



FACT SHEET

Environmental Tobacco Smoke and Service Industry Employees

Exposure to ETS

In 1994, more than 55 billion cigarettes¹, over 155 million cigars², and 200 tonnes of pipe tobacco³ were smoked in Canada. Health Canada estimates that these products generated over 960 tonnes of environmental tar annually in environmental tobacco smoke (ETS)⁴. Also called second-hand smoke, ETS is composed of sidestream smoke (emitted from the burning tip of cigarettes, cigars, and pipes) and mainstream smoke (directly exhaled by the user). ETS contains over 4,000 compounds, including at least 42 known cancer-causing agents (carcinogens)⁵.

Health Effects

It has been widely accepted since 1986 that ETS causes lung cancer in non-smokers⁶. In 1993, the U.S. Environmental Protection Agency (EPA) classified ETS as a "Group A" carcinogen⁷, responsible for approximately 3,000 lung cancer deaths annually among American non-smokers⁸. Over 300 Canadian non-smokers die from lung cancer each year as a result of ETS exposure⁹.

Recent studies indicate that ETS is also responsible for other cancer and heart disease deaths among non-smokers¹⁰. ETS can pose an immediate danger

to persons with respiratory conditions, such as asthma¹¹. An estimated 2.4 percent¹² of the population has asthma¹³, or approximately 694,000¹⁴ Canadians. In addition, ETS poses numerous risks to pregnant women and their developing fetuses¹⁵.

Increased Health Risks to Restaurant Workers

Most Canadian service industry* employees are exposed to ETS in the workplace. Not surprisingly, research suggests they face significantly elevated cancer risks¹⁶. For instance, food service workers are 50 percent more likely to develop lung cancer than members of the general population. Restaurant employees are exposed, on average, to ETS levels 1.6 to 2 times higher than workers in offices that **allow** smoking everywhere or restrict it to areas not separately ventilated. Chemical concentrations in ETS have been found to be, on average, 4 to 6 times higher in bars than in offices where smoking is allowed¹⁷.

* Unless qualified, the expressions "service industry" and "service sector" refer to occupational settings such as restaurants, cafés, bars, discotheques, hotels, shopping centres, retail stores, amusement arcades, hair salons, taxis, etc.

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Service Sector Clientele: Children and ETS

ETS in the service sector is even more alarming because of the large number of children and infants among the clientele. Exposure to ETS can trigger and worsen asthma attacks in children¹⁸. An estimated 300,000 Canadian adolescents and children have asthma¹⁹. ETS is responsible for **new** cases of asthma in children²⁰. It also increases the risk of developing lower respiratory tract infections, such as pneumonia and bronchitis²¹.

Nineteen percent of all fast-food restaurant customers are under 18 years of age, with nine percent under six years²². Among more "formal" restaurant chains, the Keg or the Olive Garden, for instance, over eight percent of diners are under 18 years of age, with four percent under six years²³.

No-Smoking Policies and Legislation

Acknowledging that ETS constitutes a serious occupational health risk, the federal government has banned smoking in its public sector work sites and in federally regulated private workplaces²⁴. The territorial governments, as well as the majority of provincial and municipal governments, have also banned or severely restricted smoking in their workplaces²⁵. Municipalities across Canada have enacted by-laws restricting or prohibiting smoking in private sector workplaces or enclosed public places. Legislatures have begun to enact similar province-wide no-smoking legislation²⁶.

There is, however, a substantial drawback in most Canadian no-smoking laws and policies: most service sector employees receive little protection. **Not a single provincial no-smoking act or municipal by-law meaningfully protects the occupational health of waiters, waitresses, and bartenders.** By contrast, over 165 U.S. municipalities ban smoking in restaurants, 18 in bars, and 51 in bars attached to restaurants²⁷.

Why Service Sector Employees Remain Unprotected

Many service sector employees are teenagers or individuals in their early twenties who are trying to be self-sufficient for the first time. The U.S. fast-food industry estimates that 40 percent of its employees are under the age of 18²⁸. Though unavail-

able, Canadian figures are probably quite similar. Most food and beverage servers²⁹ are individuals between the ages of 15 and 24 years³⁰. Seventy-six percent of teen servers are young females³¹.

