) To the *extent that is reasonably practicable*, every ventilation system installed before January 1, 1997 to control the concentration of an airborne hazardous substance shall be maintained so as to meet the requirements set out in subsection (1). [emphasis added][31]

Thus, the federal legislation requires employers who had already established a ventilation system prior to 1997 to adapt to the new ventilation requirements only to the extent that is reasonably practicable. Consequently, on its face, the legislation creates exceptions for employers who can successfully argue that adaptations to accommodate the ventilation standards are not practicable.

There are several other sections of the Canada *Occupational Safety and Health Regulations* that also include exceptions for employers if the changes to the workplace as required by the legislation are not reasonably practicable.

Undoubtedly, this legislative scheme has been the subject of much critique. Those seeking to ban smoking in the workplace question why employers would only be held responsible for particular health measures if they are reasonably practicable, particularly if the safety of employees is to be paramount.

[31]Canada Occupational Safety and Health Regulations, Made under Part II of the Canada Labour Code, SOR/86-304 at SOR/96-294 .s2.

According to the IPG, before deciding what constitutes "reasonably practicable" for the purposes of abiding by the legislation, several factors are to be considered, including both financial and technical compliance measures. Indeed, costs and fiscal considerations appear to be at the forefront of the deliberations. In fact, the government has stated in the Guideline that the "cost of compliance with the initial requirement must significantly out-weigh the benefit before it is reasonable to set the duty aside or substitute an alternative requirement."[32]

Such considerations may include:

- the technical aspect of complying - are the suggested adaptations possible and will their implementation cause other hazards?
- the impact of complying - will there be a noticeable improvement if the requirements are implemented?
- the economical aspect - will the costs involved in the adaptations be justified? (ie: will the adaptations necessitate grave capital expenditures and only result in a small hazard reduction?)
- the length of time during which the initial requirement will benefit the workplace - will the measures be justified?
- the attempts made to comply with the initial requirement - will the effort involved in adapting to compliance of the legislation bring about positive improvements?
- the degree of risk present - would an improvement in a high risk area be more beneficial than an improvement in a low risk area?[33]

To add to these considerations, the current literature on the effectiveness of ventilation with regard to ETS indicates that ventilation standards, no matter how sophisticated, are futile. The current thinking is that in order for ventilation to remedy the hazards of exposure to ETS, the systems would need to be so intrusive and forceful that they would be comparable to a wind tunnel. The technical requirements involved in completely eliminating ETS chemical hazards would be even more onerous than those already delineated by the legislation.

Furthermore, the interpretive Guideline suggests that in rendering a decision, the health and safety officer should be aware of several aspects of the powers he / she has.[34] He / she should be flexible in the use of his / her discretionary powers, for example. It is also suggested that a comparative analysis would be helpful to the officer.[35] Determining if other companies have undergone similar changes would be useful in assessing whether or

[32] *Supra* note 30 at 1.

[33] *Ibid*. at 1 - 2.

[34] *Ibid*. at 2.

[35] *Ibid*.

not an adaptation has been "reasonably practicable" in the past for other employers.[36]

In summary, the IPG presents an interpretation of "reasonably practicable" that will impose obligations less stringent than they would be if the term in the legislation were simply "practicable". The Guideline concludes: "[t]here are measures which are 'practicable', but not 'reasonably practicable', to take to protect the safety and health of employees. The employer must weigh the effort, time, and cost of eliminating the hazards and the probability of injury and illnesses. Since the employer's first duty under the Regulations is to comply with the initial requirement of the Regulations, the effort, time and cost must significantly outweigh the benefit of the initial requirement." [37]

No.: 700-9-IPG-036, Date: 31-07-90[38]

This IPG addresses Indoor Air Quality ("IAQ") complaints directly. As such, it determines how the Labour Affairs Officers ought to apply the prescribed legal requirements for ventilation, temperature and humidity for non-industrial work places. Although at first blush it appears directly on point for the purposes of this study, the Guideline specifically precludes itself from complaints involving smoking.
The federal government, in separating its procedure for responses to IAQ complaints from smoking complaints, has determined that such smoking complaints should be addressed under the *Non-Smokers' Health Act*. The Guideline reads:

> 1. Subject
>
> Application of Part II of the *Canada Labour Code* (CLC) and Part II of the *Canada Occupational Safety and Health Regulations* (COSH) in the investigation of Indoor Air Quality Complaints in non-industrial work environments. *Complaints involving smoking are not addressed; they should be handled under the Non-Smokers' Health Act*. [emphasis added].[39]

Thus, HRDC clearly distinguishes air quality complaints between those involving smoking, and those involving generic ventilation considerations.

In addition to the *Canada Code*, the *Non-Smokers' Health Act* is applicable to the federal labour jurisdiction, and has significant legal effects on controlling smoking in the workplace.

The legislation was introduced into the House of Commons by New Democrat Member of Parliament Lynn McDonald in 1986 as a Private

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[36] *Ibid*.

[37] *Ibid*.

[38] Canada, Human Resources Development Canada, *IPG, Response to Indoor Air Quality (IAQ) Complaints - Canada Labour Code, Part II*, No.: 700-9-IPG-036 (Ottawa: Human Resources Development Canada, 1990).

[39] Ibid.

Member's Bill. Bill C-204, as it became, was eventually passed into law in 1988, a rare occurrence with a Private Member's Bill.[40]

The *Non-Smokers' Health Act* aims at a smoke-free environment in workplaces under the jurisdiction of the federal government. The legislation extends and applies to federally regulated transportation carriers, such as aircraft, ships, and trains. It imposes a broad restriction on smoking in federally-controlled workplaces.[41] Section 4(1) states that smoking is not permitted while the employee is under the employer's control except in a Designated Smoking Area ("DSA") or a Designated Smoking Room ("DSR"), the establishment of which are permitted by the legislation under ss. 2 and 3.
Independent ventilation of a DSA is required under the *Non-Smokers' Health Act*, however the legislation only requires it where "reasonably practicable".[42] The employer, however, is under the obligation to consult with a workplace committee or health and safety representatives before the establishment of a DSA, and to then ensure that appropriate ventilation is in place.[43]

The Regulations under the *Non-Smokers' Health Act*, in particular s. 3(1) of Regulation SOR/90-21[44], permit the employer to designate a DSR, so long as it is not a private office, and so long as it is properly enclosed by walls, is clearly identified, and has the appropriate ventilation standards. Such standards include the requirement to exhaust the air to the outside, and not to recirculate it.[45] If the employer allows a DSR, he / she must ensure that it is appropriately equipped with objects such as ashtrays or non-combustible covered receptacles.[46] Proper signage is also essential. The employer must, for instance, post clearly visible signs to inform employees about the smoking restrictions, and the employer must also ensure that members of the public are made aware of such policies.[47]

The federal government has legislatively implemented a monitoring system to ensure compliance with the *Non-Smokers' Health Act* and its accompanying Regulations. An inspector may enter the workplace to ensure that employers are respecting the smoking restrictions.[48] In the event that an employer is found to have disregarded or to have breached any provisions of the *Non-Smokers' Health Act*, he /

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[40]Michael Grossman and Philip Price, *Tobacco Smoking and the Law in Canada* (Markham: Butterworths Canada Ltd., 1992) at 3-11.

[41]At s. 3(1), the legislation stipulates that employers "shall ensure that persons refrain from smoking in any work space under the control of the employer". *Supra* note 9.

[42]See: s. 3(4).

[43]See: s. 3.

[44]*Non-Smokers Health Regulations*, Made under the *Non-Smokers' Health Act*, SOR/90-21.

[45]*Ibid*. at s. 3(2).

[46]*Ibid*. at s. 5(1).

[47]*Ibid*. at s. 7(1).

[48]See: ss. 9 - 10, *Supra* note 9.

she may be liable on summary conviction for punishments, depending on the severity of the breach, including fines of up to $10, 000.[49]

Thus, the federal government has attempted to address smoking in the workplace directly in the *Non-Smokers' Health Act*. The legislators clearly wanted to separate concerns regarding the hazards of ETS from general occupational health and safety concerns that generically fall under Part II of the *Canada Code*. This is not to say that all smoking in the workplace concerns are irrelevant for the purposes of the *Canada Code*. On the contrary, arguments can be made that pursuant to the rights given under the *Canada Code*, employees may protect themselves from tobacco smoke exposure, such as utilizing the statutory right to refuse work. Nevertheless, the government obviously sought to establish normative standards through the implementation of the *Non-Smokers' Health Act* that would govern workplace smoking restrictions in a more coherent and pointed manner. Although the *Non-Smokers' Health Act* is laudable in its attempt to restrict smoking in the workplace, it unfortunately falls far short from a imposing a complete ban. If the object of the legislation is to eliminate the federal employees' exposure to ETS, the only true legislative solution is to ban smoking in the workplace completely.

[49]The fines and punishments for various breaches are further expounded in s. 11 of the *Non-Smokers' Health Act*.

