

Smoking Restrictions in the Workplace

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FOREWORD

The Industrial Relations Centre is pleased to include this study, Smoking Restrictions in the Workplace, in its publication series School of Industrial Relations Research Essay Series. The series is intended to give wider circulation to selected student research essays, chosen for both their academic merit and their interest to industrial relations practitioners and policy makers.

A substantial research essay is a major requirement of the Master's Program in Industrial Relations at Queen's. The essay may be an evaluation of a policy oriented issue; a limited empirical project; or a critical analysis of theory, policy, or the related literature in a particular area of industrial relations.

The author of the essay, Rhonda Hamel—Smith, graduated from the School of Industrial Relations in October 1988.

I would like to express my appreciation to the author for granting permission to publish this excellent study.

D.D. Carter, Director
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ABSTRACT

This paper looks at the implementation of smoking restrictions in Canadian workplaces in an attempt to discover the impetus for these new policies and laws, as well as some of their social and legal implications.

Workplace smoking restrictions have come about because of new medical evidence claiming a real hazard to non-smokers from environmental tobacco smoke. Although this evidence is inconclusive with respect to healthy non-smokers, there is still enough suggestion of a long-term risk to warrant preventive action. The notion of restricting smoking has been popularized by an effective anti-smoking lobby, in turn, prompting employers and legislators to respond to the new public mood.

Case studies of the implementation of smoking policies by two Canadian employers revealed some of the difficulties involved in regulating personal behaviour and raised doubts about the effectiveness and enforceability of smoking policies.

A major implication of the legal and industrial relations issues is the fact that, despite the protection of individuals' rights in the workplace, there is little existing law to protect the non-smoker or the smoker, but workplace legislation is quickly changing this for the non-smoker.

In light of the potential social impact on smokers and to improve the effectiveness of smoking policies, employers must combine workplace restrictions with supportive efforts in the implementation of these policies.

I. INTRODUCTION

Recent restrictions upon smoking in the workplace have raised difficult legal and industrial relations issues that have yet to be resolved. At first glance, the prohibition of smoking at work appears to be simply a response to accumulating medical evidence and a sound, proactive health and safety practice -- justified on the grounds of improving the health of smokers and protecting non-smokers. A closer look at no-smoking policies, however, leads one to question this somewhat simplistic view. In imposing smoking bans, have employers and legislators been acting without consideration for the personal freedoms of smokers, exposing their policies to arbitral and judicial scrutiny? Or is the workplace evolving, with new responsibilities being foisted upon employers by changing social norms? And, as important, although few would dispute that smoking is harmful to health and that reducing the number of smokers should be a public health goal, how effective will smoking bans ultimately be in practice? Looking first at the evolution and current state of the controversy, and then at two case studies describing the implementation of no-smoking policies, this paper will assess the legal and industrial relations implications of such policies.

II. WHY SMOKING IS BEING RESTRICTED

i. Medical Evidence

For more than 20 years, the health risks of smoking have been known. In 1962, a British report was the first to capture international attention by stating that smoking was the most likely cause of the worldwide increase in lung cancer deaths (Health News, 1986). Since then, no less than 17 reports by the United States Surgeon General have documented the health consequences of smoking -- pinpointing cancers of the lung, respiratory tract, pancreas and urinary bladder (USDHHS, 1986). The list continues. The reports cite smoking as the single greatest cause of chronic obstructive lung diseases and a cause of cardiovascular diseases, including coronary heart disease, aortic aneurysm and atherosclerotic peripheral vascular disease. Even maternal smoking has been blamed for endangering fetal and neonatal health, contributing to perinatal deaths, low birth weights and complications during pregnancy.

Although the number of Canadians who smoke has declined from about 50 percent in the early 1960s, in 1988 one in three people 18 years and older continues to smoke (The Journal, 1987). In Canada, government estimates indicate that, every week, more than 550 smokers die from smoking-related diseases (Dewey, 1985, 2).

But what is curious about the current debate in the workplace is that it really has little to do with the health of smokers; even arguments about productivity losses and higher health-care, insurance, building maintenance and absenteeism costs incurred by smokers are secondary to the issue.¹ That is not to say employers are not concerned about employees who smoke -employer-sponsored wellness programs, including smoking cessation courses, attest to this concern. But, previously, employers hesitated to regulate what was clearly considered personal behaviour unrelated to the job, unless justified on safety grounds (USDHHS, 1986).

The real controversy stems from mounting claims by non-smokers' rights advocates that environmental tobacco smoke is a serious health hazard to everyone, prompting both employers and legislators to restrict smoking at work. But, apart from the irritating effects of second-hand smoke² and the exacerbation of symptoms of pre-existing diseases in some individuals, the medical evidence that healthy non-smokers exposed to tobacco smoke are at risk for smoking-related diseases -- including lung cancer and heart disease -- is not conclusive and this makes the issue difficult to assess.

The evidence for most of the claims is summarized in the 1986 U.S. Surgeon General's report entitled The Health Consequences of Involuntary Smoking. The report is the first ever from the U.S. Department of Health and Human Services to establish a health risk due to tobacco smoke exposure for individuals other than smokers and is the work of more than 60 physicians and scientists from the United States and around the world. The report states three major conclusions:

1. * Involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers.
2. The children of parents who smoke compared with the children of nonsmoking parents have an increased frequency of respiratory infections, increased respiratory symptoms and slightly smaller rates of increase in lung function as the lung matures.
3. ** The simple separation of smokers and nonsmokers within the same air space may reduce but does not eliminate the exposure of nonsmokers to environmental tobacco smoke.
(USDHHS, 1986, 7)

The first and third conclusions are relevant for the workplace.

Scientists have determined this association between passive smoking and disease indirectly by looking both at the composition of sidestream³ and mainstream smoke⁴, and at the tobacco-related materials absorbed by the body during passive smoking. They have also assessed this association directly from epidemiological studies which trace the development of disease in non-smokers exposed to tobacco smoke (Green College, 1987).

Indirect Research -- Exposure to Tobacco Smoke

Another premise of the Surgeon General's first conclusion* deals with the extent to which involuntary smokers are exposed to the components of tobacco smoke; that is the extent to which the body absorbs and then gives up those components. Exposure is important because there is no known threshold level of exposure to tobacco smoke for the development of cancer -- the risk is directly related to the amount of tobacco smoke inhaled (House, 1985). These studies measure the concentration of tobacco smoke components (nicotine and a derivative called cotinine) in the body fluids of non-smokers. It then compares these levels with those in smokers whose concentrations indicate well-known levels of risk of disease.⁵ Risks for non-smokers are then extrapolated based on the data for active smokers (Green College, 1987).

This method has been questioned by both sides for its assumption that the tobacco components found in body fluids are proportional to the amounts of carcinogens absorbed by the individual from the tobacco smoke (Wigle et al., 1987). One problem with the assumption is that non-smokers essentially inhale constant low doses through the nose, while smokers inhale intermittent high doses through the mouth.

Smokers also inhale more deeply and may pause before exhaling. This implies that tobacco smoke constituents will be deposited and retained differently in the respiratory tracts of smokers and non-smokers (Halter et al., 1986). In other words, exposure could be greater or less than cotinine measurements indicate.

A further warning has been sounded when associating exposure with risk by using the results of body fluid tests. Some researchers argue that most of the nicotine present in environmental tobacco smoke is in the gas phase and, because this is very difficult to measure, unless carefully done, it is not possible to correlate in a linear manner the amount of nicotine or cotinine found in the body with exposure to environmental tobacco smoke (Eatough et al., 1986).

Based on these differences, critics argue that the problem of the non-smoker and the smoker should be dealt with as two toxicologically distinct phenomenon, and to estimate exposure in terms of active smoking can be misleading (Baiter et al., 1986).

