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## TENANTS

### The Challenge of Proving a Loss of Quiet Enjoyment

#### What is your right to quiet enjoyment?

In BC and across the country, there are laws that protect you in your workplace and in public places, but there are no laws that regulate smoking in private residences of multi-unit dwellings. Further, there are no laws that guarantee tenants the right to breathe clean, smoke-free air in multi-unit dwellings. If smoking is permitted in your building, tenants have the right to smoke in their own homes. However, there are limits to those rights.

According to Section 28 of the *Residential Tenancy Act* (RTA), tenants are entitled to quiet enjoyment. Quiet enjoyment, defined in simple terms, is not the absence of noise, but rather the presence of peace. The right or covenant of quiet enjoyment has been part of the common law for centuries and is an implied part of every tenancy. In BC, this right is enshrined in s.28 of the RTA, which reads as follows:

- S. 28. A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:
- a. reasonable privacy;
  - b. freedom from unreasonable disturbance;
  - c. exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];
  - d. use of common areas for reasonable and lawful purposes, free from significant interferences. The right to quiet enjoyment thus protects tenants from unreasonable disturbances and any serious interference with their tenancy. A landlord must provide quiet enjoyment to all tenants. All tenants must ensure that their actions or the actions of their guests do not unreasonably disturb other tenants.

#### Is second-hand smoke a breach (or loss) of quiet enjoyment?

Yes, in certain circumstances, second-hand smoke infiltrating a home from a neighbouring unit can be considered a loss of quiet enjoyment, even in buildings where smoking is allowed. While there is no right to smoke guaranteed in law, Dispute Resolution Officers (DRO) in BC, as well as other provinces, have generally found that in the absence of a no-smoking clause in the tenancy agreement, tenants have the right to smoke in their suites. However, it should be clarified that these rights are not absolute and are limited by the right to quiet enjoyment of neighbouring tenants. If a tenant can successfully argue that second-hand smoke is infiltrating his/her home from a neighbouring unit or balcony on a frequent and on-going basis, and unreasonably interfering with the use and enjoyment of the unit, then landlords have a responsibility to take steps to correct the problem.

It is important to stress that the bar is high to prove that second-hand smoke infiltrating a suite has caused an "unreasonable" disturbance. The mere presence of second-hand smoke is not enough; it must be frequent, ongoing and substantially interfering with a tenant's use and enjoyment of the unit. Temporary discomfort or inconvenience does not constitute a breach of quiet enjoyment. (For more information, see our Legal section on the website).

#### What is the landlord's responsibility?

A landlord who is notified of a loss of quiet enjoyment due to second-hand smoke has a responsibility to investigate and take reasonable steps to resolve the problem. If a landlord fails to take reasonable steps to address an ongoing problem caused by second-hand smoke travelling between units, a tenant may apply to the Residential Tenancy Branch (RTB) for an "order requiring the landlord to provide quiet enjoyment and/or compensate the tenant for his/her loss of quiet enjoyment".

#### Challenges of proving a loss of quiet enjoyment due to second-hand smoke:

There is an emerging body of Canadian case law concerning second-hand smoke in multi-unit dwellings. In BC, the Residential Tenancy Branch (RTB) is the government office that provides landlords and tenants with dispute resolution services. Dispute Resolution Officers (DRO) help parties resolve their disputes during a formal hearing, and make a binding decision on the parties. Based on the evidence presented by the landlord and tenant, the DRO makes a decision about the problem, based on an interpretation of the law.

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It should be clarified however, that while Judges in our Court system are bound by past decisions or “precedents” to guide them in their decisions, dispute resolution hearings are quasi judicial in nature, and DROs are not bound to follow past decisions.

As a result, there is no assurance that the result in one case will be applied to another case.

Before you decide to apply to the RTB for compensation for loss of enjoyment due to second-hand smoke infiltrating your home, here are some issues and challenges that should be considered:

### **1. Second-hand smoke is not included in RTB Policy Guidelines**

The Residential Tenancy Branch (RTB) has issued Policy Guidelines to explain the intent of the Residential Tenancy Act in everyday language. The Guidelines are also intended to help landlords and tenants understand the issues that are important and the evidence necessary to support their case at a dispute resolution hearing.

The BC RTB has developed Policy Guidelines on the Right to Quiet Enjoyment. These Guidelines do not include second-hand smoke as an example of the type of interference that could result in the loss of quiet enjoyment. The guidelines do, however, include other examples of what could be considered a loss of quiet enjoyment – such as “unreasonable and on-going noise.”