Part II - Provincial and territorial legislation governing smoke in the workplace

Comparison between legislation of the provinces and territories

This paper will compare provincial and territorial legislation in the following areas:

a) Employers' obligations;
b) Right to refuse work;
c) DSAs and DSRs; and
d) Ventilation requirements.

a) Employers' obligations

It can safely be stated that every Canadian provincial and territorial jurisdiction provides for a general duty on employers to ensure that the workplace is a safe one in which to work. Employers' duties under provincial and territorial legislation are generally found in the respective legislation.[50]

[50]Each province and has outlined general duties to be imposed on employers working within provincial regulatory jurisdiction. The following is a provincial list of the applicable legislation and / or Regulations in which the general duties of employers are located. (Alphabetical order)

1. Alberta: *Occupational Health and Safety Act*, R.S.A. 1980, c. O-2, s. 2(1).
2. British Columbia: *Workers Compensation Act*, R.S.B.C. 1996, c. 492, Part III, *Occupational Health and Safety*, s. 3.
3. Manitoba: *Workplace Safety and Health Act*, R.S.M 1987, c. W210, s. 4(1).
4. New Brunswick: *Occupational Health and Safety Act*, R.S.N.B. 1983, c. O-0.2, s. 9.
5. Newfoundland: *Occupational Health and Safety Act*, R.S.N.F. 1978, c23 s1, s. 4.
6. Northwest Territories and Nunavut (Note: Nunavut has incorporated the laws of the Northwest Territories into its Territorial jurisdiction), *Northwest Territories Safety Act*, R.S.N.W.T. 1988, c. S-1, s. 4.
7. Nova Scotia: *Occupational Health and Safety Act*, S.N.S. 1996, c. 7, s. 13(1).
8. Ontario: *Occupational Health and Safety Act*, R.S.O. 1990, c. O-1, s. 25(1).
9. Prince Edward Island: *Occupational Health and Safety Act*, R.S.P.E.I. 1985, c. O-1, s. 13.
10. Québec: *Loi sur la Santé et la Sécurité du Travail*, L.R.Q. 1986, S-2.1, s. 51.

Black's Law Dictionary defines "Duty" in the following manner:

> Duty: [..] Obligatory conduct of service. Mandatory obligation to perform. [...] An obligation, recognized by the law, requiring actor to conform to certain standard of conduct for protection of others against unreasonable risks.[51]

If a duty is judicially interpreted as constituting a mandatory obligation to protect others against unreasonable risks, then arguably, the general duties of employers as stated in all of the legislation could include a complete ban against smoking in the workplace. Exposure to ETS is an unreasonable risk to employees, and certainly a preventable one. Consequently, a strict reading of the terminology in the general duties could be helpful in providing a legal basis for a smoke-free work environment.

Most provincial drafters chose a similar description of what are usually referred to as "General Duties of Employers" or "Duty [Duties] of Employers". The most frequent citation describing the general duties of employers includes a similar structure to "Every employer must [...] ensure the health and safety of all workers [employees]". Provinces such as British Columbia, Alberta, Nova Scotia and Prince Edward Island, as well as two territories the Northwest Territories and Nunavut, have extended the employer's general statutory duty.[52] In these jurisdictions, employers must ensure the health and welfare of other persons in the same vicinity as well as their own employees.[53]

There are some limitations to the standard general duty of employers. Some provinces and territories have elected to include the terms "reasonably practicable" or a variation thereof to limit the general duty.[54] In these jurisdictions, the employer's responsibility of ensuring a safe work environment is then framed within the concept of "reasonableness", which appears often in workplace safety legislation. Problematic as it is, the term "reasonable" is often not defined and is open for a broad interpretation. Only three provinces have not limited the general duty of employers to provide a safe workplace for their employees: British Columbia, Ontario, and Québec. Each of the remaining provinces and territories have included limiting terms such as "in as far as reasonably practicable", or "take all reasonable

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11. Saskatchewan: *Occupational Health and Safety Act*, S.S. 1993, c. O-1.1, s. 3.
12. Yukon: *Occupational Health and Safety Act*, R.S.Y. 1986, c. 123, s. 3(1).

[51] *Black's Law Dictionary*, 6th ed., *s. v.* "duty".

[52] See: Applicable legislation, *Supra* note 50.

[53] *Ibid*.

[54] These jurisdictions are Alberta, Manitoba, New Brunswick, Newfoundland, Northwest Territories and Nunavut, Nova Scotia, Prince Edward Island, Saskatchewan and the Yukon.

precautions" and the like. Employees who wish to work in a completely non-smoking environment would certainly submit that it is reasonably practicable for employers to prohibit smoking in the workplace; arguably it would be easier than establishing specific smoking policies, DSAs and DSRS, and implementing the ventilation regulations necessary to allow smoking in the workplace. The other side of the debate suggests that in setting up smoking areas and ventilation systems the employer is doing all that is "reasonable" to protect employees from exposure to ETS.

b) Right to refuse work

Prior to the enactment of legislation in Canada, there were two legal means by which an employee could lawfully refuse work. Firstly, the employee had recourse to a common law right to refuse work if the conditions were dangerous through the civil law of negligence.[55] In this circumstance, the employee would sue the employer for breaching the employer's duty of care. This method, however, proved both inefficient and eventually moot. It was inefficient because it required the employee to commence a lengthy civil action, and it became moot after the development of workers' compensation legislation as it removed the right of an employee to sue an employer for negligence with respect to dangers in the workplace.[56]

Secondly, the employee was entitled to refuse work if his / her collective agreement specifically provided for such a right.[57] Trade unions, however, were often unsuccessful in negotiating a work refusal clause and then the only remedy available to the worker was to sue the employer in negligence.[58]

Under both federal and provincial legislation, a worker has a general right to refuse work if the work is deemed by him or her to be dangerous.[59] There are key jurisdictional differences between

[55]Norman A. Keith, *Canadian Health and Safety Law*, Release No. 6, (Aurora: Canada Law Books Inc., 2001) at 5-2.

[56]*Ibid*.

[57]*Ibid*.

[58]*Ibid*.

[59]The right to refuse dangerous work is generally regulated under the same legislation as that which outlines an employer's general duties. The following list pinpoints the statutory basis upon which an employee must rely to refuse work.

Federal: *Canada Labour Code (Part II)*, *Supra* note 8, s. 128.

The applicable provincial legislation is cited *Supra* note 50.
1. Alberta: s. 27.

2. British Columbia: s. 3.12.

3. Manitoba: s. 43.

4. New Brunswick: s. 19.

5. Newfoundland: s. 45.

6. Northwest Territories and Nunavut: s. 13.

the definition and interpretation of "dangerous" or "danger" in the various pieces of legislation. Consequently, the right to refuse work will vary according to the jurisdiction and the applicable legislation. Furthermore, the right to refuse work in many jurisdictions includes the right to refuse if the worker has reasonable cause to believe that he / she or another person or employee will be exposed to some type of hazard. On this note, most governing statutes prohibit the right to refuse work if doing so would jeopardize the safety of other employees, or if the dangerous activity or condition of the workplace is a usual or normal condition of the employment. Lastly, almost all the applicable legislation contains general prohibitions against dismissal or disciplinary action against the employee if the employee sincerely believes that a workplace situation is dangerous.

Indeed, the right to refuse work is riddled with different standards of "reasonableness" and probable grounds. In this area, the provinces and territories have legislatively approached the statutory right to refuse work in a similar manner as the federal government. In the federal jurisdiction, for example, under the *Canada Code*, an employee may refuse work where he / she has reasonable cause to believe that the a condition exists in the workplace that constitutes a danger to him / her, or to another person.[60] The federal government has defined "danger" as any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it. The federal legislation even provides examples of physical risks that are considered severe enough to refuse work, including the likelihood of developing a chronic illness, a disease, or damage to the reproductive system.[61]

At the outset, it seems evident how exposure to ETS could reasonably fall within the prescribed federal guidelines and conditions that will permit an employee to refuse work. Certainly, exposure to ETS is dangerous to the health of both the employee and others within the vicinity of the exposure. ETS has been inextricably linked to chronic illness, disease, and has been proven to adversely affect the growth of a foetus, thus affecting the reproductive system. Nevertheless, there does exist in the legislation the condition that prohibits the refusal to work before the condition has been addressed with the employer, and the employer has had a subsequent opportunity to rectify the situation.[62] Many employers would argue that the establishment of

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7. Nova Scotia: s. 43.
8. Ontario: s. 43.
9. Prince Edward Island: s. 20.
10. Québec: s. 12.
11. Saskatchewan: s. 23.
12. Yukon: s. 14.

[60] *Supra* note 8 at s. 128.

[61] *Ibid*. at s. 122.

[62] *Ibid*. at s. 127.

DSAs and / or DSRs would be sufficient enough to constitute rectification of the ETS exposure problem. Since the federal government has implemented a general non-smoking policy in its various workplaces, the question may be moot for the federal government as the employer.

A comparison between the provincial and territorial legislation to the federal legislation suggests that the federal statute was used as a drafting guide for the other jurisdictions. For instance, a survey of provincial and territorial legislation reveals that "reasonable" grounds for refusal to work is the prescribed legislative condition. Every province and territory has utilized a fixed term or a combination of terms including "reasonable", "grounds", and a conjugation of "believe" to create phrases such as the following: "reasonable cause to believe", "believes on reasonable and probable grounds", "believes on reasonable grounds", "has reason to believe", "has reasonable grounds" and "has reasonable grounds for believing". Clearly, provincial and territorial drafters of legislation have all been concerned with restricting employee refusals to work by adding an element of reasonableness to the legislative requirements. Legally, there is reason to presume that "reasonableness" is based on a subjective test, given that it is the employee's views that are determinative with respect to whether or not there existed reasonable danger at the time of refusal.

Many provincial and territorial jurisdictions, such as British Columbia, Manitoba, Northwest Territories, Nunavut, Nova Scotia, Quebec and the Yukon Territory, legislatively permit an employee to refuse work if he / she believes on reasonable grounds that a condition exists in the workplace that is dangerous to another.[63] The provinces have not specified who would qualify as "another" person. Perhaps this opens the door for an argument that a member of the general public entering the workplace, or an employee of another workplace, such as a delivery person, would qualify as "another". The remaining provinces, Alberta, New Brunswick, Newfoundland, Ontario, Prince Edward Island, and Saskatchewan, all limit an employee's right to refuse work to considering his / her own danger and / or that of another employee or person employed at the work site.[64]

The definition of the terms "danger" or "dangerous" is instrumental in the analysis of provincial and territorial occupational health and safety legislation. If an employment dispute were to escalate to a court dispute, it is the interpretation of the danger in the situation that the courts will use to determine if the employee had a right to refuse to work. A few provinces and territories have actually attempted to define danger in an effort to facilitate understanding at the workplace level, in addition to eliminating unnecessary interpretation or reading in at the judicial level. Alberta, for example, defines danger as being "imminent".[65] More specifically, the legislation

[63] *Supra* note 59, See: provincial jurisdictions.