The Surgeon General's third conclusion** focuses on ventilation because the principal determinants of an individual's exposure are the amount of time spent in smoke-contaminated environments, the size of the room, the number of smokers and the amount of ventilation. The fact that cost-effective filtration of tobacco smoke is not currently available -- partly because of the small size of the smoke particles -- means that the particles remain suspended in the air for long periods of time (USDHHS, 1986). And, because the submicron particles follow air streams, dissemination occurs quickly enough to ensure the spread of smoke throughout an air space within an eight-hour day. The Surgeon General concludes that simple separation of smokers and nonsmokers within the same air space will reduce but not eliminate exposure to environmental tobacco smoke -- particularly in settings where exposure is prolonged, such as the workplace.

Direct Research -- Epidemiological Studies

Another basis for the Surgeon General's conclusions are epidemiological studies.⁶ This direct method studies groups of non-smokers (often spouses or children) who live with smokers and develop smoking-related diseases (Green College, 1987). The studies focus on lung function and lung cancer in adults and on bronchitis and pneumonia in children. Eleven of the 13 studies which examined the question of an association between involuntary smoking and lung cancer found a positive association with exposure to tobacco smoke and, in six, the association reached statistical significance (USDHHS, 1986, 9). In other words, the studies found that among people who say they have never smoked, those who live with smokers are more likely to develop lung cancer.⁷ The difference observed is said to be too large to be accounted for by chance.

The main criticisms of the epidemiological studies are the lack of documentation on just how much the individuals were exposed to tobacco smoke and how much environmental factors have played a role in health problems. The researchers depended on responses given to questionnaires and/or personal interviews and there are inconsistencies in the studies because of this lack of information as well as the small number of subjects examined.

With regard to the long-term effect of passive smoking on the respiratory tract and lungs, of four key studies, two have demonstrated a statistically significant impairment of small airways function among healthy non-smokers⁸ and two have not.⁹ The two studies showing an association had, on average, older subjects, and hence greater exposure, and also used more sensitive criteria.¹⁰ On balance, results indicate some reduction in lung function but experts note that changes are quite small and not indicative of serious disease, pointing out the difference between statistical significance and clinical significance (House, 1985, 43).

However, the important point about the evidence is that although the need for further studies of greater numbers is widely acknowledged, there appears to be international consensus (International Agency for Research on Cancer, The United States Research Council, Health and Welfare Canada, The National Research Council/as well as various authors) "that prolonged exposure to environmental tobacco smoke increases the risk of lung cancer" (Wigle et al., 1987, 151).

An interdisciplinary working group of the International Agency for Research on Cancer sums up the current tentative state of the medical evidence:

"Examination of smoke from the different sources shows that all...contain chemicals that are both carcinogenic and mutagenic. The amounts absorbed by 'passive smokers' are, however, small and effects are unlikely to be detectable unless exposure is substantial and very large numbers of people are observed. The observations on non-smokers that have been made so far are compatible with either an increased risk from 'passive smoking' or an absence of risk.

Although the studies are inconclusive, the group concluded:

"Knowledge of the nature of sidestream and mainstream smoke, of the materials absorbed during 'passive smoking' and of the quantitative relationships between dose and effect that are commonly observed from exposure to carcinogens, however, leads to the conclusion that 'passive smoking' gives rise to some risk of cancer." (Green College, 1987, 211)

Sensitive Non-smokers

For the most part, the above studies deal with the risks of disease for healthy non-smokers. A number of studies have also investigated the effect of passive exposure to tobacco smoke on sensitive non-smokers, that is, those with pre-existing diseases that might increase susceptibility to smoke. A 1978-79 Canada Health Survey stated that 21 percent of Canadians have a health condition that is aggravated by cigarette smoke, including heart disease, acute respiratory disease, emphysema, asthma, hay fever and angina (Kirkbride, 1986).¹¹

There is little doubt that increasing dissemination of the new medical evidence and, generally, greater individual concern for health and fitness have helped to heighten non-smokers' awareness about their own risks. But, by themselves, these factors do not fully explain what has facilitated the rapid penetration of antismoking sentiments into the workplace and, more important, the present growing trend of restricting

an individual's freedom to smoke at work. For a more complete understanding, we must also look at the role of advocacy groups.

ii. A Vocal Minority

Another confounding element in the workplace smoking issue concerns whether there is popular support for restrictions. Undoubtedly, in the past, anti-smoking activities by governments, health agencies and interested lobby groups -- through communications, including anti-smoking films, television ads and educational materials, publishing of research findings on smoking-related diseases and pressure to change advertising laws -- can all take credit for fewer smokers, as can warnings on cigarette packages, voluntary removal of cigarette advertising from television, low tar and nicotine cigarette brands, an adult population more informed about smoking and health and, of course, the rise of the non-smokers' rights movement (Imperial Tobacco, 1987).

Those against smoking restrictions, including the tobacco industry, contend that smoking is not an issue for most employers and employees and attribute the growing number of smoking controls to a vocal minority who are lobbying governments to adopt legislation governing the workplace (BNA, 1986). Despite the obvious self-interest of these critics, the lobbying effort does make it difficult to determine exactly where the initiative for smoking controls is coming from -- employers or legislators. But, whatever its source, the anti-smoking activity is clearly associated with the notion of non-smokers' rights.¹²

Consequently, it is also difficult to determine whether the smoking debate has recently focused on non-smokers' rights because of the new medical evidence about second-hand smoke or because anti-smoking advocates have recognized the "rights" arena as having a powerful, unleashed moral force. Some inconsistency is apparent: for instance, the Non-Smokers' Rights Association of Toronto claims it was founded in 1974 to address the problem of environmental tobacco smoke (NSRA pamphlet) but, in fact, that medical evidence only began showing up in the late 1970s and early 1980s. It would seem, instead, that the anti-smoking lobby has improved its credibility with this new evidence and now, wisely, is using it to make new gains in the legislative arena.

Moreover, success in evoking outrage among non-smokers -initially prompting restrictions on smoking in public places -and evidence that average workplace exposures to second-hand smoke are greater (nearly four times) than that experienced in the home (Dewey, 1985, 11 (op. cit. Repace and Lowry, 1983)), as well as failure to achieve ground-breaking decisions from the courts regarding the accommodation of non-smokers may all have prompted non-smokers' rights advocates to shift the debate squarely into the workplace and step up lobbying of all governments. Judging by recent legislative developments, if this has been the tactic, it may prove successful.

Furthermore, the criticism that the debate is being carried by a very effective lobby may, in part, be substantiated by the fact that sponsors of two recent legislative victories for non-smokers -- the Toronto Bylaw restricting smoking in workplaces and Bill C-204 covering federally regulated employers -- did not canvass employers in their Jurisdictions to determine whether they may already have been introducing smoking policies or if they felt such policies might be necessary, based on employee complaints.

U.S. legislators may have already taken the lead. In 1986, a survey by the Bureau of National Affairs (one of the first surveys on workplace smoking independent of both the tobacco industry and smoking control advocates) of 1,967 members of the American Society of Personnel Administration found that 36 percent of employers responding had introduced smoking policies regarding employee health or comfort concerns. The single, most common reason given for adopting policies was state or local legislation requiring smoking policies (28 percent); employee health or comfort concerns were cited as the lone reason by 22 percent and employee complaints about smoke were cited by 21 percent (BNA, 1986). The Surgeon General cites this and another survey to suggest that businesses in states with workplace smoking laws are more likely to have adopted smoking policies than are companies located elsewhere (USDHHS, 1986, 299).¹³

In Canada, no employer surveys have been done and there are no available estimates about whether employers are ahead of legislators in regulating smoking at work, but considering the similarity of non-smokers' rights groups in the two countries and the greater propensity to regulate employment in this country, there may be no reason to suggest that employers here are taking the lead. Municipalities appear to have led the way by enacting no-smoking laws in public places, with some employers following in the last two or three years. Now legislators are beginning to regulate workplace smoking and more employers are taking the initiative. But without relevant statistics, the trend is not clear. We can only say that according to media reports, within the past few years, more employers have adopted smoking policies.