It is arguable that because loud noise is specifically mentioned in the Policy Guidelines on quiet enjoyment, landlords in BC are quick to take action when they receive complaints about loud music or loud parties. Any first time renter soon learns that if they play loud music, and it disturbs other tenants, the landlord will promptly advise them in person or by letter that they are violating S. 28 of the Residential Tenancy Act (breach of quiet enjoyment). Landlords mean business when it comes to complaints of loud music. The same cannot be said for complaints of second-hand smoke disturbances.

Further, it is arguable that because the Policy Guidelines do not list second-hand smoke as an example of what could be considered a loss of quiet enjoyment – as is the case for loud music – landlords are reluctant to deal with complaints of second-hand smoke.

### **2. Lack of clarity on what is considered an unreasonable disturbance**

Based on past decisions at the RTB, it appears that the bar is very high to prove that second-hand smoke is grounds to prove a loss of quiet enjoyment. It might seem logical to conclude that simply being exposed to a known cancer-causing substance would constitute an “unreasonable” disturbance. However, it is not sufficient for tenants to show that unwanted second-hand smoke is present in their homes. In order to increase the chance of success, tenants must provide extensive evidence that the smoke is unreasonably interfering with the use and enjoyment of the home on a frequent and on-going basis. The test often comes down to whether a tenant can prove that the amount of smoke entering a unit from a neighbouring unit is too much smoke - or “unreasonable” according to the average person. However, it is unclear as to what evidence is required in order to meet this test.

### **3. Inconsistent decisions at the Residential Tenancy Branch**

While there are some similar criteria used by DROs within BC to determine if there has been a loss of quiet enjoyment due to second-hand smoke disturbances, based on a review of past decisions, there are no generally accepted guidelines to determine what amount of smoke constitutes an “unreasonable disturbance”. This means that many decisions are subjective, resulting in some wide discrepancies among decisions within BC and across the country.

### **4. DRO decisions do not reflect the science or public attitudes about second-hand smoke**

Until recently, people living in apartments didn’t feel they had the right to complain about unwanted smoke entering their homes from neighbouring units. Many believed they had to tolerate the smoke because they were living in a communal situation and compromise was expected. In fact, our 2008 survey of renters in BC found that over three-quarters of tenants who experience unwanted second-hand smoke entering their homes still don’t complain to landlords.

However, as the public awareness of the dangers of exposure to second-hand smoke has increased, tenants are less tolerant of being exposed to a known cancer-causing substance in their homes. Unfortunately, it seems that dispute resolution decisions coming out of the Residential Tenancy Branch do not reflect the current public perception of

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what amount of smoke exposure is acceptable in our society. Nor are their decisions based on the scientific evidence of the health impacts of exposure to second-hand smoke.

In one BC Residential Tenancy Branch decision, the DRO stated:

"There is no question in my mind that the applicant and her husband have serious health problems. I am also satisfied that [the smoking tenant] is "stressing" the applicant with her smoking, but I am not persuaded, based upon the evidence presented that the amount of smoke entering the applicant's suite has resulted in an "unreasonable" disturbance. Given the number of smoking tenants who peacefully co-exist next to non-smoking tenants, I am satisfied that societal standards tolerate a certain level of cigarette smoke, but there are limits, and those limits are, to a large extent, dictated by the terms of the tenancy agreement." (See Case law examples – BC RTB Dispute Resolution Decisions - Burnaby File #194712)

The amount of smoke that this DRO thinks society must tolerate is not clear. What is clear is that any amount of smoke is too much – or "unreasonable" - if individuals and families are forced to inhale it, against their will, on a regular and on-going basis. Until the RTB accepts the science and makes decisions based on the fact that any amount of smoke is hazardous to human health, it will be almost impossible for tenants to successfully prove that an "unreasonable" disturbance has occurred.

As more tenants apply for compensation, it is hoped that DRO decisions may begin to reflect the change in societal standards in regards to exposure to second hand smoke. It is very likely it will take direction from government to make this happen.

**The good news** is that there is an emerging body of Supreme Court decisions on this issue that sets precedents to guide how decisions are made at the RTB.

In 2010, a BC Supreme Judge overturned a decision of the RTB and found that:

"It is conceivable that the exposure of a tenant and her children to second-hand smoke, with all of the associated health risks, could interfere with quiet enjoyment or breach the tenant's right to be free from unreasonable disturbance."

Source: [Lawrence v. Kaveh, 2010 BCSC 1403](#)