[64] *Ibid.*, See: provincial jurisdictions.

[65] *Ibid.*, See: Alberta, s. 27.

states that imminent danger is one that is not normal for that occupation, or a danger under which a person engaged in that occupation would not normally carry out in his / her work.[66] Northwest Territories and Nunavut qualify danger as having to be "unusual"[67]; that is, the danger does not normally exist in an occupation, or is a danger under which a person engaged in that occupation would not normally carry out in his / her duties.[68] Similarly, in Saskatchewan, an employee may refuse work when he / she has reasonable grounds to believe that the work imposed is "unusually" dangerous.[69]

There have been instances where employees have refused work on the basis that exposure to tobacco smoke constituted a danger to their health, and / or to the health of other persons or employees. In instances where the applicable provincial legislation had defined danger as being "imminent", the refusal to work was not legally validated.[70] Although this is troublesome to the rights of employees to work in a completely smoke-free environment, it remains to be seen how the courts would interpret the right to refuse work based on exposure to ETS in provinces that have not specifically required the danger to be "imminent". Would the removal of the term "imminent" have changed the outcome of the case law? It is possible, particularly with the data now available through a significant amount of research on the dangers of exposure to ETS.

c) Designated Smoking Areas (DSAs) and Designated Smoking Rooms (DSRs)

Some Canadian jurisdictions have legislatively provided for the establishment of DSAs and / or DSRs.

Only three provinces have chosen to directly address DSAs and DSRs with regard to smoking in the workplace through legislation: British Columbia, Ontario, and Newfoundland.

British Columbia, for example, addresses ETS in Part 4 of its *Occupational Health and Safety Regulations* entitled "General Conditions".[71] The Regulation imposes a general obligation upon the employer to prohibit smoking in the workplace, or to restrict it to DSAs or by "other equally effective means".[72] If the employer

[66] *Ibid*.

[67] *Ibid*., See: Northwest Territories and Nunavut, s. 13(2).

[68] *Ibid*.

[69] *Ibid*., See: Saskatchewan, s. 23.

[70] Case law that established this principle will be addressed in Part IV of this paper.

[71] *Occupational Health and Safety Regulation*, Made under *Workers Compensation Act*, BC Reg. 296/97, Environmental Tobacco Smoke Regulation 4.81.

[72] *Ibid*. at s. 4.81(a), (b).

chooses to designate a smoking area, it must be clearly identified by appropriate signage and its structural design must comply with particular requirements.[73] The DSA must be separated from other work or break areas, and it must be ventilated to the accepted standards.[74]

The amendments to the General Conditions recently legislated by British Columbia become effective beginning May 1, 2002. They amount to clearer and more precise employer obligations with regard to the ventilation standards of a DSA, and they provide statutory permission for employees to refuse to enter a DSA to perform workplace functions.

In Ontario, the *Smoking in the Workplace Act*[75] is the governing statute. Its application is very widespread. It applies to approximately 90 % of the workplaces under provincial jurisdiction, including retail, commercial, manufacturing and mining operations, hospitals, social service agencies and educational institutions. The legislation specifically disallows smoking in the workplace except in a DSA, a public area, a lodging area, or a private dwelling.[76] Before establishing a DSA, an employer must consult with health and safety representatives.[77] If an employer designates a smoking area, the DSA must not exceed 25 percent of the total floor space.[78] Importantly, if an employee asks to work in a place away from the DSA, the employer is obliged to make every reasonable effort to accommodate that request.[79]

Unfortunately, the Ontario legislation exempts particular locations from its requirements. Some vehicles, for instance, such as buses or the cabs of trucks, are not considered workplaces.[80] Furthermore, areas of workplace used primarily by the public are also exempt from the *Smoking in the Workplace Act*.[81] Given the public place exemption, shopping malls, the floor area of a store accessible to the public, restaurants and bars are all exempt workplaces.

Newfoundland's *Smoke-Free Environment Act*[82], which addresses both public places and workplaces in the province, is perhaps the most pro-active insofar as restricting smoking in the workplace is concerned. It contains a general prohibition against smoking in

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[73] *Ibid*. at s. 4.82(1).

[74] *Ibid*. at s. 4.82.

[75] *Smoking in the Workplace Act*, R.S.O. 1990, c. S-13.

[76] *Ibid*. at s. 2(2).

[77] *Ibid*. at s. 3(3).

[78] *Ibid*. at s. 3(2).

[79] *Ibid*. at s. 5(2).

[80] *Ibid*. at s. 2(2).

[81] *Ibid*.

[82] *Smoke-Free Environment Act*, S.N. 1993, c. S-16.1.

the workplace or in a public place[83], although, like Ontario's legislation, it does provide employers with the right to designate a smoking area.[84] This allowance is nevertheless more restrictive than its counterpart in Ontario. In Newfoundland, DSAs are not to exceed 20 % of the seating or other area normally occupied by the public.[85] Employers in Newfoundland may also designate a smoking room on the premises of a public place, but a DSR may not be designated in any of the following locations:

- a day care centre or nursery school
- a primary, elementary or secondary school
- an acute health care facility
- a retail store
- a recreational facility
- a vehicle designed or used for carrying passengers for compensation[86]

Under the Newfoundland legislation, as of January 1, 2002, a DSR may not be designated in a food establishment as defined in the Regulations.[87] The definition of a food establishment for the purposes of the legislation are:

a) a food establishment that does not have a liquor licence; or

b) a food establishment that has a liquor licence related to a motel, hotel, tourist home, restaurant, military mess, institution, transportation services, airport establishment, or recreational facility; or

c) a food establishment during the hours that persons under the age of 19 are permitted in cases such as a club, a lounge, or an establishment that holds a special events liquor licence.[88]

The Lieutenant-Governor in Council may by regulation, establish public places where a person may not smoke if the place is open to persons under the age of majority. The Regulation has classified public places as:

a) a boys and girls club;

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[83] *Ibid*. at s. 3. The legislation was publically controversial after the release of a proposed draft. Despite the concerns of business and restaurant owners and two days of public hearings regarding the legislation, no major changes were made to the *Smoke-Free Environment Act*. In fact, the only real change that was brought about by the public debates was the date of enforcement. It was pushed *ahead* six months. See: *Workplace Smoking Legislation in Canada*, Special Report prepared by Canadian Occupational Health & Safety News (Toronto: Southam, 1995) at 24.

[84] *Ibid*. at s. 4.

[85] *Ibid*. at s. 4(1).

[86] *Ibid*. at s. 5(a - f).

[87] *Ibid*. at s. 5(2).

[88] *Smoke-free Environment Regulations*, Made under *Smoke-free Environment Act*, O.C. 98-122, 58/98 at s. 11.

b) a games arcade;

c) a shopping mall;

d) a common area of a hotel, motel or convention centre;

e) an air, bus, or marine passenger vessel terminal; and

f) a public library.[89]

The Newfoundland legislative additions constitute a wide-spread governmental attempt to further restrict smoking in the workplace.

Both the Ontario and Newfoundland legislation protect employees from retaliation if they seek compliance with the legislation.[90] Compliance with the legislation includes the fulfilment of certain ventilation standards.

d) Ventilation requirements

Each provincial and territorial jurisdiction has enacted ventilation requirements in the workplace through statutes and accompanying Regulations.[91] Generally, employers in every province

[89] *Ibid*. at s. 12.

[90] In Ontario, See: *Supra* note 75 at s. 8(1), in Newfoundland, See: *Supra* note 82 at s. 10(1).

[91] The following is a list of provinces that have included ventilation requirements in legislation and / or ETS workplace smoking legislation.

(Alphabetical order)

1. Alberta: *Ventilation Regulation*, Made under *Occupational Health and Safety Act*, AR 326/84.
2. British Columbia: *Occupational Health and Safety Regulation*, Made under *Workers Compensation Act*, B.C. Reg. 296/97, Confined Spaces Ventilation Regulation 9.30.
3. New Brunswick: *General Regulation*, Made under *Occupational Health and Safety Act*, O.C. 91-1035, Reg. 91-191, Air Quality.
4. Newfoundland: *Smoke-free Environment Regulations*, Made under *Smoke-free Environment Act*, O.C. 94-261, Reg. 125/94, Ventilation.
5. Northwest Territories and Nunavut: *General Safety Regulations*, Made under *Northwest Territories Safety Act*, R.R.N.W.T. 1990, c. S-1, Ventilation.
6. Nova Scotia: *Occupational Safety General Regulation*, Made under *Occupational Health and Safety Act*, N.S. Reg. 112/76, Ventilation, Lighting, Sanitation and Accommodation.
7. Québec: *Règlement sur la Santé et la Sécurité du travail*, Made under *Loi sur la Santé et la Sécurité du Travail*, L.R.Q., 1986, S-2.1, Ventilation et Chauffage.

and territory have basic responsibilities with regard to ventilation. Provincial and territorial legislation reveals a nation-wide acceptance that an employer must ensure that the workplace under his / her control is adequately ventilated. There are several provisions for natural ventilation, that is ventilation that introduces air from the outside. Most provinces and territories stipulate that the employer has an obligation to ensure that any mechanical ventilation is properly maintained, with a view to preventing employees from inhaling impurities, generally insofar as "reasonably practicable". There are also overall provisions that govern the re-circulation of air. Some provinces have implemented extra-jurisdictional standards; ventilation standards in these cases usually must conform to institutions such as the American Society of Heating, Refrigerating and Air-Conditioning Engineers ("ASHRAE") standard 62-1989, "Ventilation for Acceptable Indoor Air Quality".