Vocal minority or not, there can be no denying that non-smokers are in the majority, and reports from some employers of the smooth transition of no-smoking policies might indicate they are simply carrying out the will of the majority in the workplace.

Indirect Research -- Composition of Tobacco Smoke

One premise of the Surgeon General's first conclusion* concerns the composition of tobacco smoke. The report says that although the chemical composition of the smoke inhaled by active smokers (mainstream smoke) is quantitatively different from that inhaled by involuntary smokers (environmental tobacco smoke¹⁴), both are the product of tobacco smoke which suggests that the toxic and carcinogenic effects will be qualitatively similar (USDHHS, 1986). In other words, it assumes that environmental tobacco smoke can cause lung cancer because it contains substances which individually are known to cause cancer when tested by means of animal bioassays.¹⁵

But critics argue that extrapolating risk to non-smokers based on the presence of individual carcinogens in environmental tobacco smoke is scientifically inappropriate because, in the absence of appropriate epidemiological data, it presumes causation but does not establish it (Baiter et al., 1986). Furthermore, of studies that have examined the chemical composition of environmental tobacco smoke, most report on concentrations of various chemicals in indoor air in the presence of smoking. With few exceptions, the chemicals that have been measured are not unique to environmental tobacco smoke and the background (non-smoking condition) levels of these contaminants have not been adequately reported (Baiter et al., 1986).

Another criticism of the studies upon which the Surgeon General's report is based relates to the lack of knowledge about how tobacco smoke ages, (that is, how it disperses) and the difficulty

associated with measuring the components of a mixture that is made up of both gas and particles.¹⁶ This uncertainty affects the second premise, that is, how to measure a nonsmoker's exposure to tobacco smoke.

iii. The Changing Employment Relationship

The workplace has never been regarded as a democracy. In the past, employers had great freedom to hire and fire at will, extend working hours, employ child labour and even discriminate openly -- treating workers as they saw fit. But all that has changed. Employers now owe new and expanded duties to employees in the form of "just cause" for dismissal, wage, hours and safety standards and anti-discrimination protection (Finney, 1988).

Historically, there is little dispute that this expansion of statutory regulation of the employment relationship has been aimed at protecting workers from the carelessness or tyranny of their employers and, perhaps, more so in the individual employment relationship, at redressing the imbalance of bargaining power by providing a minimum of rights to employees (Labour Law, 1986).

Whether this statutory erosion of the "pure" contract nature of the employment relationship has occurred because of greater recognition of the importance of work to the individual as a primary source of wealth -- and hence the need to preserve employment at all costs -- or because of the view that work is "a central aspect of the individual's existence, serving his personal needs and drives and shaping his daily existence," (Labour Law, 1986, 8 (op. cit. Beatty)), few would deny that there has been a trend towards increased respect for individuals and protection of their rights in the workplace. Recent evidence that this trend is far from over is found in the 1987 Canadian Human Rights Commission's annual report which revealed that for the fourth year in a row, more than 80 percent (380) of all complaints accepted by the commission were employment related.

But where does the prohibition of smoking in the workplace fit into this pattern? Some suggest that a newer phenomenon is overtaking that of individual rights -- the protection of the interests of society as a whole -- which is evidenced by the increasing importance in the workplace of employment protection features such as portable pensions, severance payments, training, pay equity and child care (Finney, 1988). In other words, the employer has gained new social obligations, though perhaps less so in North America than in some Western European countries.¹⁷

But the individual rights' issues are far from resolved, as mandatory retirement, drug and AIDS testing, and now smoking prohibitions, attest. What is different is that, more and more, employers are being expected to balance individual and social obligations. The smoking issue typifies their dilemma: On the one hand, a majority of non-smokers demanding protection of their health, backed by medical evidence, albeit inconclusive, and public policy initiatives; on the other, a minority of smokers whose personal freedoms are being restricted.

Laws protecting the individual, which have clearly established a precedent for governmental regulation of employment, coupled with the growing recognition that, in the workplace, more than anywhere else, people with an "intensive, constant and immediate influence on each other's' peace of mind, health and

financial security" (Finney, 1988, 39) have now combined to pave the way for restrictions on individual behaviours that are offensive to the majority (or vocal minority) in the workplace.

The prohibition of smoking at work then may be a clear reminder that, despite the proliferation of individual rights protection at work, employment is not only a vehicle of individual fulfillment but is also a social activity. In response to the public mood, employers must also ensure that an individual is able to make his contribution in socially desired ways. If not, legislators will step in to carry out the mandate.

iv. Legislative Developments

Although Canadian legislators may not be moving as fast as their American counterparts (currently 15 states and more than 100 municipalities regulate workplace smoking (Colosi, 1988, 74) compared with just four states in 1985), smoking at work is being legislated, albeit mostly at the municipal level.

Vancouver

In January 1987, Vancouver introduced a by-law prohibiting employees from smoking except in separate, designated smoking areas or in firms where all employees smoke. It was the first legislation in Canada to ban smoking in private as well as public spaces (HRMC, 1987, 47.1). The director for Unit Health Services said the City was concerned by reports of non-smoking employees forced to leave jobs because supervisors refused to respond to their complaints that smoke at work was affecting their health. From a research study, the City found that more than 80 percent of Vancouver residents, including smokers, favoured some kind of regulation (HRMC, 1987, 47.1). The municipalities of North Vancouver and Richmond, B.C. have introduced similar by-laws.

Toronto

In March 1988, the City of Toronto introduced a by-law requiring every workplace in the city to adopt a written smoking policy by March 1, 1988. A City of Toronto official cited the proven health hazard to smokers and the dangers of second-hand smoke as reasons for the by-law. Although no employer surveys were done, the official believes few employers had policies before the by-law was introduced (City of Toronto, 1988).

The by-law, which is similar to the San Francisco workplace ordinance, states that where a non-smoker objects to smoking, the employer is required to attempt to reach an accommodation between the preferences of smoking and non-smoking employees. The employer may use "already available means of ventilation, separations or partitions," but is not required to make expenditures or structural alterations to accommodate non-smokers. If the non-smoker is not satisfied, the employer is required to prohibit smoking in the workplace. Signs indicating the maximum fine of \$2000 must also be erected. This fine applies to both employers who permit smoking contrary to the policy or fail to fulfill the duties of the by-law as well as employees who violate the law by smoking. It is estimated that about 150,000 of the 500,000 people covered by the by-law are smokers (Sack et al., 1988). Approximately 32,000 provincial employees are exempted (Globe and Mail, 2/3/88).

During the first five months since the law came into effect, there were approximately 185 complaints from non-smokers relating to non-compliance but, as of July 1988, complaints from smokers were not

tallied. Although described as "tough" by some observers, the Toronto by-law does not quite meet the standards of an advocacy group in that city. The Non-Smokers' Rights Association claims the solution is a compromise that undermines existing practices by some employers, such as total bans, and that the only two viable smoking policies are either a total ban or separately ventilated smoking areas. Since the by-law does not require employers to make structural changes to ensure independent ventilation and enforcement is complaint based, the group feels non-smokers will be pressured into compromising on their health (Indorair, 1988).

Despite these "shortcomings," the by-law gives clear priority to the rights of non-smokers, accommodating them to the point of a smoke-free workplace. As we will see, this approach goes much further than the courts have been prepared to go.