Service sector employees often lack other marketable skills or experience valued by society. Many are single parents. Often part-time and among the lowest paying in Canada³², service industry occupations contain the largest proportion of poor working women³³. In short, many service workers live in poverty. Poverty alone can discourage employees from exercising their rights out of fear of reprisal. Most service employees do not take advantage of health safeguards under labour law, in part because they are generally non-unionized.

Teen employees are often unaware of their legal rights and show little concern for their own long-term health. They are thus unlikely candidates to initiate ETS-related occupational health and safety complaints. Lacking experience, knowledge, and money, working teenagers³⁴ also lack the political power to change existing laws and policies. Those under 18 years of age cannot vote.

Legal Recourse: Introduction

While enjoying little protection from no-smoking legislation, service sector employees may use other laws to eliminate ETS. Provincial human rights codes and section 15 of the Canadian Charter of Rights and Freedoms may be used to challenge discriminatory no-smoking laws, inadequate no-smoking policies, and harmful smoking practices. ***Although these laws have their own limitations, they hold out significant promise. Less promising is provincial occupational health and safety legislation, dealt with only briefly here.***

Occupational Health and Safety Legislation

Provincial occupational health and safety laws do not deal specifically with ETS. They do, however, contain relevant provisions, especially the following: (1) an employee's right to refuse unhealthy or unsafe work without retaliation; (2) the duty of employers to provide a safe and healthy workplace.

Refusing Unhealthy or Unsafe Work

Though a valuable means of protecting health, the right to refuse unhealthy or unsafe work may not secure effective protection from ETS. Employees with asthma, for instance, may be unable to work in what applicable health and safety standards regard as an acceptably contaminated workplace. More generally, employees may not recognize the risks of ETS exposure, and may not identify ETS as the source of their ill health.

Refusals to work are upheld only if the substance in question presents a sufficient danger **within the meaning of the health and safety statute**. Statutes are worded differently. Some support refusals only if a substance poses an "imminent danger," where "imminent" means relatively immediate. Others may simply require the honest belief that a substance is dangerous or likely to cause harm.

A 1986 federal labour decision held that ETS was not an "imminent danger." The Federal Court of Appeal ordered the case reconsidered⁴⁵. During rehearing, the federal government amended the *Canada Labour Code*, dropping the "imminent" requirement. The employee refused work again, under the amended Code. The decision in this case was favourable, based upon poor air quality in general, not just the presence of ETS⁴⁶.

A 1991 Ontario Court decision⁴⁷ upheld an ETS-related refusal to work. *Ontario's Health and Safety Act* allows refusals involving situations or substances likely to endanger the employee's health.

Providing a Safe and Healthy Workplace

The decision in *Canada (Treasury Board) v. Wilson* presents an obstacle to eliminating ETS under an "employer's duty" provision. At issue was a federal standard requiring the employer to remove airborne contaminants or to confine them as close to their source as possible. The Federal Court of Appeal did not question the danger of ETS. Instead, it ruled that the standard did not address ETS. The standard addressed contaminants resulting from work-related processes, not those introduced by fellow employees. The employer, therefore, was found to have no duty to eliminate ETS under the standard. The Supreme Court of Canada refused to hear an appeal⁴⁸. The *Wilson* decision thus sets a somewhat discouraging but by no means definitive precedent.

Human Rights Legislation

Advantages of Using Human Rights Legislation

Human rights legislation offers several advantages over health and safety laws. Human rights acts not only apply to laws⁴⁹ and workplace policies but also regulate certain relationships, such as those between the general public and service providers. If a service employee is unable or reluctant to launch a complaint, a customer may do so. A no-smoking by-law or statute may be challenged if it is "discriminatory."

Human rights complaint procedures are designed to be straightforward, inexpensive, and **expedient**. Individuals seeking protection under such legislation often belong to vulnerable groups and have low-paying, part-time employment. Accordingly, human rights commissions will often take up a complaint free of charge if they are satisfied the complaint has merit.