Saskatchewan's *Occupational Health and Safety Regulations* address tobacco smoke in the workplace and the importance of ventilation.[92] S. 77(2) of the Regulations requires a cessation of smoking on or after July 1, 1997 in an enclosed place of employment, worksite or work-related area except in an area designated for smoking. It therefore does allow for DSAs and DSRs. Interestingly, the legislation requires that passage of smoke into non-smoking areas is to be "minimized" by the employer, but this somewhat permissive section is then difficult to reconcile with the strict ventilation requirement that the Regulations state will ensure that "no worker will be exposed to second-hand tobacco smoke".[93] According to the legislation, the ventilation system is to be so effective so as to prevent any ETS contamination in areas outside a DSR.[94]

Newfoundland's *Smoke Free Environment Regulations*[95] demand that an employer who installs a ventilation system in accordance with the Regulations in DSAs must maintain the system with proper cleaning techniques, proper recording methods and this maintenance must be performed at least every six months.[96] It also specifies the measuring particulars of operating efficiency, flow volumes and

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8. Saskatchewan: *The Occupational Health and Safety Regulations*, Made under *Occupational Health and Safety Act*, c. O-1.1 Reg. 1, General Health Requirements, Ventilation.

9. Yukon: *Occupational Health Regulations*, Made under *Occupational Health and Safety Act*, R.S.Y. 1986, C. 123, Section 7, Ventilation.

Noteworthy is the fact that neither Ontario's *Occupational Health and Safety Act* and accompanying Regulations nor the *Smoking in the Workplace Act* contain ventilation requirements governing DSAs or DSRs.

[92]See: Saskatchewan, *Supra* note 95.

[93]See: s. 77(5)(i), (ii).

[94]*Ibid*.

[95]*Supra* note 91.

[96]*Ibid*. at s. 6(a) - (e).

specifications with regard to the mechanical operations of the ventilation system.[97] In addition, there is a specific prohibition contained within the legislation that stipulates that smoking may not be permitted in a DSA or DSR unless the ventilation standards are observed.[98]

As previously mentioned, a systemic problem that is virtually Canada-wide involves the effectiveness of ventilation. The dangerous chemicals and substances that derive from tobacco smoking are those that are presumed to be eliminated by ventilation. The system of legislative controls, however, is severely flawed in that many jurisdictions have excluded derivatives of tobacco smoke in their hazardous substance legislation.

This legislation is generally in the form of regulations, that address workplace hazardous materials. For most provinces and territories, the system of classification that is used for the qualification of dangerous substances is legislatively known as the Workplace Hazardous Materials Information System ("WHMIS"). It consists of an extensive methodology and delineation of hazardous substances that are to be monitored, limited and avoided in a workplace. Some chemicals are presumed to be eliminated through proper ventilation.

Some of the chemicals found in cigarette smoke are those that are listed in many of the provincial and territorial regulations as being completely restricted in the workplace.[99] Clearly, for this reason, in addition to the general dangers of exposure to ETS in the workplace, one would presume that tobacco products would be included in the WHMIS system. Notwithstanding this logical assumption, there is also a common application issue plaguing the Canadian method for the classification of hazardous substances. It is usual that the WHMIS legislation specifically excludes tobacco,

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[97] *Ibid*. at s. 7(a) - (c).

[98] *Ibid*. at s. 8(a).

[99] For instance, the *Occupational Safety General Regulations* in Nova Scotia state at s. 4(1) that the threshold limits relating to gases, vapours, mists, fumes, smoke, dust and other chemical substances and physical agents shall be governed by the Threshold Limit Values for chemical substances and physical agents for 1976, published by the American Conference of Governmental Industrial Hygienists and by its subsequent amendments or revisions. The 1998 revision of the Threshold Limit Values classifies 4-aminnodiphenyl and 2-naphthylamine as A1 carcinogens. These substances are known to cause cancer in animals and humans, and consequently, the America Conference of Governmental Industrial Hygienists recommends that humans have no contact with them. Employees, therefore, should not be exposed to either of these substances at their place of employment; yet, both of these carcinogens are found in mainstream and sidestream smoke of 33 brands of Canadian cigarettes. The only way to truly abide by the legislation is to prohibit smoking in the workplace. See: Physicians for a Smoke-Free Canada, *Protection From Second-Hand Tobacco Smoke in Nova Scotia*, A Report to the Government of Nova Scotia (Ottawa: Physicians for a Smoke-Free Canada, 2001) at 28.

or products made from tobacco, from being considered as hazardous materials. This is not to say that there are no other legal avenues on which to travel, but if at least one provincial or territorial government would repeal the tobacco exclusion from the WHMIS legislation, others might follow.

After analysing various ventilation regulations, it is clear that legislation has attempted to impose ventilation standards that assume, should the standards be followed, that smoke in the workplace would be properly controlled. A more effective and less costly choice would be to prohibit any tobacco smoking and avoid the entire ETS ventilation issue altogether.

Part III - Municipal Control

A municipal corporation is a creature of the provincial government. Since the powers and authority of state fall under federal and / or provincial heads alone, a municipal corporation operates without a constitutional framework. Thus, it only has authority to act on matters specifically designated to it by provincial governments. The municipality, as created by statute, acts as an administrator and a provider of services, carrying out policies of the provincial government. In addition, the municipality plays a political role, viewed as the cradle of democracy. This is democracy at the local level, ensuring that residents have a certain element of political control over issues in the locality, and providing a mechanism for inhabitants to express, debate, and resolve local issues.

Although they are very contentious, non-smoking by-laws may be passed by municipalities with clear authority. Generally, the authority to pass such by-laws derives from one of several legal authoritative rights of a municipal corporation. Within the legal jurisdictional boundaries of a municipality are powers expressly conferred by statute, powers necessarily or fairly implied or which are incidental to express powers, and powers essential to achieving a purpose of the corporation. For example, in Ontario, the express powers for non-smoking by-laws are set out in the *Municipal Act*[100] s. 213 and in the omnibus provision of s. 102.

Noteworthy is the fact that actions of a municipal corporation cannot violate provincial legislation. Therefore, by-laws inconsistent with provincial laws may be either void or superceded by provincial legislation. In *Re Martin Feed Mills Ltd. and Township of Woolwich*[101], the Ontario Court of Appeal determined that a conflict between a municipal by-law and provincial legislation will arise where the legislation intends to raise the same policy as the by-law and the legislation was meant to be exhaustive; in other words, that the provincial government expressed in the legislation that it was intended to govern the entirety of the matter, not to be added to or subtracted from by municipal by-laws.[102]

In Ontario, the vast majority of municipal non-smoking by-laws will likely fall under s. 213 and / or s. 102 of the *Municipal Act*. The omnibus section of the *Municipal Act*. S. 102 stipulates:

> Every council may pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act and for governing the conduct of its members as

[100] *Municipal Act*, R.S.O. 1990, Chap. M. 45.

[101] 46 O.R. (2d) 244.

[102] *Ibid*. at 245.

> may be deemed expedient and are not contrary to law.

Although seemingly broad in concept and intent, s. 102 does have limitations. First, it has a constitutional limitation in that a municipality cannot exercise jurisdiction over a matter that does not fall within provincial jurisdiction. Second, municipal by-laws are subject to superior provincial legislation. Third, the *Municipal Act* is nearly exhaustive in its list of express powers which must be seen as detracting from s. 102. Nevertheless, s. 101(2) of the Act specifically prevents by-laws properly passed by council to be open to be quashed, set aside or declared invalid on account of unreasonableness or supposed unreasonableness of its provisions. Thus, the legislation provides some statutory protection for validly passed by-laws, no matter how controversial they may be.

It has been held that a somewhat stricter rule of construction will apply in the context of municipal authority to pass by-laws if the by-law somehow restricts the common law or civil rights.[103] Opponents to non-smoking by-laws will often rely on the argument that smoking is or ought to be included in their civil rights, and thus the Courts should find the by-law *ultra vires* the municipality using a stricter rule of construction. Furthermore, opponents of non-smoking by-laws may also argue that the true purpose of non-smoking by-laws is to limit civil rights rather than promote and protect the health and welfare of residents, as required by s. 102 of the *Municipal Act*.

For the purposes of smoking in the workplace by-laws, the most important statutory authority arising from the *Municipal Act* is s. 213. It specifically allows municipal corporations to pass by-laws that will govern or restrict smoking in the workplace. It reads:

> 213.
> (1) In this section,
> "public transit vehicle" includes a school bus and a passenger vehicle used for hire;
> ("véhicule de transport en commun")
> "workplace" includes a public transit vehicle.
> ("lieu de travail")
> [...]
>
> (2) The council of a local municipality may pass a by-law regulating the smoking of tobacco in public places and workplaces within the municipality and designating public places or workplaces or classes or parts of such places as places in which smoking tobacco or holding lighted tobacco is prohibited
> [...]
>
> (3) A by-law made under subsection (2) may,
>
> (a) define "public place" for the purposes of the by-law;

[103] *R.* v. *Greenbaum* [1993] 1 S.C.R. 674 at 688.

> (b) require a person who owns or occupies a place designated in the by-law to post signs referring to the prohibition or to such other information relating to smoking as is required by the by-law;
>
> (c) prescribe the form and content of signs referred to in clause (b) and the place and manner in which the signs shall be posted;
>
> (d) permit persons who own or occupy a place designated in the by-law to set aside an area that meets criteria prescribed by the by-law for smoking
> within the place;
>
> (e) prescribe the criteria applicable to smoking areas in clause (d), including the standards for the ventilation of such areas;
>
> (f) require areas set aside for smoking in places designated by the by-law to be identified as an area where smoking is permitted; and
>
> (g) require the employer of a workplace or the owner or occupier of a public place to ensure compliance with the by-law.
> [...]
>
> (4) Despite any definition of "public place" contained in a by-law made under subsection (2), no by-law made under subsection (2) shall apply to a street, road or highway or a part thereof.