Federal

In the summer of 1988, the federal government passed two pieces of legislation concerning smoking.¹⁸ Neither bill was proclaimed as of August 1988. Bill C-204 gives employees in the federal civil service, Crown corporations and federally regulated industries the right to a smoke-free workplace. Smoking will be restricted to smoking rooms which, if built after 1990, must be separately ventilated. This affects almost 900,000 workers in about 33,000 workplaces covered by the Canada Labour Code (HRMC, 1987, 51.1) and makes the federal jurisdiction the first senior government to pass such legislation.

The bill also declares tobacco products "hazardous" in order to ban cigarette promotion and advertising and to authorize regulations that would subject the sale of cigarettes to prescribed circumstances. However, this does not mean that tobacco will be included in lists of hazardous workplace materials. In fact, the passage of Bill C-204 has meant the abandonment of an effort to develop a new regulation on smoking, initiated in 1987, by the Review Committee responsible for revisions to the Canada Occupational Safety and Health Regulations (under Part IV of the Canada Labour Code).

While giving priority to non-smokers' health, Bill C-204 does accommodate the smoker to a greater extent than the Toronto bylaw because of its requirement for designated smoking areas.

Ontario

In November 1987, the Ontario government announced that, within a year, it would introduce legislation that "discourages and regulates smoking in the workplace." Initially, the government indicated that, irrespective of the type of policy, it would likely be the same for private employers since "there is no reason why we should separate government from the private sector on this agenda" (Globe and Mail, 4/11/87). In July 1988, although the type of policy was still unknown, it was leaked to the media by non-smokers' rights advocates that a proposed policy to ban smoking in all Ontario Public Service workplaces had been shelved and a revised policy separating smoking and non-smoking areas was being prepared instead (Globe and Mail, 19/7/88). This change of heart may reflect the Ontario government's desire to adopt the more accommodating approach taken in Bill C-204.

III. SMOKING POLICIES -- A LOOK AT TWO EMPLOYERS

Although there is no estimate of the number of Canadian employers who have introduced smoking policies, it is known that they are approaching the issue in many different ways. In some cases, policies are being shaped by legislation outlined above. Otherwise, they range from a restriction on smoking near safety hazards, to the designation of smoking areas, to a complete ban, to non-smoker-only hiring policies. The following case studies deal with how two dissimilar employers have implemented their smoking policies and some of the potential problems they face.

i. Employer A

Employer A is a well-established university located in a medium-sized Ontario town. There are 3300 full-time employees, including faculty, 1700 casual and part-time staff, and about 12,000 students. Approximately 700 staff are unionized and comprise a mixture of non-professional library personnel and technical, custodial, maintenance and trades employees. A staff association represents just under 400 non-union support staff. About 20 percent of all employees are smokers, while 25 percent of unionized staff smoke.

Smoking Policy

A new smoking policy, effective July 1, 1988, prohibits smoking in all "university buildings and facilities, including student residences, except for designated areas or private rooms where ventilation prevents others from being exposed to second-hand smoke." Except for public areas, department heads may designate smoking areas at their discretion and are responsible for enforcement. Persistent problems can be referred to the occupational health and safety department. The university sponsors smoking-cessation programs and will refund the fee to those still not smoking after six months. The previous policy, from 1979, was a "common courtesy" approach where, except for safety reasons, smoking was permitted where it was not objected to and this had evolved into generally accepted restrictions in academic areas, including labs, classrooms and academic meetings. In addition, department heads could prohibit smoking at their discretion, and a growing number had done so.

Interest in a policy first occurred in 1984 when a central Joint health and safety committee presented a report to the vice-principal responsible, recommending that smoking be banned in the university. The issue remained in abeyance until early in 1986 when the faculty of medicine passed a unanimous resolution recommending a smoking policy. A year later, the vice-principal concerned gave the task of further studying the issue to the central joint health and safety committee, which struck a subcommittee comprising two union and two management representatives, as well as a representative each from the personnel and the occupational health and safety departments.

In the spring of 1987, a survey compiled by the subcommittee and mailed to all support staff and faculty received better than 50 percent response. Results revealed that 82 percent were in favour of some restriction on smoking, with 25 percent working in areas where there were already some restrictions. Many major departments already had total bans when the survey was done and these had caused some friction with staff. Because of the small number identifying themselves as smokers (5 percent), it was suspected that many smokers had not responded to the survey.

The survey results in hand, the subcommittee drafted a policy which was approved by the central joint health and safety committee and submitted to the vice-principal. The draft proposed that effective January 1, 1988, departments would identify designated smoking areas within staff lounges and, where agreement existed in specific departments (agreement was not defined), lounges could be declared smoke-free immediately. One full year later, the university would be declared a smoke-free environment. All staff were invited to information sessions about the draft policy but these meetings were poorly attended.

The head of the occupational health and safety department notes that the idea of restricting smoking was not considered seriously until the survey results and feedback from the department heads on the draft policy had been received. The rationale given for the policy was two-fold: concern for smokers' health, because of their higher illness and mortality rates, and the fact that tobacco smoke was a serious irritant to those with particular sensitivities or allergic reactions. The head of occupational health and safety maintains that the issue of second-hand smoke as a hazard to those other than the allergic non-smoker was not a consideration since "that medical evidence does not stand up to close scientific scrutiny or peer review."

It is not clear why the draft policy was revised, but it was decided that, although a complete ban would be the ultimate goal, it would have to be phased in gradually and an effective date was deferred indefinitely. The final policy requires neither designated smoking areas nor agreement among staff. Moreover, reference to second-hand smoke is carefully worded (see above) and does not guarantee independent ventilation of smoking areas.

The department has had no complaints since the policy became effective one month ago and the head of the occupational health and safety department attributes this to the fact that the university did its homework in advance, consulted with staff and gave ample warning of the policy through a professional communications program. He also believes that the smooth transition reflects the decentralized nature of university administration. "It's a local affair and department heads will deal with it as such. We offered to help departments select designated areas but have had only three requests."

According to the head of occupational health and safety, the university has no plans to introduce a hiring preference for nonsmokers and has made it clear to employees that "It's not whether you smoke, it's when and where you smoke....Smoking is your business, but smoking at work is our business." The policy will be enforced as any other policy -- if violated, there will be three warnings and then dismissal. But the department head "does not think it will get to that". Instead he expects, as with other institutions, the number of smokers will decline.

"Those who are heavily addicted can reduce the amount of nicotine ingested without causing problems. They may not be able to quit but they will be able to stop smoking at work. There is some evidence that people who are addicted can become less addicted if they reduce their intake. And, since there is no funding to provide well-ventilated areas for smokers and there is no right to smoke, the university will accommodate addicts but, in the long run, will become completely non-smoking." It is also possible that individuals bothered by persistent smokers could seek relief via the university's non-union grievance procedure as a reasonable alternative to discipline.

Within the first month of the new policy, 20 people have applied for smoking-cessation programs and one has claimed a refund retroactively.

Employee Reaction

The staff association, which is also represented on the central joint health and safety committee, was invited to comment on the draft policy and tabled the issue at a general meeting. A majority of members agreed with the proposed first phase to restrict smoking to designated areas but, although in favour of the second phase -- the total ban -- many anticipated problems with enforcement. The staff association president notes that/ currently smoking policies vary by department but there have been no complaints since the new restrictions became effective July 1. However, she says that may be because smokers are going outdoors in departments where smoking has been banned. When the cold weather arrives, the complaints may also start.

The union executive has a somewhat different perspective. Despite its participation on the central joint health and safety committee, which wrote the first draft, the national representative sees the policy as having been unilaterally imposed and believes it will not affect the membership until discipline for violation arises.