The Supreme Court of Canada has ruled that human rights codes aim at prevention, not blame⁴⁹. Those launching complaints need not prove discriminatory intent⁴¹. Nor need they suffer actual injury or harm. Establishing fault or blame, in the sense of the common or civil law, is unnecessary.

The Supreme Court considers human rights acts to be 'almost constitutional' in nature⁴². These have been interpreted⁴³ with a view to preventing discrimination **and** fostering human potential and achievement⁴⁴. If a law or policy unfairly discriminates against a group, a judge may 'read in' this group, so that its members enjoy the advantages or protection otherwise denied.

Provincial and Federal Human Rights Acts

The *Canadian Human Rights Act* (CHRA) applies to federal legislation as well as to policies and actions of federal departments and agencies. It applies to federal contracts, collective agreements, federally regulated private companies and federal Crown corporations.

Provincial human rights codes govern most private industry policies and practices, including those of federally incorporated companies, which are provincially regulated. **Virtually all non-unionized service sector workplaces fall within provincial jurisdiction**. Provincial human rights acts apply to provincial laws, policies, agencies and to municipal councils and departments.

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Discrimination Defined

Several human rights acts have defined "discrimination"⁴⁵. Where they do not, courts have provided definitions. Existing definitions point to unfair distinctions and unjustifiable barriers. The Supreme Court of Canada has affirmed that the concept of discrimination encompasses intentional and unintentional discrimination⁴⁶. Failure to restrict smoking, for instance, may represent unintentional discrimination against asthmatic employees or patrons. Legal remedies may vary according to whether discrimination is intentional or unintentional. Whether a law, policy, or practice is intentionally or unintentionally discriminatory depends on the details of the case.

Prohibited Forms of Discrimination

Human rights codes protect only against forms of discrimination that they enumerate. Discrimination based on sexual orientation, for instance, is not enumerated in every code. Discrimination based on a disability, however, is enumerated in all such codes but one: the Yukon's. Persons with a disability such as asthma may therefore be protected should they face discrimination because of their sensitivity to ETS. Numerous human rights and labour tribunal decisions support this position⁴⁷.

Females, too, may be protected if they are discriminated against because of risks ETS poses to pregnancy. A woman who is (or intends to become) pregnant and is seeking to avoid exposure to ETS may be forced to quit her job and avoid enclosed public places. She may therefore face barriers to employment and services. Every Canadian human rights act prohibits discrimination on the basis of sex. Manitoba's *Human Rights Code*, for example, prohibits discrimination on the basis of "sex, **including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy**" [emphasis added]. Nova Scotia's *Human Rights Act* states that the term "sex" includes "the **possibility** of pregnancy and pregnancy-related illness" [emphasis added].

ETS is a serious barrier to employment opportunities and services⁴⁸, especially for persons with respiratory conditions and for pregnant women. While such health-related conditions may not affect job performance, sensitivity to ETS may discourage individuals from applying for a position or effectively force them to leave a smoke-filled work site. What is more, ETS can undermine job performance and advancement opportunities⁴⁹. Sensitivity to ETS

may force certain individuals to work fewer hours and accept a less remunerative position.

Denying protection to teenagers because of their age may also be judged unfairly discriminatory.

Québec's Charter

Québec's *Charter of Human Rights and Freedoms* includes two provisions that may protect individuals from ETS in the workplace. Section 1 of the *Charter* declares that "[e]very human being has a **right to life**, and to **personal security, inviolability** and freedom" [emphasis added]. Section 46 states that "[e]very person who works has a right, in accordance with the law, to fair and reasonable conditions of employment **which have proper regard for his health, safety and physical well-being**" [emphasis added]. Thus in Quebec a person need not fall within an enumerated group to seek protection from ETS.

Challenging Human Rights Legislation

Human rights acts must comply with the *Canadian Charter of Human Rights and Freedoms*. If a group is unfairly discriminated against in a way that violates the *Charter*, a court may 'read' that form of discrimination into the act. The Ontario Court of Appeal, for example, has read sexual orientation into the *Canadian Human Rights Act* so that it complies with section 15 of the *Charter*⁵⁰.

Process

Members of enumerated groups must establish a credible case of discrimination. They must show that the disputed law, policy, or practice discriminates against them unfairly. If such unfairness can be shown, a legal remedy may be in order⁵¹.