A plain reading of s. 213 gives municipalities clear authority to determine where smoking can be restricted in the workplace.

The City of Ottawa has exercised this power and thus far the resulting by-law has been upheld by the judiciary. The by-law was challenged in the Ontario Superior Court of Justice and was upheld. The decision is now under appeal.

Of course, some affected parties will seek to have such by-laws quashed. Indeed, the Ontario Superior Court of Justice has the statutory authority to quash a by-law in whole or in part for illegality pursuant to s. 136 of the *Municipal Act*. Any resident of the municipality or a person *interested*[104] in a by-law may apply to the court to have a by-law quashed. Furthermore, s. 137 allows another municipality or any ratepayer of it to apply to the court to have the by-law quashed if it is alleged that the by-law injuriously affects the other party. S. 138 of the *Municipal Act* imposes a one year limitation period within which a party must apply to the Court to have the by-law quashed; however, if the by-law required the assent of the electors "and was not submitted for or did not receive such assent, the application may be made at any time." Consequently, these statutory sections are those on which interested parties, such as residents or organizations, will rely to counter a municipal corporation seeking to impose non-smoking by-laws.

[104] See: s. 136(1), *Supra* note 100.

In 2001, the City of Ottawa passed non-smoking by-laws that restrict smoking in public places and workplaces. Municipal By-law No. 2001-148[105] restricts smoking in public places, and By-law No. 2001-149[106] restricts smoking in workplaces. In so far as the workplace restrictions are concerned, the by-law imposes clear obligations on employers to implement a non-smoking policy that prohibits smoking in workplaces found within the City of Ottawa. It also requires employers to post proper signage referring to the policy, and sets out offences and accompanying fines. Employers may be found guilty of an offence under the by-law if they refuse, fail or neglect to perform any of the duties imposed by the by-law, or if they hinder or obstruct an inspector lawfully carrying out the enforcement of the by-law. The resulting fines are set at a maximum of $5,000.

Some residences and institutions that themselves may constitute a "workplace" are exempt from the by-law.[107] Facilities such as hospitals, psychiatric facilities, various homes for the elderly, schools and charitable institutions are examples of those locations that will continue to be regulated under the *Ontario Tobacco Control Act*[108]. Since provincial legislation has fully dealt with smoking in such locations, the by-law exemption was enacted.

The by-laws have been legally challenged by the Pub and Bar Coalition of Ontario ("PUBCO").[109] The Ontario Superior Court of Justice upheld the validity of the Ottawa by-laws and found in favour of the Corporation of the City of Ottawa. The case was heard in Ottawa on August 27 - 28, 2001, and Morin, J. of the Ontario Superior Court rendered his decision on August 31, 2001. The case is appropriate as a case study since both the plaintiffs and the defendant raised arguments typical to those usually raised in smoking legislation challenges.

The following is a summary of the legal arguments raised in the City of Ottawa By-law challenge dealing with municipal authority to enact such by-laws.

The applicant, PUBCO, applied to the Court pursuant to s. 136 of the *Municipal Act* to quash the two by-laws of the City of Ottawa (the "City") respecting smoking in public places and smoking in the workplace on the grounds that the City exceeded its jurisdiction under the enabling legislation. PUBCO also challenged the constitutionality of various corresponding legislation, such

[105] City of Ottawa, By-law No. 2001-148, *Public Places By-law* (August 1, 2001).

[106] City of Ottawa, By-law No. 2001-149, *Workplaces By-law* (August 1, 2001).

[107] City of Ottawa, *By-law Services*, online: City of Ottawa,

<http://www.city.ottawa.on.ca/city_services/bylaws/1_3_3_4_en.shtml> (last modified: 2001)

[108] *Tobacco Control Act*, S.O. 1994, Chap. 10.

[109] *Pub and Bar Coalition of Ontario* v. *Ottawa (City)* [2001] O.J. No. 3496.

as the Ontario *Smoking in the Workplace Act*. Rideau Carleton Raceway Holdings Limited (the "Raceway"), the second applicant, applied to quash the by-laws on the basis that they exceeded the City's jurisdiction under s. 213(2) of the *Municipal Act* and were discriminatory to the Raceway.

The Court begins its decision with a summary of the applicable legislation to be considered. It then turns to the by-laws themselves, and surveys the restrictions imposed upon owners and managers of public business places to eliminate smoking.[110] It then turns to the main positions of the City with respect to the arguments raised by the applicants. These positions are those that are typically held by municipalities seeking to defend a by-law that restricts smoking.

The submissions of the City of Ottawa were essentially based on two main premises: first, that it had legislative authority to invoke a complete ban on smoking, and second, that the enabling legislation allowed for the implementation at the municipal level of more restrictive limitations on smoking than under provincial legislation.

The City relied on s. 213 of the *Municipal Act* for its authority to enact by-laws. It pointed to the section that allows the City to define "public places" for the purpose of the by-law. The only restriction in that regard is s. 213(4) which requires that no by-law shall apply to a street, road or highway or part thereof. It also relied upon s. 213 of the *Municipal Act* as authorizing a prohibition as opposed to only regulation of smoking. In the alternative, the City argued that in any event, the by-laws did not amount to an outright prohibition since there was a distinction between indoor and outdoor restrictions.

Moreover, the City argued that the by-laws were not in conflict with the *Tobacco Control Act* or the *Smoking in the Workplace Act*. Both statutes provide for the passing of by-laws by municipalities that contain more restrictive smoking provisions than the provincial legislation. Thus, the doctrine of paramountcy remains intact and unviolated. If the provincial legislation provides statutory authority for municipalities to enact more restrictive smoking by-laws, there is no risk of making subordinate legislation paramount to superior legislation. In this way, the City argued that the by-laws were not designed to circumvent the jurisdiction of the province. Consequently, compliance with the by-laws meant compliance with the provincial legislation.

The Court acknowledged that, generally, if a municipality purported to *regulate* smoking in all public places and workplaces, it would be acting *ultra vires* its powers. The Court rightfully expounded, however, that the province was clear in its enabling legislation.[111] It had expressly provided that the municipality may designate public places or workplaces or classes or parts of such places as places in which smoking tobacco or holding lighted tobacco is prohibited.

[110] *Ibid*. at 6.

[111] *Ibid*. at 26.

Because of its findings that the City had legislative authority to enact the by-laws, and that the by-laws did not violate any rules of legislative paramountcy, the Court dismissed the application.[112] The by-laws were held to be valid.

In the final analysis, Ontario municipalities do have the statutory authority to restrict and even prohibit smoking in the workplace through s. 213 of the *Municipal Act*. Although not specifically dealt with in the Ottawa case, municipal corporations also have the right by virtue of s. 102 of the *Municipal Act* to pass by-laws that consider the health and welfare of its inhabitants which certainly goes to smoking controls.

[112] *Ibid*.

Part IV - Judicial application of both federal, provincial and territorial legislation and case law analysis

In *Berger* v. *Willowdale A.M.C.*[113], the Ontario Court of Appeal has unequivocally stated that "an employer owes a duty to its employees of providing and maintaining a safe working place."[114] If this is the case, one may question how smoking in the workplace is still widely permitted in some jurisdictions. It seems trite to state that exposure to second hand smoke is hazardous to the health of employees. Furthermore, studies have proven that neither DSAs nor DSRs provide sufficient protection for employees. It has been said that "[s]itting in the nonsmoking section of a building is like swimming in the nonchlorinated section of a pool. The difference, of course, is that a little chlorine won't kill you. Other people's cigarettes may."[115]

Proponents of non-smoking legislation and of non-smoking workplaces should find comfort in the common law. Although there is a surprisingly small pool of jurisprudence that directly addresses the issues surrounding smoking in the workplace, the case law has revealed that the judiciary is not as adverse to forcing an implementation of non-smoking policies as some might assume. In fact, the judiciary has in several circumstances upheld the rights, and obligations in some cases, of employers to create and maintain a non-smoking work environment.

A survey of the case law reveals that the jurisprudence is divided into several general categories. These are:

a) *How the courts have incorporated the health hazards of ETS into their interpretation of the legal ramifications of smoking in the workplace;*
b) *Whether the courts will generally uphold the rights of employers to implement a non-smoking workplace;*
c) *Whether employees have the inherent or legislative right to refuse work if they are exposed to ETS in their workplace;*
d) *How the courts will likely interpret employees' rights to insurance such as sickness and accident benefits if their at-work injuries are as a result of workplace exposure to ETS;*
e) *Whether or not institutions that can be considered a "residence" in addition to a workplace are still subject to non-smoking workplace policies; and*
f) *How the courts will interpret human rights arguments in the context of workplace smoking policies.*

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[113] 41 O.R. (2d) 89.

[114] *Ibid*. at 95.

[115] "Poison at Home and at Work: A New Report Calls Secondhand Smoke a Killer" Newsweek (29 June 1992) 55 at 55, as referred to in: Wendy Hyman, "Environmental Tobacco Smoke in the Workplace: The Legal Impact of Federal and Ontario Occupational Health and Safety Legislation" (1996) 4 Health L. J. 221 - 257 at 1.

a) How the courts have incorporated the health hazards of ETS into their interpretation of the legal ramifications of smoking in the workplace

In *Canada (Treasury Board)* v. *Wilson*[116], the applicant applied to the Federal Court to review and set aside a previous decision by an Adjudicator on the ground that he erred in law in deciding that passive tobacco smoke constituted a dangerous substance within the meaning of the Dangerous Substances Safety Standard ("Standard"). The Standard had been incorporated into a collective agreement that was in effect in the workplace.