"There was a request for opinions but there was no consensual decision-making because the administration will not let the central joint health and safety committee make policy. This is typical of the paternalistic, conservative and very centralized decision-making at the university. The administration pretends to consult. If the university had sought to negotiate the policy, the union would have been part of the mechanism." The head of occupational health and safety notes that the joint health and safety committee did want to include the smoking issue in collective bargaining but the administration resisted.

"Enforcement will be a problem," says the national representative. Over the past 20 years, restrictions on smoking have been tightening, allowing a consensus to emerge, without the need for discipline. Now, there's a big question mark about enforcement; we aren't aware of how it will be done."

One health and safety committee member suggests the university had to consider a smoking policy primarily because many department heads had already been instituting their own. He also believes that the central joint health and safety committee does not have much influence because it is separate from and does not represent the views of 30 local safety committees across the university that deal with departmental issues. "The central committee only deals with public and other areas not covered by the local committees."

The union would like to see designated smoking areas *where* an employee can go at any time. This, they say, has been tried in other organizations and has not affected morale or productivity. Furthermore, one union member claims that because designation of smoking areas is at the complete discretion of department heads, smokers have nowhere to go if their department head decides not to allocate a smoking area. A member of the central joint health and safety committee notes that if he could do it all over again, he would take a much harder line on ensuring designated smoking areas.

Although there have been no grievances or complaints to the union, the national representative initially explained this was because the policy will not have any effect on members until discipline arises --

suggesting that non-compliance was already occurring. Two recent incidents involving smokers may prove this assessment true unless discipline can be avoided.

The union maintains that, despite heated debates at some union meetings, all locals support the view that workplaces should be non-smoking and free from all occupational hazards, and that employees should be encouraged and supported in their efforts to stop smoking. However, there should also be separately vented, designated smoking areas for those who need to smoke, and the policy should be applied consistently across the university.

Analysis

The new smoking policy seems to authenticate and confirm previous policy making at the university by allowing individual department heads to determine smoking areas and, hence, there is no one policy being applied. In some places a total ban is already in effect even though a smoking ban has not yet been stipulated in the policy. This does not accommodate smokers, and the lack of reasonable notice of this change in some departments could leave the university open to constructive dismissal claims by employees. Moreover, the lack of separately ventilated smoking areas means that, if there is a serious hazard to nonsmokers from environmental tobacco smoke, it will not be curtailed in buildings where smoking is currently permitted.

There is also the issue of whether the policy will meet arbitral tests for unilaterally imposed employer rules, particularly with respect to consistency of application and whether clear notice has been given of the consequences for violation. As suggested above, enforcement will be the key issue because the absence of one clear policy will mean department heads will have to justify their policies individually.

Furthermore, if the administration holds to its position that second-hand smoke is not yet a proven hazard to the healthy nonsmoker, in the face of its restrictions which now extend beyond actual safety hazards, it may have some difficulty demonstrating the need for and/or reasonableness of the rule.

ii. Employer B

Employer B is a major oil and gas company located in Alberta. It has approximately 1700 employees, with about 350 of those at more than 35 locations around the province and the remainder located at the head office building. Employees at the company's four gas plants are represented by independently certified unions and comprise approximately 140 members.

Smoking Policy

The company recently introduced a phased smoking policy. The first phase, from July 1, 1988, prohibits smoking in meetings, conferences and training sessions. Phase II extends the ban to private offices, work stations and open work areas and is effective October 1, 1988. The final phase prohibits smoking on all company premises, including company vehicles with two or more occupants, and comes into effect on January 1, 1989. The policy applies to all categories of employees, contractors, consultants and visitors. Managers are responsible for compliance and are to enforce the policy as any other -- warnings and, if necessary, dismissal. Although there has been some discussion about a nonsmoker-only hiring policy, no decision has been made and it is not contemplated in the near future.

Managers in field locations where living quarters are part of the workplace (e.g., drilling rigs) have wide discretion in complying with the policy. However, they must ensure there is sufficient ventilation in designated smoking areas to prevent non-smokers from being exposed to second-hand smoke, and the designation of smoking areas must be supported by a majority of those who live at the location. The company had no previous smoking policy at the head office but there have always been smoking bans at gas plants except for maintenance houses, control rooms and offices. Upon hiring, employees would be notified.

The policy was introduced for several reasons -- the overriding concern being the health of smokers and non-smokers. Those who initiated the policy in the medical services department used medical evidence of the effects of smoking in the workplace on smokers, the allergic reactions of some non-smokers and the long-term danger to healthy non-smokers as its rationale. In addition, they cited numerous enquiries from employees about a no-smoking policy (the number of which increased significantly in past two years), the fact that eight of the 10 "majors" in the oil industry already had some type of smoking policy, the influence of a municipal no-smoking bylaw in public buildings and, finally, the fact that three head office departments and two field locations had already declared themselves non-smoking.

Based on the above factors, the decision to restrict smoking was actually made before consulting employees but a survey was used to determine employees' preferences on the schedule and method of implementation. Conducted by medical services, the survey had a 74 percent response rate from the head office and 71 percent from field locations. Results revealed that approximately 20 percent of head office staff and 24 percent of field staff were smokers. A majority of both groups favoured a completely smoke-free workplace as well as phased implementation.

Employee Reaction

Apart from two individuals who felt their "personhood had been attacked" and another who threatened to resign, there was an initial lack of response from employees -- few complaints and no interest in smoking cessation -- about the policy. This surprised specialists at the medical centre who, at first relieved, found some cause for concern after comparing notes with other companies who also used a phased approach. At least two companies said there had been almost no employee response until the total ban became effective and then smokers seemed to panic and, to quote one individual, "all hell broke loose."

Based on their peers' experience, Employer B then decided to take a more proactive approach by distributing a memorandum with information on smoking cessation to employees and advising them on how to quit at work, rather than waiting for employees to step forward. This seems to have had the desired effect. So far, 26 head office employees -- almost evenly split male and female and comprising clerical, secretarial, supervisory and managerial staff -- have expressed interest in the Alberta Lung Association self-help kit "Freedom From Smoking" which the company offers and costs employees 10 dollars. In addition, six requests for self-help kits have come from gas plants.

The medical services specialist says the company's executive management, who are predominantly non-smokers, did not want to impose sanctions but preferred a reasonable approach. Some other major oil companies did not survey employee opinion and a few who used the phased approach said if they

had to do it again, they would not phase in the policy because of disagreements about where smoking should or should not be permitted. But Employer B believed the phased approach to be the humanitarian one, helping to diffuse some of the emotional issues. Furthermore, giving employees notice was thought to be "only fair" -- even though it was clear that employees were expecting smoking restrictions for some time because Employer B was one of the last of the 10 major oil companies in the city to introduce a policy.

Some smokers familiar with the head office design blame building inadequacies and, in part, unsympathetic management for the decision not to allow designated smoking areas. They explain that ventilation was initially designed to accommodate room dividers but when floor-to-ceiling movable walls were installed instead, the ventilation system was not modified, so air intake and outflow might occur in separate rooms and contribute to poor air quality. Aware of these ventilation concerns, the company has recently moved air intake to the roof and increased air exchange. These employees argue that the company has not pursued technical solutions to the smoking issue very vigorously and, if better ventilation is needed anyway, then perhaps tobacco smoke has been targeted prematurely.

A further complaint of smokers is that the company only rents the top half of the building and cannot control smoking by occupants on the remaining floors -- hence, weakening the secondhand smoke rationale. But the company is considering requiring new lessees to agree to a smoke-free building -- although the dearth of tenants in the Alberta office building market has some thinking that this would discourage leasing.