An employer cannot excuse discriminatory practices by claiming that these represent the non-authorized actions of co-workers⁵² or clients. Employers must take reasonable steps to eliminate such practices and prevent future occurrence⁵³. Employers and service providers cannot justify discriminatory policies based on customer preferences either⁵⁴. Lower profitability, too, is not an excuse for discrimination⁵⁵.

Workplace rules that discriminate intentionally and unjustifiably are struck down⁵⁶. In the rare event that an employer can justify a discriminatory rule, the employer is under no duty to address the complaint of those affected⁵⁷. Laws, policies, or rules that discriminate unintentionally will ordinarily not be struck down. For example, a work schedule

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requiring employees to work Fridays or Saturdays, the Sabbath for Muslims and Jews, respectively, will not be struck down. Instead, the employer will be required to accommodate the employee or client "short of undue hardship." Accommodation will vary in each case. The employer must show why accommodation is not possible "short of undue hardship." No standard definition of undue hardship exists. Judicial opinion has cited such factors as financial cost, employee morale, and risk to safety⁵⁸.

Given the preeminence of employee and public safety under the law generally, it is doubtful that a pro-smoking policy could be upheld, since it has an adverse impact on **all** employees, clients, and members of the public. It is difficult to claim that smoke-free policies place undue hardship on restaurants and other service providers. All of McDonald's corporate-owned restaurants and more than half of its franchises in Canada became smoke-free in March, 1994. All of its company-owned restaurants in the United States are smoke-free⁵⁹. Taco Bell restaurants in Canada went smoke-free on April 1, 1994⁶⁰. New Dairy Queen franchises in Canada, too, must adopt a smoke-free policy⁶¹. A growing body of U.S. economic research indicates that smoke-free municipal by-laws do not have a negative impact on restaurant sales⁶².

Human rights challenges may change industry practices faster than efforts to enact or amend no-smoking legislation. It is revealing that McDonald's adopted its smoke-free policy shortly after a number of high profile health-related lawsuits were launched against the U.S. parent⁶³.

Section 15 of the Canadian Charter of Rights and Freedoms

Sub-section 15(1) of the *Canadian Charter of Rights and Freedoms* states that:

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

Section 15 aims to eliminate discrimination caused by unequal treatment. Its scope, however, is limited to law. The *Charter* does not apply to purely private activity. Rather, it applies to government activity, for instance, a by-law protecting some

employee groups from ETS but ignoring or only inadequately protecting others⁶⁴.

Section 15 protects **all** Canadians, not just groups enumerated under sub-section 15(1). Section 15 explicitly protects against discrimination on the basis of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

The Supreme Court of Canada has held in certain cases that section 15 should protect groups that are politically vulnerable and unfairly denied benefits enjoyed by others. These decisions may serve as useful precedents for groups who have historically experienced unfair treatment, such as service industry workers. They may prove useful, too, in extending Section 15 protection to youth in the service sector.

Section 1 of the Charter

"1. *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Section 1 places limits on the rights and freedoms it sets down. What limits, if any, should be placed on section 15 rights will vary from case to case⁶⁵. Any such limits must be introduced by law and fulfil certain conditions. The government has to justify limiting a right or freedom. Its purpose in so doing must be "pressing and substantial." For example, a court would have to ask itself whether a no-smoking law that exempts the service industry is a justifiable limit on the right to equal health protection under the law. By contrast, a law that bans smoking altogether imposes no limit on this right. Section 1 criteria would favour the second law.

Conclusions

Human rights codes and the *Charter* may be used to challenge discriminatory pro-smoking practices as well as inadequate no-smoking laws and policies in the service sector. These legal avenues are open to members of the general public as well as to employees. Members of the larger community are often in a better financial position to challenge discriminatory laws, policies, and rules affecting service employees than the employees themselves. Conventional labour grievances have met with limited success since most service employees are

not unionized. Along with the *Charter*, human rights codes should be seen as complementing occupational health and safety laws. All of these legal strategies may be helpful in eliminating ETS from the workplace.