In 1984, the respondent, a clerical employee of the Department of National Health and Welfare, filed a grievance in which it was alleged that his employer had violated the Standard by allowing smoking in the workplace. The respondent further argued that the employer should only allow employees to smoke in an adequately ventilated area that would be separate from the workplace.

The Adjudicator classified the tobacco smoke as "passive", "ambient", "second hand" or "sidestream" and consequently found that tobacco smoke did constitute a dangerous substance that fell within the meaning of the Standard.[117] It was decided that the employer was therefore in breach of the provision of the Standard and the grievance was upheld.

The majority of the Federal Court, in allowing the appeal, noted that the Adjudicator came to the conclusion that ETS could be classified as a dangerous substance at the end of a two-step process. First, the Adjudicator held that passive cigarette smoke was a dangerous substance within the meaning of the Standard. The definition of "dangerous substance" in subparagraph 5(1) of the Standard reads: "any substance, that because of a property it possesses, is dangerous to the safety or health of any person who is exposed to it." Second, the Adjudicator held that the applicable paragraphs forbidding certain dangerous substances had been violated.[118]

Contrary to the Adjudicator's reasoning, the majority of the Court of Appeal held that the question to be decided was not whether passive cigarette smoke in the workplace was dangerous to the health of the respondent. Rather, the Court's mandate was limited to that established by the *Federal Court Act*, namely, to decide whether the Adjudicator "erred in law".[119] Thus, the real and only real question to be answered was whether passive cigarette smoke was a dangerous substance as defined by the Standard.

Importantly, the Court concluded that passive cigarette smoke did not fall within the meaning of dangerous substance. The Standard

[116][1987] 1 F.C. 452.

[117]*Ibid*. at 4 of the Quicklaw version.

[118]*Ibid*. at 9.

[119]*Ibid*. at 10.

required the employer to confine "any dangerous substances that may be carried by air as closely as is reasonably practicable to the places where they are being used, stored or handled, and in appropriate cases, to the places where they are being manufactured or processed."[120] In the present case, the Court held that the employee's health was not at risk because of substances originating from any of the workplace related sources, but rather from the personal habits of fellow employees. Since this danger was not addressed by the Standard, the Adjudicator erred in law in deciding that passive cigarette smoke applied to the dangerous substance paragraphs of the Standard.[121] Thus, the appeal was allowed, the decision of the Adjudicator set aside, and the matter was referred back to the Adjudicator on the basis that passive cigarette smoke was not a dangerous substance that applied to the Standard.

Although this decision may appear to be detrimental to the cause of eliminating smoking from the workplace, Justice Mahoney's dissent clearly proves that the Court may not always consider a plain reading of a work-related contract as paramount. Mahoney, J. confirmed that the Court can consider a broad interpretation of contractual provisions dealing with the health and safety of employees, in favour of a non-smoking workplace.

Even though the majority decision was based on the *source* of the danger, the dissent emphasized that the source was not relevant. The dissent also posited that since the Standard had been incorporated into a collective agreement, the provisions of the Standard that addressed air borne contaminants should apply to secondhand smoke both on a purposive construction and a literal reading of the Standard.

In denying that the source of the danger is a deciding consideration, the dissent concluded that a clear purpose of the Standard was to reduce, by all reasonable means, dangers to employees existing in their workplace. Using this reasoning, the judge noted:

> I find nothing in the Standard that excludes its application to airborne contaminants from a particular source. Rather, in my respectful opinion, it applies to any dangerous substance carried by the air in the workplace regardless of the source. I see no rational basis whatever for excusing the employer from the testing requirements [...] of the Standard by reason of the source of an airborne contaminant and the qualification that it be confined as close to the source as reasonably practicable obviates any legitimate objection that might be raised as to the application of paragraph 12 to a dangerous substance by reason of its source. It is neither unreasonable nor unjust to require the employer

[120] *Ibid*. at 14.

[121] *Ibid*.

> to observe the requirements of the Standard vis-à-vis ambient tobacco smoke in the workplace."[122]

Based on this decision, then, it can be presumed that if, in negotiating a collective agreement, the parties wish to include legislation or documents that deal with health and safety issues of employees, it would be wise to specifically delineate substances that are not found within the legislation if the parties wish for them to apply. If the contract specifically included or excluded air borne substances that did not derive from particular functions of the employment, such as air borne cigarette smoke, the interpretation of the contract would be much less subjective on the part of a court. This case stands for the proposition that a court will not read into a collective agreement where it is not essential, on the basis that the parties have the right to contract the contents of the agreement as they see fit. In this way, a court will apply a usual contract interpretation methodology in determining the contents and scope of the agreement, in addition to the intentions of the parties, when considering a collective agreement. Consequently, parties that are seeking to include ETS, as dangerous substances within the terms of a collective agreement should specifically include it. The clearer the terms of the agreement, the less reading into it will be required by a court.

b) Whether the courts will generally uphold the rights of employers to implement a non-smoking workplace

Two decisions from the late 1980's illustrate that employers have the authority to implement workplace non-smoking policies. It is within the employer's jurisdiction to set smoking restrictions, or a complete ban on smoking. The facts of these cases also indicate that the employer is not always the party looking to allow the continuation of smoking in the workplace.

Re Thibodeau-Finch Express Inc and Teamsters Union, Local 938[123], is a frequently cited union grievance in which a company's smoking ban in a garage was challenged. The matter before the Ontario Labour Board arose out of a grievance dated September 15, 1986.

The disputed smoking ban was to come into effect in September, 1986. There were six maintenance facilities operated by the employer, all of which were subject to the smoking ban, but only one of which disputed the policy.

The Labour Board was prepared to give administrative notice of the following: "in general terms it can be said that exposure to secondary cigarette smoke can be hazardous to health."[124] This is significant, and could be useful for other union grievances involving the dangers of exposure to ETS.

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[122] *Ibid*. at 7.

[123] 31 L.A.C. (3d) 191.

[124] *Ibid*. at 2 of the Quicklaw version.

There were particular facts that were of interest to the Board, and that brought the Board to the conclusion that the ban on smoking should be upheld.

- Fire hazard - the solvents, paints, oils, aerosol cans, and other flammables present on the premises and used on a daily basis to perform mechanical functions could be ignited by careless smoking
- Health hazard - the company had become more aware of the dangers of exposure to ETS and wished to protect its employees
- Productivity - valuable time is often lost by smoking
- The effects of non-employees in the garage - if the smoking ban were not in effect, persons who were not employed within the garage such as delivery persons would be free to smoke in the workplace and would not necessarily be prudent with their actions[125]

The Board found that based on management's clear and unequivocal right to create and enforce rules for the safe operations of its enterprise, the non-smoking policy was a valid workplace regulation.[126] The Board emphasized that rule-making based on safety was a "core management function".[127] For this reason, the agreement of the union was not required in the implementation of the smoking ban.

This case is instrumental in the promotion of management's right to enact rules that go directly to the safety of the workplace. Although for our purposes this decision may have been more valuable if the Board had also based its decision upon the protection of the health of employees which would be compromised by exposure to ETS, it can provide another legal angle to assist employers in forbidding smoking in the workplace. Since the Board evaded the health implications, possible future complainants might be wise to introduce how the safety of the workplace could be jeopardized by careless smoking. In this way, the trier of fact would not only have the negative health implications of exposure to ETS to weigh in favour of a smoke-free workplace, but also a safety issue.

In *Jourdain* v. *Canada (Treasury Board) (T.D.)*[128], the plaintiff, a federal civil servant and a long-time smoker sought a declaration from the Federal Court of Canada that the defendant's smoking policy was illegal. The Treasury Board had released a policy that promoted a safe and healthy work environment for its employees, and, to the extent possible, free of tobacco smoke. Subsequent to the release of the policy, the Treasury Board implemented a ban on

[125] *Ibid*. at 3 - 4.

[126] *Ibid*. at 8.

[127] *Ibid*. at 9.

[128] [1989] 3 F.C. 507.

smoking of tobacco or other products in all public service workplaces.[129]

The plaintiff raised a jurisdictional argument and challenged the Treasury Board to prove that it had the authority to enact policies dealing with health and safety matters in the workplace.[130] The Treasury Board, in response, emphasized that the policy was in force to prevent smoking in the workplace, and was not directly tied to any health or safety issue. The defendant submitted that in the alternative, even if the policy had been invoked as a result of health and safety concerns, it would have the jurisdiction to deal with the subject matter since the Treasury Board was responsible to administer all Ministries of the government.[131]

The Federal Court took judicial notice of the fact that there exists "some evidence of the possible hazardous effects of smoking and of inhaling tobacco smoke."[132] Coupled with the administrative notice of a similar presumption by the Labour Board in the *Thibodeau* grievance, the judicial notice taken by the Federal Court can be useful in future smoking workplace policy cases.

The Federal Court concluded that the pith and substance of the smoking policy had directly to do with health and safety issues. It was held that the Treasury Board had the jurisdictional authority to set policies of reasonable conditions of the workplace, particularly when they involved the public interest in health and safety.[133] More specifically, the Court summarized that "[a]n employer alone has the authority to decide on the reasonable conditions of the workplace unless that issue of these reasonable conditions becomes a matter into an agreement between the representatives of the public service and the Treasury Board."[134]

Accordingly, an employer has the common law right to enact such policies so long as they are rules of conduct of an internal nature made pursuant to the employer's general power of control. The judiciary will likely be wary to find in favour of the argued rights of smoker-employees in circumstances where the employer has enforced a non-smoking policy as part of the rules and regulations of the workplace.

[129] *Ibid*. at 3 of the Quicklaw version.

[130] *Ibid*. at 4.