Neither health and safety committees nor union executives were involved in the development or implementation of the smoking policy at the four unionized gas plants. The labour relations advisor suggests the union probably would not have been able to reach a consensus because of battles between smokers and nonsmokers. "In fact, in the survey, some employees said the company should just go ahead and make the decision, and some smokers felt a no-smoking policy would help them to stop smoking." In the advisor's opinion, the policy "may not be reasonable in the labour relations context but is justified on ethical and health grounds." Smoking is not specifically covered under the collective agreement.

The labour relations advisor believes the smoking ban will be most difficult for control room operators at the capital-intensive gas plants (because of process-control technology, fully computerized gas plants are operated from a control room by two individuals). He expects that supervisors may try to be reasonable by allowing smokers to go outside if they can get coworkers to cover for them. For seriously addicted smokers, the company will provide referral to the employment assistance program but they will not be allowed to smoke in the building.

One gas plant supervisor, a non-smoker, is ambivalent about the new policy. "At the head office, it's different because they all share the same air. In the gas plants, control room operators are on 12-hour shifts and, although we definitely need them there if something happens, the work is generally monotonous. When the ban comes into effect, the only place you'll be allowed to smoke is outside the plant gates, and operators won't be allowed to leave the control room to smoke during a shift." This employee thinks the policy puts plant supervision in an unenviable spot with respect to enforcement.

There have been no complaints or grievances at this plant or any other -- although it should be noted that the company has an exceptionally low grievance rate. For example, during the life of the collective agreement (25 years) at this gas plant, there have been fewer than two dozen grievances.

One smoker who was a member of the union executive for 15 years believes that, either way, the situation presents problems -- on the one hand, the policy restricts smokers' rights, but not doing anything endangers non-smokers' health. "Most employees are aware of the dangers of second-hand smoke. And because many of the top bosses smoke, they understand, so they won't be fighting us." However, this member believes the crucial issue will be whether the company helps employees to quit. "Everybody is interested in the stop-smoking programs. If the company provides them, it will be good for us; but if they expect employees to pay for the seminars or schedule seminars that don't accommodate 12-hour shifts, there will be a lot of hard feelings."

Although the company initially decided not to subsidize smoking cessation programs, a medical services specialist suggests this may change. After some smokers complained, prescription insurance claims for nicotine gum are now being refunded retroactively at 85 percent of the cost under the supplemental health care plan. The company is now considering reimbursing smokers for the self-help kits if they successfully stop after a reasonable period and is also looking at whether time spent at information or support sessions should be split between company and employee hours.

Analysis

Fortunately, the unofficial byword in the implementation of the smoking policy at Employer B is flexibility. Learning from its peers' and its own experience, the company appears willing to adjust its position to accommodate smokers, with the medical services department having a supportive rather than policing role. Ultimately, however, smokers will not be accommodated with designated smoking areas and it remains to be seen whether supervisors will permit smoking breaks. This will very much depend on individual interpretations of enforcement since it seems no guidelines have been given on this matter.

As a non-union employer at its head office location, Employer B does not face the prospect of a general challenge to its unilaterally imposed policy and, judging by its stable labour relations, such a challenge at the gas plants is most unlikely. Constructive dismissal actions by employees because of a fundamental change to the employment contract are also unlikely because publicizing and phasing in the policy at three-month intervals probably constitutes reasonable notice of the change. As with Employer A, without a designated time or place to smoke, an addicted smoker could claim a handicap under human rights laws and activate the employer's duty of reasonable accommodations but referral to the employee assistance program might satisfy that requirement. Finally, if dismissed for violating the policy, a smoker could sue for damages for wrongful dismissal, arguing that the reason for discharge is unrelated to past job performance. On balance, as with Employer A, much hinges on enforcement.

IV. THE IMPACT ON INDIVIDUAL RIGHTS

Given that the restriction of employees' freedom to smoke is not only a health issue but one of individual rights, employers must deal with smokers and non-smokers who assert these rights. Can employers restrict employees' personal freedom by prohibiting smoking at work? Can they legally discriminate by refusing to employ or continuing to employ smokers? What protection or accommodation is an individual entitled to? There are many potential claims and those not yet tested in Canadian workplaces may be given some guidelines by decisions in the United States.

The question of a fundamental right to smoke or to a smoke-free workplace has not arisen in Canada¹⁹ but, on this issue, the U.S. courts have held that there is no constitutional right to a smoke-free workplace, and labour lawyers doubt there would be a corresponding right to smoke at work.²⁰

i. Common Law/Safe Workplace Claims

An issue often raised by non-smokers' rights activists is whether an employee has a right to a smoke-free workplace based on his employer's common law duty to provide a safe working environment. So far, in Canada, there have been no common law claims regarding smoking at work, and there is relatively little Canadian jurisprudence relating to the employer's implied duty to provide a safe work environment (Arthurs et al., 1984, 104). This is likely because of the two-pronged public policy response to occupational injury and disease -- compensation and prevention. On the one hand, statutory workers' compensation schemes, which have typically removed an employee's right to sue the employer for damages or for an injunction, have replaced judicial remedies with a compensation mechanism for employee injury or disease arising out of or incurred in the course of employment (Arthurs et al., 1984). On the other hand, occupational health and safety laws, outlining mutual obligations of employers and employees, give employees the right to refuse unsafe work, in most cases, without fear of discipline (Arthurs et al., 1984). But there is no doubt that employers still have such a common law duty. As the Ontario Court of Appeal stated in *Berger v. Willowdale A.M.C.* (1983), "...an employer owes a duty to its employee of providing and maintaining a safe working place" (Sack et al., 1984).

Decisions in the United States give some indication of how common law claims regarding tobacco smoke might be decided. While recognizing the employer's common law duty to provide a safe work environment,²¹ the U.S. courts have not been prepared to grant that such a duty was owed to an employee as an individual,²² and neither were they prepared to require employers to completely accommodate non-smokers to the point of stipulating a smoke-free environment (Crocker, 1987). In both cases, where the common law duty was acknowledged, the plaintiffs presented evidence of their own sensitivity to tobacco smoke as well as scientific evidence of the hazard posed to others in general (Crocker, 1987). Where a plaintiff failed to present evidence of a general hazard to all employees, no employer duty was found.

Clearly, the U.S. courts found it too onerous to impose a duty on employers to make the workplace completely safe for the sensitive non-smoker, requiring only that, as a minimum, it be safe for the average healthy employee. If we assume a similar interpretation in Canada, more conclusive evidence of the hazards of second-hand smoke to the healthy non-smoker would strengthen the common law/safe workplace approach (BNA, 1986, 32). As it stands now, however, the sensitive non-smoker seems to have little protection at common law. But, as mentioned above, a common law claim may be a moot point

in the Canadian context, depending on the wording of workers' compensation laws, and this may explain the absence of such claims in Canada, despite predictions that Canadian non-smokers would also go to court.²³

ii. Claims Under Occupational Health & Safety Laws

It may also explain why, unlike their American counterparts, non-smokers in this country have been invoking occupational health and safety laws which entitle employees to refuse to perform unsafe work. But success has been limited.

Ontario

In 1983, an employee with the Workers' Compensation Board (WCB) in Toronto refused to work in an environment he regarded as unsafe because of cigarette smoke.²⁴ Romano Greco was the first to claim this right under section 23 (3) of the Occupational Health and Safety Act (R.S.O., 1980, c. 321), which states:

"A worker may refuse to work or do particular work where he has reason to believe that...(b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself;"

A provincial safety inspector found that carbon dioxide and carbon monoxide levels in the air near Mr. Greco were within acceptable limits and decided that the law did not apply because "the presence of cigarette smoke is due to the actions of other workers indulging in a personal habit and is not related to any work process carried on." The WCB was simply advised to increase the supply of fresh air.