1. Statistics Canada. *Production and Disposition of Tobacco Products*, Catalogue 32-022 (monthly), December, 1994; *Imports by Commodity*, Catalogue 65-007 (monthly), December, 1994.
2. Statistics Canada. *Production and Disposition of Tobacco Products*, Catalogue 32-022 (monthly), December, 1994; *Imports by Commodity*, Catalogue 65-007 (monthly), December, 1994.
3. In 1994, pipe tobacco sales were suppressed by Statistics Canada for reasons of confidentiality. In 1991, 213 tonnes of pipe tobacco were legally imported and 8 tonnes of domestically produced pipe tobacco were sold in Canada (Kaiserman J., "Tobacco Production, Sales and Consumption in Canada, 1991" (1992), 13 *Chronic Diseases in Canada* 68, at p. 68).
4. Regulatory Impact Analysis Statement (RIAS) published with *Tobacco Products Control Regulations, Canada Gazette, Part I*, March 20, 1993, pp. 795-801.
5. U.S. Environmental Protection Agency. *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*. Washington, D.C.: National Institutes of Health, August, 1993; NIH Publication # 93-3605, pp. 35, 38; International Agency for Research on Cancer (IARC). *IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Humans: Tobacco Smoking (volume 38)*. Lyon, France: World Health Organization, 1986.
6. U.S. Department of Health and Human Services. *The Health Consequences of Involuntary Smoking: A Report of the Surgeon General*. U.S. Department of Health and Human Services, Public Health Service, Office of the Assistant Secretary of Health, Office on Smoking and Health. DHHS Publication No. (PHS) 87-8398, 1986.; National Research Council. *Environmental Tobacco Smoke: Measuring Exposure and Assessing Health Effects*. Washington, D.C.: National Academy Press, 1986.
7. U.S. Environmental Protection Agency. *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*. Washington, D.C.: National Institutes of Health, August, 1993; NIH Publication # 93-3605, p. 3, "Major Conclusions".
8. *Ibid.* p. 3.
9. Wigle, D., *et al.*, "Deaths in Canada from lung cancer due to involuntary smoking" (1987), 136 *Canadian Medical Association Journal* 945.
10. Steenland, K., "Passive Smoking and the Risk of Heart Disease" (1992), 267 *Journal of the American Medical Association* 94; Glantz, S.A., Parmley, W.W., "Passive smoking and heart disease" (1991), 83 *Circulation* 1; Wells, A., "An Estimate of Adult Mortality in the United States from Passive Smoking" (1988), 14 *Environment International* 249.
11. See, Gervais, A.J.G., Chad, Z., "Environmental Tobacco Smoke and Asthma: A Review of Cigarette Smoke-Challenge Studies" (1994), 9 *Practical Allergy & Immunology* 9.
12. While no recent national estimates are available, the Canada Health Survey of 1978-79 indicates that the prevalence rate was 2.5% for males and 2.2% for females (Kathryn Wilkins (Bureau of Chronic Disease Epidemiology, Health Canada), "Fact Sheet: Asthma (ICD-9 493)" (1993), 14 *Chronic Diseases in Canada* 50).
13. Kathryn Wilkins (Bureau of Chronic Disease Epidemiology, Health Canada), "Fact Sheet: Asthma (ICD-9 493)" (1993), 14 *Chronic Diseases in Canada* 50.
14. Statistics Canada. *Report on the Demographic Situation in Canada, 1994*, catalogue 91-209E (Annual), Table A9, "Canadian Population as of July 1st, 1992 and 1993, by Age and Sex", pp. 109-10 [Projected estimate from the 1991 census]. A 2.4% segment of the 1993 population is equivalent to approximately 694 574 persons.
15. See, Shannon, P., Petersen, R., Tuell Moore, D. *Alcohol, Tobacco, and Other Drugs May Harm the Unborn*. Rockville, MA: U.S. Department of Health and Human Services, 1990 (No. 277-274/20940), pp. 22-23.
16. Michael Siegel, MD, MPH, "Involuntary Smoking in the Restaurant Workplace: A Review of Employee Exposure and Health Effects" (1992), 270 *Journal of the American Medical Association* (4th) 490.
17. *Ibid.*
18. U.S. Environmental Protection Agency. *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*. Washington, D.C.: National Institute of Health, August, 1993; NIH Publication # 93-3605, pp. 3, 6-7.
19. Older data suggest that among children under 15 years of age, 3.4% of boys and 1.6% of girls have asthma. More recent asthma prevalence figures for children aged 5-8 years indicate a range of about 5% to 7%, and an average of 4% among all ages combined (Kathryn Wilkins, "Fact Sheet: Asthma (ICD-9 493)" (1993), 14 *Chronic Diseases in Canada* 50, at p. 50). The 300 000 persons estimate assumes a 4% rate of asthma prevalence among (i.e., infants) to 18 year olds. Demographic source: Statistics Canada. *Report on the Demographic Situation in Canada, 1994*, catalogue 91-209E (Annual), Table A9, "Canadian Population as of July 1st, 1992 and 1993, by Age and Sex", pp. 109-10.
20. U.S. Environmental Protection Agency. *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*. Washington, D.C.: National Institutes of Health, August, 1993; NIH Publication # 93-3605, pp. 3, 6-7.
21. U.S. Environmental Protection Agency. *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*. Washington, D.C.: National Institutes of Health, August, 1993; NIH Publication # 93-3605, pp. 3, 6-7.
22. Crest Canada. *Age Profile of the Canadian Restaurant Industry*. Willowdale, Ontario: Crest Canada, 1994.
23. *Ibid.*
24. See Public Service Tobacco Policy (22/4/87) and *Non-smokers' Health Act* (NsHA), R.S.C. 1985, c. 15 (4th Supp.) pursuant to NsHA *Regulations*, SOR/90-21, as am. SOR/90-70, SOR/90-335, SOR/91-605, SOR/93-368, and SOR/94-487.
25. National Clearinghouse on Tobacco and Health. *Environmental Tobacco Smoke Control: Provincial Governments' Policies and Legislation*. Ottawa: NCTH, 1995.
26. See Manitoba's *Non-smokers Health Protection Act* (1990), Newfoundland's *Smoke-free Environment Act* (1993), Ontario's *Smoking in the Workplace Act, 1989* and *Tobacco Control Act, 1994*, and Québec's *An Act respecting the protection of non-smokers in certain public places* (1986).