[131] *Ibid*. at 4 - 5.

[132] *Ibid*. at 6.

[133] *Ibid*.

[134] *Ibid*.

c) Whether employees have the inherent or legislative right to refuse work if they are exposed to ETS in their workplace

The Canadian Labour Relations Board had the occasion to consider issues surrounding smoking in the workplace in 1985, in *Alberto Timpauer, complainant* v. *Air Canada, employer, and Harold B. Monteith, Labour Canada Safety Officer*.[135] Several studies on the subject of workplace exposure to ETS cite *Timpauer* as indicative of the Labour Board's original reluctance to classify smoking in the workplace as a dangerous hazard.

The complainant argued that he was in "imminent danger" from exposure to tobacco smoke in his workplace and therefore rightfully refused to work.[136] Consequently, he submitted that his employer should be ordered to prohibit smoking in the workplace, except in a specially DSR vented to the outside.

Timpauer was employed as a lead attendant for Air Canada in the international baggage area at Terminal 2, Pearson International Airport, in Toronto. Smoking was permitted during working hours in a large baggage room and in offices. The complainant's physician had determined that he was allergic to smoke, and as a result of this diagnosis, Timpauer requested a reduction in cigarette smoke. When these requests fell on deaf ears, the complainant refused to work, citing s. 82.1 of the *Canada Code* [as it then was] which permitted an employee to refuse work if he / she had reasonable cause to believe that a condition existed in the workplace that would constitute an imminent danger to his / her own safety.[137] After the employer investigated the situation, a requirement under the *Canada Code* if an employee refuses work based on imminent danger, it concluded that there was very little evidence of an accumulation of tobacco smoke in the atmosphere.[138]

The Board, in rejecting the complainant's arguments, held that "imminent danger" must be interpreted as signifying that the employee believes "that he or she is about to be actually and immediately harmed and he or she must at once remove himself or herself from the scene to avoid the danger."[139] Furthermore, the Board established that the imminent danger provision was not intended by legislators "to be applied at some intermediate stage in the long build-up of conditions and circumstances which, at a certain climax, might indeed present a real danger to safety and

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[135] CLRB Decision No. 502, Board File: 950-34. Note: this decision was quashed by the Federal Court of Appeal (Court File No. A-277-85) unreported Judgment of March 19, 1986 on the basis that the complainant was denied natural justice in not being allowed to call his personal physician to give evidence. The legal analysis with regard to ETS in the workplace, however, remains valid since the matter was quashed for different reasons.

[136] *Ibid*. at 2 of the Quicklaw version.

[137] *Ibid*. at 4.

[138] *Ibid*.

[139] *Ibid*. at 5.

health."[140] Although the Board did note that a ban on smoking in the workplace might not be a bad outcome following further scientific evidence, it insisted that it would be up to the legislature to make this decision.[141]

The ramifications of this decision in the mid 1980s was significant since exposure to ETS was not considered an imminent danger within the meaning of the *Canada Code.* It is possible that this matter would be decided differently today, since the term "imminent" is no longer in the *Canada Code.* Now, an employee may refuse to work in a place if the employee has reasonable cause to believe that a condition exists in the workplace that constitutes a danger to him / her.[142] Since the Board's decision turned on the term "imminent", there is an arguable case to be made that the removal of the term is indicative that legislators might at this time consider exposure to ETS as a danger. If it is true that smoking in the workplace policies ought to be modelled by the intentions of the legislators, then there is now an argument to be made that there exists a legislative intent to soften the limits of the term "danger" so as to include ETS.

In a similar case, and a decade later, an employee brought forth a complaint against the Correctional Service of Canada alleging that he felt harassed by his employer. In *Martin and Treasury Board (Solicitor General Canada - Correctional Service)*[143], the complainant had raised concerns to his employer due to the hazards of exposure to the second-hand smoke caused by the inmates' smoking. Because of this danger, the complainant had refused to work.[144]

The employer met with the employee to discuss his employment. Several alternative work options were made available to the employee, including light duties. The light duties option would ensure that the employee would not be exposed to tobacco smoke. The Canada Public Service Staff Relations Board found that this was a fair compromise, and the light duty arrangement was not unreasonable given the employee's susceptibility to smoke.[145] Further, the Board, in dismissing the complaint, found no merit to the suggestion that the complainant was harassed, dismissed, suspended, laid-off, or demoted or was otherwise dealt with unfairly by the employer as a result of the his complaints.[146]

In this case, therefore, the Court focussed on the alternative options to the employee rather than the right of an employee to refuse work. If the employer provides the employee with a reasonable workplace compromise in an effort to eliminate the

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[140] *Ibid*.

[141] *Ibid*. at 6.

[142] *Supra* note 8 at s. 128.

[143] [1996] C.P.S.S.R.B. No. 50.

[144] *Ibid*. at 2 of the Quicklaw version.

[145] *Ibid*. at 10.

[146] *Ibid*.

danger for the employee concerned, the employer may evade liability for lax smoking in the workplace policies. Rather than forcing an employer to enact a complete non-smoking policy, the Court will apparently allow the employer to alter the terms / duties of employment of the employee. If one pursues the legal ramifications of this case even further, one might question its place in classic employment law. Could the alteration of employment duties constitute constructive dismissal? Must an employee be forced to accept different conditions of employment than those to which were originally agreed merely by virtue of the fact that the employer's smoking policy is detrimental to the employee's health? The Court did not go so far as to address these questions, however, these legal issues could be raised in future similar cases to negate the reasoning of the Court in this case.

d) How the courts will likely interpret employees' rights to insurance such as sickness and accident benefits if their at-work injuries are as a result of workplace exposure to ETS

An interesting element to employees' rights that arise out of exposure to ETS is the analysis of sickness and accident benefits. If exposure to second-hand smoke at the workplace makes an employee ill, will that employee be legally eligible to collect sickness or sick leave benefits from the insurance company?

This was considered in a labour grievance filed in 1986, a relatively new claim for the time. In *Re De Havilland Aircraft of Canada Ltd. and United Automobile Workers, Local 673*[147], the grievor, Mrs. V.E. Torrance, claimed to have been improperly denied sickness and accident benefits. Diagnosed by her physician as being an "atopic" individual, the grievor suffered from an altered immunity and larger than normal propensity to have strong reactions to irritants and allergens.[148] ETS was one such irritant.

As a result of exposure to ETS, the grievor had been absent from her employment. In her physician's opinion, she was fit to return to work, depending on the type and location of the work. The grievor had previously been relocated to another department within her workplace, in which all of the members of the team were smokers. She requested to be assigned to a different team due to her health concerns, and this became the subject of an arbitration.[149]

Rather than focus on the issue of relocation, the Board decided that the issue before it was whether or not the grievor continued to qualify for receipt of sickness and accident benefits under the terms of the collective agreement.[150] In doing so, the Board held

[147] 25 L.A.C. (3d) 249.

[148] *Ibid*. at 1 of the Quicklaw version.

[149] *Ibid*. at 2.

[150] *Ibid*. at 4.

that the grievor was indeed qualified to receive the sick leave benefits, since she would not be able to return to her relocated employment under the current conditions of the workplace.[151] She was to continue "to receive such benefits within the terms of the benefit plan during whatever period she was both sick and unable to work at her normal job." [152]

The ramifications of this decision were and continue to be considerable. An employee can receive sick leave benefits if exposure to ETS is making him / her ill. The Board, however, did not clarify several hypothetical legal circumstances. Would the employee ever have to return to the same position in the workplace if exposure to ETS were a regular occurrence? If the employee were forced to return to the workplace due to the expiry of sick benefits, would the employer be forced to accommodate the employee by restricting smoking or relocating him / her? Lastly, if the employee were not forced to return to the workplace under the terms of the agreement, would the sick benefits continue indefinitely?

e) Whether or not institutions that can be considered a "residence" in addition to a workplace are still subject to non-smoking workplace policies

The workplace smoking legislation and common law rights and obligations of employees and employers all address smoking in a public workplace. Clearly, there is no legislative provision or common law rule that attempts to govern the behaviour of persons in their private residence. In other words, although smokers may be subjected to restrictive regulations at work, they are free to smoke in the privacy of their own homes. A trilogy of cases has considered the smoking prohibitions in workplaces that can also be deemed a "residence". These cases all review the conflict between workplace and residence in the context of correctional institutions. Furthermore, because the cases range from Western, Central and Eastern Canada, it can be presumed that they stand for the Canadian position.

In *Carlston* v. *New Brunswick (Solicitor General)*[153], the applicant, an inmate at a provincial correction institution, brought an application under s. 24(1) of the *Charter of Rights and Freedoms*[154] for an appropriate remedy rectifying an infringement of the applicant's s. 12 *Charter* rights. S. 12 protects persons from cruel and unusual treatment or punishment. In an attempt to protect its employees from the hazards of second-hand smoke, the respondent adopted a policy restricting the smoking of tobacco in

[151] *Ibid*.

[152] *Ibid*.

[153] [1989] N.B.J. No. 449.

[154] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. [hereinafter "*Charter*"].

provincial correctional institutions. The original policy was softened from a total ban to a policy that would allow inmates reasonable opportunities to smoke throughout the day.[155]

The applicant and other smokers who "resided" in the institution, were escorted in small groups outside at least three times a day in order that they may smoke. Because other duties sometimes required the attention of the escorting prison guards, however, there were occasions when the inmates "missed" their short break outside. The applicant's argument was based on the premise that there was no guarantee to inmates of their right to smoke following the implementation of the non-smoking policy, and this placed the inmates at the arbitrary discretion of the institution's director.[156]

Intriguingly, the Court explained that had the original total smoking ban continued, the Court would have had "little hesitation in finding that the application of that policy constituted cruel and unusual treatment insofar as the applicant was concerned and that as such it would amount to an infringement of that right to which he is entitled by reasons of s. 12 of the *Charter*. The policy, however, was changed and the applicant was afforded reasonable opportunities to smoke."[157]

In an application under s. 24(1) of the *Charter*, a court is primarily concerned with whether an individual has in fact suffered an infringement or denial of rights conferred on him / her by the *Charter* and not with the possibility that some infringement or denial may occur in the future.