The Canadian Union of Public Employees appealed to the director of Ontario's industrial health and safety branch who, after 10 months' deliberation, decided that there was no medical evidence to support Mr. Greco's complaint and left open the question of whether section 23 of the Act applied to cigarette smoke. The union asked the director to reconsider and to base his decision on broader medical reports from an occupational health doctor at St. Michael's Hospital in Toronto who said:

"There are now sufficient studies to indict secondhand cigarette smoke as a cause, not only of discomfort, but also of disease. In my opinion, Mr. Greco has good reason to believe that secondhand cigarette smoke in his work environment poses a threat to his health."²⁵

Upon further complaints, testing by the Toronto Department of Health revealed that workers at the WCB were exposed to levels of tobacco-related respirable particulates well in excess of acceptable levels. The department could only recommend that the WCB adopt a policy to regulate smoking in its offices, reduce the exposure of non-smokers to second-hand smoke and, in doing so, give precedence to the rights of non-smokers. It also stated that the only effective way to eliminate the second-hand smoke was to provide separate areas for smokers, vented outside.²⁶ Had he been covered by the new Toronto Smoking By-law, with a single complaint, Mr. Greco could have made the entire office smokefree.

Federal

In 1984, an employee of the Department of National Health and Welfare grieved that his employer was violating the Dangerous Substances Safety Standard by allowing smoking in his workplace. Peter Wilson asked that the employer be ordered to restrict tobacco smoke to a separate, adequately ventilated area.²⁷

The collective agreement required the employer to take all reasonable precautions for the occupational safety and health of employees, including consulting with the union to adopt techniques to prevent or reduce the risk of injury. The Dangerous Substances Safety Standard incorporated in the agreement required each department to ensure that the level of any dangerous substance in the air, in the workplace did not exceed prescribed limits.

The Public Service Staff Relations Board considered lengthy expert testimony on the dangers of second-hand smoke from a specialist with the American Environmental Protection Agency. Quoting what he considered were conservative figures, James Repace said: "...tobacco smoke in the workplace kills some 5,000 non-smokers in the United States and 500 in Canada." His calculations assume that one-third of workers are smokers who have two cigarettes an hour over a six-hour shift.²⁸

The arbitrator held that the employer had violated the Standard as it did not confine tobacco smoke as closely as was reasonably practicable to its source, did not sample or test the atmosphere adequately and did not provide separately ventilated areas for smokers. He also held that "tobacco smoke was a dangerous substance because the grievor's evidence established the existence of a statistically significant co-relation (sic) between exposure to passive smoke and an increased incidence of lung cancer." On appeal, the Federal Court set aside the Board's ruling, returning it for redetermination on the basis that passive tobacco smoke is not a dangerous substance to which the Dangerous Substances Safety Standard applies. A new Treasury Board policy will go further than Bill C-204 by abolishing designated smoking areas in federal public workplaces.

In 1985, an Air Canada baggage foreman at the Toronto airport refused to work, claiming that tobacco smoke in his workplace constituted an "imminent danger" to his health, as provided for under Part IV of the Canada Labour Code. In an appeal of a safety inspector's decision that there was no imminent danger, Mr. Timpauer asked the Canada Labour Relations Board to ban smoking in his work area and to provide outside ventilation for designated smoking rooms nearby.

The Board looked at the way "imminent danger" had been defined in the case law and stated that a person is in a situation of imminent danger when he has reasonable cause to believe that he is about to be actually and immediately harmed and must remove himself at once from the scene to avoid the danger. Referring to the impact on all federally covered workplaces of ordering a ban, the Board said it was not for the Canada Board to play the role of legislator of significant social change.²⁹ On appeal, the Federal Court held that the Board was not justified in refusing to hear the expert evidence Mr. Timpauer wished to supply.³⁰

Subsequently, the Code was amended to expand employees' rights to refuse unsafe work; the word "imminent" was removed and the definition of danger was changed to "any hazard or condition that could

reasonably be expected to cause injury or illness to a person exposed thereto." Later that year, Mr. Timpauer again refused to work and invoked the newly proclaimed section of the Code. The safety inspector upheld his action and ordered Air Canada to ensure proper ventilation and to enforce its ban in the trailer where Mr. Timpauer worked. But Mr. Timpauer's main complaint, that there were carcinogens in his workplace, was not tested. Instead, Labour Canada based its ruling on the poor air quality when workers smoke.

It is clear that the courts were not prepared to give the relevant legislation a broader meaning that would grant healthy non-smokers an unlimited right to refuse work in a smoking environment. In the Peter Wilson case, the court did not dispute whether second-hand smoke is, in fact, a dangerous substance, but simply looked at the safety standards which list the sources of dangerous substances found in the workplace and decided that, since tobacco smoke was not among them, the standard did not apply (HRMC, 1986, 45.7). In the Alberto Timpauer case, the court looked at the strict meaning of "imminent danger" and flatly refused to act as "a legislator of social change" by including the health effects of cigarette smoke as an occupational health issue.

All three cases show that health and safety codes are intended to deal with hazards produced by the manufacturing process in the industrial plant and not by employees in an office. More important, the decisions reflect the fact that the courts interpret these laws in the context of the common law and will not read into them employer duties that have not been spelled out by legislators. This inability of health and safety laws to deal with the second-hand smoke hazard has been recognized in the past few years, no doubt explaining the introduction of new legislation directly affecting these cases.

iii. Claims for Disability Benefits

Sensitive non-smokers have had some success in claiming benefits. In Re De Havilland Aircraft of Canada Ltd. ((1986) 25 LAC (3d) 249 (Davis)), a non-smoker employed at De Havilland in Ontario won a grievance for disability payments because her particular sensitivity to tobacco smoke (diagnosed as allergic rhinitis, conjunctivitis and bronchitis) made her ill and unable to do her job. Vicky Torrance had been off work for six months on her doctor's orders. Since the illness was not covered by workers' compensation and she was found unable to work, the arbitrator held that she was eligible for the disability benefits of the company plan as provided for in the collective agreement.

The awarding of disability benefits to sensitive non-smokers is supported by decisions in the United States. In one case, an employee developed numerous health problems after she was transferred to an office occupied by many smokers. On leave from work, the problems subsided. The court ruled she was entitled to disability pay until or unless the employer gave her a comparable Job where she was not exposed to smoke.³¹

There have also been a number of claims (unreported) by non-smokers for workers' compensation benefits in Canada and a few have been allowed,³² although generally where another physical condition exists.³³ This has also occurred in the United States. In one case, a workers' compensation board held that a flight attendant had proved an industrial injury because of her allergic reaction sustained in a smoke-filled section of the aircraft. She was awarded \$3657.50 disability indemnity, plus actual medical expenses and attorney's fees.³⁴

Not only will employers have to assume liability for disability benefits and workers' compensation for employees who can show they are incapacitated by tobacco smoke at work but, because these injuries often only occur in a smoky environment, they may have to choose between accommodating or compensating them.³⁵

iv. Human Rights Laws

Perhaps the avenue with the greatest potential for claims in the smoking issue is human rights legislation -- probably because it continues to provide the widest protection for individual rights. Discrimination claims are possible for both non-smokers and smokers where human rights codes grant protection on the ground of "handicap" or "physical disability." Both the Canadian and Ontario human rights commissions are now developing guidelines on this issue and can only offer tentative positions.

Non-smokers

If a non-smoker could show a disability caused by tobacco smoke at work, it would raise the employer's duty of reasonable accommodation. Proving a disability, such as asthma attacks or angina, would require a medical opinion. Reasonable accommodation of the sensitive non-smoker is yet to be defined but, according to the Canadian Human Rights Commission, remedies would not include imposing or enforcing a smoking ban in the workplace. Accommodation would likely depend on the degree of the individual's sensitivity, the amount of smoke and whether accommodation would cause the employer undue hardship.