27. Americans for Nonsmokers' Rights. *100% Smoke-free Ordinances*. Berkeley, CA: ANSR, March, 1995.
28. U.S. State Attorneys General Working Group. *Fast Food, Growing Children and Passive Smoke: A Dangerous Menu. Findings and Preliminary Recommendations for Implementing Smoke Free Policies in Fast Food Restaurants*. November 8, 1993, p. 7.
29. This category refers to the Standard Occupational Classification (SOC) Group 6125 "Food and Beverage Serving Occupations" used by Statistics Canada.
30. Labour Force Survey Sub-Division, Household Survey Division, Statistics Canada, "Employment and Percentage Distribution for SOC6125 and SOC6129 by Age and Sex for Canada, Annual Average, 1993" (unpublished data (Internal Reference Code #W94018, June, 1994)).
31. *Ibid.* "Employment and Percentage Distribution for SOC6125 and SOC6129 by Age and Sex for Canada, Annual Average, 1993".
32. Gunderson, Morley and Muszynski, Leon. *Women and Labour Market Poverty* (Ottawa: Canadian Advisory Council on the Status of Women, June, 1990), p. 95.
33. *Ibid.* p. 77.
34. In 1993, the workforce aged 15 to 24 years totalled just over 1.9 million persons. Of this number, approximately 724,000 were aged between 15 and 19 years ("Employment and Percentage Distribution for SOC6125 and SOC6129 by Age and Sex for Canada, Annual Average, 1993").
35. *Timpaer v. Air Canada (CLRB)*, [1986] 1 F.C. 453; 27 D.L.R. (4th) 75; 65 N.R. 382; 11 C.C.E.L. 81 (C.A.).
36. See Michael Grossman and Philip Price, *Tobacco Smoking and the Law in Canada* (Toronto: Butterworths, 1992) p. 6-22.
37. *R. v. de Havilland Canada Ltd.* (1992), 11 T.L.W. 604 (O.C.J., Prov. Div.)
38. (1987), 78 N.R. 320 (note).
39. Unless otherwise stated, all federal and provincial legislation must conform with the human rights act adopted by that legislature. See Mr. Justice McIntyre, writing for the Supreme Court of Canada in *Winnipeg School Division v. Craton* (1985), 6 C.H.R.R. D/3014 (S.C.C.), p. D/3015.
40. Mr. Justice McIntyre for the Supreme Court of Canada in *Ontario Human Rights Commission and O'Malley v. Simpson-Sears* (1985), 7 C.H.R.R. D/3102 (S.C.C.), p. D/3105.
41. Justice McIntyre, writing for the Court in *Ontario Human Rights Commission and O'Malley v. Simpson-Sears* (1985), 7 C.H.R.R. D/3102 (S.C.C.), p. D/3106.
42. Justice McIntyre, writing for the Court in *Ontario Human Rights Commission and O'Malley v. Simpson-Sears* (1985), 7 C.H.R.R. D/3102 (S.C.C.), p. D/3105; and Justice La Forest, writing for the Supreme Court of Canada (Le Dain J. wrote a separate, one paragraph concurring opinion) in *Canada (Treasury Board) v. Robichaud* (1987), 8 C.H.R.R. D/4326 (S.C.C.) p. D/4331.
43. Note that the Québec *Charter of Human Rights and Freedoms* explicitly states: "If any doubt arises in the interpretation of a provision of the Act, it shall be resolved in keeping with the intent of the Charter" (s. 53).
44. Most Canadian human rights acts set out in a preamble or opening section certain fundamental principles that the legislature is attempting to promote within the jurisdiction.
45. For example, section 5 of the *Canadian Human Rights Act* states: "It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily open to the general public (a) to deny, or deny access to, any such goods, service, facility or accommodation to any individual, or (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination."