The Court recognized the difference in enforcing a smoking restriction in a workplace and implementing a smoking restriction in an institution that was both a residence and a workplace. "Unlike employees, [inmates] cannot step out onto the back stoop for a frequent cigarette, or smoke through a lunch-hour or an evening. At the same time it must be recognized that for one incarcerated in a gaol, often with little to occupy one's mind or attention, the ability to smoke probably represents a luxury the nature of which it is difficult for one on the outside to appreciate."[158] By the same token, the Court also recognized the practicality of those considerations. Would a judge during sentencing, for instance, ask the offender if he / she would prefer a smoking cell or a non-smoking cell?[159]

The decision of the Court was to dispose of the application, particularly since the applicant was being afforded reasonable opportunities to smoke.[160]

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[155] *Supra* note 157 at 1 of the Quicklaw version.

[156] *Ibid*. at 4.

[157] *Ibid*.

[158] *Ibid*. at 5.

[159] *Ibid*.

[160] *Ibid*.

Although its final decision was legally sound, this decision left open the opportunity for other inmates facing a total smoking ban in their "residence" to validly challenge the ban on a constitutional basis. After all, the Court did hold that a total ban would constitute cruel and unusual punishment.

A decision from the Ontario Superior Court specifically rejected the Court's reasoning in *Carlston*. In *McNeill* v. *Ontario (Ministry of the Solicitor General & Correctional Services)*[161] the Court held that a total ban on smoking in an institution did not infringe on any constitutional *Charter* rights of the resident inmates.[162]

Due to a municipal by-law banning smoking in public places, the Wellington Detention Centre imposed a smoking ban in 1997. In an effort to assist the inmates through the transition to a non-smoking environment, the institution provided counselling and aids such as Nicorette.[163]

The Court was asked to consider two possible *Charter* infringements. First, the Court addressed the argument that the policy violated the applicant's s. 12 *Charter* rights that protects him from cruel or unusual punishment. The Court quickly dismissed this argument by stating that there is a clear difference between a punishment and treatment.[164] The ban in these circumstances was not enacted to be a punishment.[165] In specifically rejecting the *Carlston* v. *New Brunswick (Solicitor General)* decision, the Court held that even if the total ban did constitute "punishment" or "treatment" within the meaning of the *Charter*, which the Court highly doubted, it was far from cruel or unusual.[166]

The Court turned to the applicant's second *Charter* violation argument. It was alleged that the smoking policy violated the protected s. 15 *Charter* rights of equality before the law, and the right to equal protection and benefit of the law without discrimination. The *Charter* protects against discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The applicant submitted that nicotine addiction was a disability included under s. 15 of the *Charter*.

Smokers, according to the decision, do not form part of a group "suffering social, political and legal disadvantage in our society", a criteria for a s. 15 successful claim.[167] Further,

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[161] [1998] O.J. No. 2288. [hereinafter *McNeill*].

[162] *Ibid*. at 6.

[163] *Ibid*. at 3.

[164] *Ibid*.

[165] *Ibid*.

[166] *Ibid*. O'Connor, J. stated that "I respectfully disagree with the learned justice [in *Carlston*] on this point and note that, in any event, his remarks were obiter dicta." *Ibid*.

[167] *Ibid*. at 5.

nicotine addiction and the accompanying symptoms caused by withdrawal fall short of constituting a physical or mental disability which is a right protected by the *Charter*.[168] Therefore, based on this decision, the right to smoke is not a right protected by the *Charter*.

Thus, the complete smoking ban in the "residence" and workplace in a correctional institution does not infringe the *Charter* rights of the inmates.

A more recent case from Saskatchewan, *Saskatoon Correctional Center* v. *Government of Saskatchewan*[169], confirmed that the *Charter* rights of inmates are not jeopardized by a total smoking ban.[170] It further held that Directors of the correctional institutions have the authority to enact such policies under the *Correctional Services Act*.[171]

These cases stand for the proposition that the safety of employees in such institutions is paramount to the right of an inmate to smoke within his / her "residence". This body of case law can be utilized in the promotion of the workplace smoking restrictions. Clearly, the courts will not underestimate the dangers of ETS exposure.

f) How the courts will interpret human rights arguments in the context of workplace smoking policies

There are, of course, employees who are employed in workplaces that do not constitute a "residence" who also argue that their constitutional rights are violated by a smoking ban. In *Vezina* v. *Canada (Human Rights Commission) (T.D.)*[172], the Federal Court was asked to quash the decision of the Canadian Human Rights Commission ("C.H.R.C.") to dismiss the applicant's complaint of discrimination against the respondent, and to direct that the applicant's complaint of discrimination be remitted back to the Commission for the appointment of a Human Rights Tribunal.[173]

The applicant was informed by her employer that she would only be permitted to leave her desk during her scheduled breaks as a result of new workplace non-smoking policies. The applicant claimed that she was the only employee to be placed under such restrictions.[174]

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[168] *Ibid*.

[169] [2000] S.J. No. 307.

[170] *Ibid*. at 7 of the Quicklaw version.

[171] *Ibid*. at 6.

[172] [1992] 3 F.C. 675.

[173] *Ibid*. at 2 of the Quicklaw version.

[174] *Ibid*. at 3.

The applicant's physician had provided a medical letter stating that preventing her from smoking, ironically, could be harmful to her health.[175] It was alleged in the letter that the applicant's stress level would increase if she were not allowed to smoke because smoking relaxed her and because she would be subjected to more severe restrictions than those of her co-workers. The applicant also submitted that the C.H.R.C. had erred in law in failing to address the issue of adverse effect discrimination when rendering its decision to dismiss the applicant's complaint.[176]

The Court dismissed the applicant's cause because she did not frame her original arguments in the context of a discrimination cause.[177] There was no mention, for instance, in her two previous complaints, of alleged discrimination against persons having a tobacco dependency. The applicant had merely submitted that she was being subjected to differential treatment because her employer was enforcing the non-smoking policy more vigorously on her. As such, she was precluded from introducing evidence and new elements in the appeal.[178]

Although the Court did not have grounds to consider the discrimination complaint since the applicant had not originally framed her pleadings to address the issue, the Court's reasoning indicates that it would have been wary to accept smokers as a class of discriminated persons, but a court has not yet decided that issue. While in *McNeill* it was decided that smokers do not constitute a protected class under the *Charter*, there has not yet been a court decision addressing whether or not "differentially" treating a person with a tobacco dependency constitutes a human rights violation under human rights legislation.[179]

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[175] *Ibid*.

[176] *Ibid*. at 4.

[177] *Ibid*. at 5.

[178] *Ibid*.

[179] Some authors suggest that smokers could be considered physically challenged. To claim a disability, for instance, smokers would have to obtain a medical opinion stating their dependency on nicotine, which could be treated as any other addiction. See: Rhonda Hamel-Smith, *Smoking Restrictions in the Workplace* (Kingston: Industrial Relations Centre, 1989) at 49.

Conclusion

The benefits of a smoke-free workplace are not one-sided. The health advantages to employees are clear and the subject should always be approached as a health, rather than an economic, issue. Nevertheless, those employee health advantages will result in a healthier workforce utilizing less health benefits. Some of such health benefits, such as sick leave plans, are directly paid for by the employer and a reduction in use of sick leave will increase employer productivity and profit. Some health benefits are offered under insurance plans but employers more often than not contribute to the premiums for such plans. Those premiums are rated and increased depending upon usage of the insured health plan. Accordingly, a lower level of usage of an insured health plan could produce premium cost savings for employers.

The ineffective alternative to banning smoking in the workplace would require employers to install expensive DSRs and DSAs. The saving by not installing filtration and ventilation systems, which have now been shown to be ineffective in any event, is significant.

Although legislative amendments would vastly improve the possibility of complete workplace smoking bans, employers and employees are not without immediate powers to reduce and, indeed, to eliminate smoking in the workplace.

Canadian courts and labour tribunals have firmly established that employers have the non-negotiable right to completely prohibit smoking in the workplace. While employers can base such a workplace smoking ban on safety policies, such as in the case of flammables in the workplace, and fiscal restraints, as in the case of employers who are unwilling to fund the establishment of DSRs and DSAs, in fact, an employer need not provide any reason at all for restricting smoking in the workplace.

Employees, on their part, can urge management to implement complete restrictions on smoking in the workplace. They can do so in a collective bargaining context or in joint management-employee committees if they exist. They can look to health and safety officers to champion their cause and can raise the matter at occupational health and safety committees. As a difficult and somewhat last resort employees can seek redress through the courts or labour tribunals where a position that exposure to ETS is hazardous to worker health and constitutes a danger controlled by legislation has found general acceptance. The judicial and arbitral recognition that ETS exposure is an unnecessary hazard in the workplace bodes well for ultimate success through legal action by employees.

The recognition by government that exposure to ETS can have alarmingly adverse effects on the health of workers should now allow public health advocates to convince legislators to clarify and strengthen occupational health and safety legislation. Legislation that unequivocally prohibits smoking in the workplace would relieve today's burden on courts and tribunals, employers and employees. The dispute resolution deciders would not have to achieve that result through interpretation of non-specific

legislative controls. Employers would be on an equal footing with each other and would not have to weigh options of providing DSR's and DSA's and could move toward a more productive workforce. Even more importantly employees would be relieved of having to resort to the costly, time-consuming and burdensome legal process to protect their health at work.