46. See Justice McIntyre, speaking for the Supreme Court of Canada in *Ontario Human Rights Commission and O'Malley v. Simpson-Sears* (1985), 7 C.H.R.R. D/3102 (S.C.C.), p. D/3106; *Action travail des femmes v. Compagnie des chemins de fer nationaux du Canada*, [1987] 1 S.C.R. 1114; (1987), 8 C.H.R.R. D/4210 (*sub nom. Canadian National Rail Co. v. Canada (Canadian Human Rights Commission)* (S.C.C.)); *Andrews v. Law Society of British Columbia* (1989), 36 C.R.R. 193; and *Alberta Human Rights Commission v. Central Alberta Dairy Pool*, [1990] 2 S.C.R. 489; 12 C.H.R.R. D/417 (S.C.C.).
47. (1993), 93 C.L.L.C. 17,020 (Matsalla, Chairperson, Man. Bd. Inq.)
48. This can include vital medical or dental services if offices are located in a smoke-filled shopping centre or similar mixed-use building.
49. This was alleged in a 1994 Alberta human rights complaint against a McDonald's Restaurant. Shortly after the grievance was launched McDonald's banned smoking in all its corporate restaurants in Canada. The parties are currently in the process of negotiating a back-pay settlement (Telephone conversation with David Haines, Inspector, Alberta Human Rights Commission, June, 1994).
50. *Haig and Birch v. Canada et al.*, (1992) 57 O.A.C. 272 (C.A.) 50.
51. See Justice McIntyre, speaking for the Supreme Court of Canada in *Ontario Human Rights Commission v. Borough of Etobicoke* (1982), 3 C.H.R.R. D/781 (S.C.C.), p. D/783. Human rights codes provide for a "bona fide occupational qualification" or "requirement" (BFOQ/BFOR) defence.
52. See Chief Justice Dickson, writing for the Supreme Court of Canada in *Janzen v. Platy Enterprises Ltd.* (1989), 10 C.H.R.R. D/6205 (S.C.C.); following the approach in *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84; 8 C.H.R.R. D/4326.
53. While employers may not have control over what customers initially say or do to employees, they do have control over *how* they deal with discrimination, once identified, in the workplace. Thus, employers have a duty to react appropriately if a customer discriminates against an employee: *Mohammad v. Marisposa Stores Limited Partnership* (1991), 14 C.H.R.R. D/215 (B.C.H.R.C.), p. D/217.
54. See *Procurur général du Québec v. Service de Taxis Nord Est (1979) Inc.* (1986), 7 C.H.R.R. D/3112 (S.C. Qué.); *Berry v. Manor Inn* (1980), 1 C.H.R.R. D/152 (N.S. Bd. Inq.); and *Mohammad v. Marisposa Stores Limited Partnership* (1991), 14 C.H.R.R. D/215 (B.C.H.R.C.). See also *Varma v. G.B. Allright Enterprises Inc.* (1989), 9 C.H.R.R. D/5290 (B.C.H.R.C.); *Scott v. Foster Wheeler Limited* (1986), 6 C.H.R.R. D/2885 (Hunter, Ont. Bd. Inq.); *Imberto v. Vic and Tony Coiffure* (1982), 2 C.H.R.R. D/392 (McCamus, Ont. Bd. Inq.); *Hajja v. Nestoras and Welland Plaza Restaurant* (1987), 8 C.H.R.R. D/3879 (Cumming, Ont. Bd. Inq.), p. D/3882; and *John Kellerman v. Al's Restaurant and Tavern Ltd.* (1986), unreported decision (M.L. Friedland, Ont. Bd. Inq.).
55. See *Berry v. Manor Inn* (1980), 1 C.H.R.R. D/152 (N.S. Bd. Inq.). Note that this case involved *direct* discrimination on the basis of the employee's colour.
56. See Madam Justice Wilson, speaking for the Supreme Court of Canada majority in *Alberta Human Rights Commission v. Central Alberta Dairy Pool*, [1990] 2 S.C.R. 489; 12 C.H.R.R. D/417, p. D/427.

57. See Madam Justice Wilson and Mr. Justice Sopinka in *Alberta Human Rights Commission v. Central Alberta Dairy Pool*, [1990] 12 C.H.R.R. D/417 (S.C.C.), pp. D/433-434 and pp. D/443-444, respectively. The justices' apparent divergence on this point is probably of little significance in the ETS context.
58. Madam Justice Wilson, writing for the majority in *Alberta Human Rights Commission v. Central Alberta Dairy Pool*, [1990] 12 C.H.R.R. D/417 (S.C.C.), p. D/438.
59. McDonald's news release, February 23, 1994, Toronto.
60. "Canadian Taco Bell bans smoking," (March 22, 1994) *Toronto Star* n/p.
61. In January, an internal DQ publication warns: "If legal action is brought against their store, the results could be devastating, regardless of the outcome." ("How fast-food joints are blowing out smokers" (March 19, 1994), *Toronto Star* A6. See also (March 15, 1994), *Ottawa Citizen* D3.
62. See Glantz, S.A., Smith, L.R.A., *The Effect of Ordinances Requiring Smoke-free Restaurants on Restaurant Sales*. San Francisco: Institute for Health Policy Studies, Department of Medicine, University of California, February, 1994.
63. The most damaging suit against McDonald's was launched by the Texas Attorney General (A-G) in February, 1994, in the Travis County District Court (District No. 167), (Cause No. 94-01809). In his petition the A-G claimed McDonald's was engaged in behaviour that violated the *Deceptive Trade Practices Act* by allowing smoking in its restaurants and not informing the public of the risks posed by a single ventilation system. Several other fast food chains were also named as defendants. Approximately one month later McDonald's announced its smoke-free policy and it was dropped from the suit.
- See also *Staron, et als. v. McDonald's Corporation* (1993), 8.2 TPLR 3.129 (D. Conn). In *Staron* three asthmatic children and one adult suffering from lupus brought an action under the *Americans with Disabilities Act* against McDonald's, Burger King and Wendy's restaurant, claiming that the presence of tobacco smoke in the defendant's restaurants discriminated against persons with respiratory conditions because it prevents them from gaining access to the defendant's goods and services.
64. See *Retail, Wholesale & Department Store Union, Local 580 et al. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.
65. [1986] 1 S.C.R. 103.