Some guidance may be found in a key decision in the United States, Vickers v. Veterans Administration (1982), where a federal district court ruled that an employee who was hypersensitive to tobacco smoke could be regarded as handicapped under the federal Rehabilitation Act (1973). The court held that while the disability should be accommodated, there was a limit to what the employer could be required to do. In this case, the employer had tried to get co-workers to voluntarily stop smoking, installed an air purifier and vents, offered to construct a partition around the employee's desk and even offered the employee an outside job. Declining the employee's request for a smoke-free work environment, the court stressed that employees who smoke also have "certain rights that cannot be disregarded" but "must be balanced," against the desires of non-smokers (BNA, 1987, 247:80).

For healthy non-smokers, even less protection may be available. The Canadian Human Rights Commission has dismissed complaints from healthy non-smokers claiming smoking is "bothersome" because "as strong as the medical evidence is on second-hand smoke, it is still difficult to prove that it causes a disability to everyone it affects" (CHRC, 1988). However, with new federal workplace legislation, "the medical evidence may become irrelevant since the public mood of protecting the non-smoker may be overtaking the need for making narrow distinctions" (CHRC, 1988).

But most jurisdictions are still without workplace smoking restrictions. And, although the duty of accommodation in human rights laws may protect sensitive non-smokers in these cases, the overriding pragmatism of the workplace will prevent protection of the healthy non-smoker until evidence of the second-hand smoke hazard is more conclusive.

Smokers

Smokers, too, could be considered handicapped. To claim a disability, a smoker would have to have a medical opinion stating his dependence on nicotine, which would be treated like any other addiction (e.g., alcoholism), requiring reasonable accommodation by the employer (CHRC, 1988). But relief would be limited. The Canadian Human Rights Commission would not require an employer to allow a smoker to smoke, any more than it would require an employer to permit an alcoholic to drink. No-smoking on the job, then, could be a bona fide occupational requirement, justified on health and safety grounds, with accommodation for the smoker likely to be referral to an employee assistance program to stop smoking. It is arguable, based on cost and work scheduling, whether it is reasonable to require employers to provide designated smoking areas or breaks to accommodate smokers.

Hiring Policies

While it may be appropriate for a company to say it is a smoke-free workplace, a non-smoker-only hiring policy could be beyond the employer's purview by attempting to regulate the employee's free time (CHRC, 1988). Recent invasions of employee privacy have been justified to protect employer rights, such as security of property (Soltan, 1985) or co-worker safety. But even with substance abuse cases, the courts have generally held that the employer's concern should be limited to the present ability of the employee to perform the job (Crocker, 1987).

In the face of a non-smoker-only hiring policy, a smoker could argue that he is being singled out because of his disability and, since smoking does not affect his ability to do the job, being a non-smoker is not a bona fide occupational requirement. The well-accepted test for a bona fide occupational requirement is outlined in Ontario Human Rights Commission et al. v. The Borough of Etobicoke ((1982) 1 SCR 202 SCC)). Although in introducing a hiring requirement of non-smokers the employer might meet the subjective part of the test -- requiring that it be "...imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work" -- it would have difficulty meeting the objective element which says the requirement:

...must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."

Because there is no measurable impairment to a smoker's job performance and no hazard to other workers if the individual does not smoke on the job, employers considering restrictive hiring policies would not have much of a defense under human rights laws. Even where they could show business necessity (Colosi, 1988) -- that smokers cost firms more or are at greater risk for disease from the synergistic effect of exposure to certain toxic workplace agents,³⁶ there is no guarantee that the policy would be upheld, and employers would still have a heavy onus to accommodate incumbent smoking employees.

In the United States, such a hiring policy was unsuccessfully challenged in Lipson v. Fortunoff Fine Jewelry and Silverware, Inc. (1986), where the employer began employing only nonsmokers. Lipson, who had applied for a job, was rejected because she was a smoker, even though she agreed not to smoke

on the job. She filed a handicap charge of discrimination arguing that she was addicted to smoking, or if she was not, had a substantially disabling condition. Her case failed because she could stop smoking and become eligible for employment; her disability was easily correctable, therefore it did not qualify as a legal physical handicap (Colosi, 1988). It is not clear whether Canadian human rights laws would make this distinction.

A related question is whether a non-smoker hiring preference is discriminatory based on "voluntary" or "lifestyle" factors. For example, if smoking can be compared to diet or personal grooming -- habits that form early in life and cannot be easily changed, and that are also associated with certain groups -- then singling out smokers for different treatment may not be legally defensible on these grounds (BNA, 1986).

A final issue is whether smoking restrictions might be inconsistent with sections of the Canadian Charter of Rights and Freedoms. Some point out that, although the Charter might not apply directly to the employment relationship, it could apply indirectly through its application to Canadian human rights legislation and the subsequent application of that legislation to the employment relationship (Carter, 1988, 318). Interpreting human rights legislation in light of the Charter, then, could serve to reinforce the protection against discrimination based on disability and the rights to privacy of smokers.

Ironically, it would seem that, because it is forced to balance competing individual rights as well as employer duties, human rights legislation, despite its charm, has limited clout in the non-smokers' rights battle.

v. Dismissal

Can an employee be dismissed for violating a smoking policy? Because an employer cannot unilaterally alter an essential term of the employment contract without warning, if smoking was previously allowed in the workplace and an employer introduces a ban, an employee could treat the employment contract as breached and sue the employer for damages for wrongful dismissal. Of course, success would hinge on whether the court finds a smoking policy to be an essential term of the employment contract (Soltan, 1985). Such a finding is unlikely because smoking is generally viewed as a limited privilege or gratuity (see note 19). In addition, by providing notice of the new policy, employers can forestall court action from smokers because the terms of an employment contract can be effectively altered unilaterally with reasonable notice.

Since most employers intend to enforce smoking policies in the same way they enforce other company rules, warnings and ultimately dismissal, this as yet untested area of the law also has potential for conflict. If governed by strict workplace smoking legislation, the employer can argue that his dismissal is reasonable because he must by law act upon the complaints of other employees (Nesdoly, 1988 (op. cit. Grosman)). But if the employer goes beyond the requirements of the law, or is not covered by legislation and fires an employee for violation, he may face a wrongful dismissal charge. Since wrongful dismissal cases deal primarily with job performance, a smoker could argue that smoking has nothing to do with his job performance (Nesdoly, 1988 (op. cit. Grosman)). The employer would be in the best position if he gives reasonable notice of the policy, offers the employee assistance to stop smoking, permits designated smoking areas and gives the smoker progressive warnings (Nesdoly, 1988 (op. cit. Grosman)).

vi. Arbitral Jurisprudence

Workplace smoking policies raise difficult industrial relations issues in unionized workplaces and, if the number of challenges to employer policies to date is any indication, it would seem the rights of individuals may stand a better chance. But it is not always possible for unions to take one position since they must simultaneously challenge unreasonable smoking rules as well as represent competing claims from all constituencies -- sensitive non-smokers, healthy non-smokers and smokers. And, although the author is not aware of any claims of breaches of the duty of fair representation, the divisive nature of this issue makes such claims possible.

The possibility of future union challenges to unilaterally imposed smoking restrictions is also very real. At present, the arbitral record is mixed, but seems to favour such policies where there is a demonstrated health or safety need. Even so, employers must ensure the scope of the policy fits that need (FCE&ER, 1987, Vol. 1, 14:108). Arbitrability aside, two major questions arise. First, if employees were previously allowed to smoke, then is smoking a privilege subject to negotiation or, alternatively, does a "prior discussion" clause require the employer to consult the union about the policy? And, second, if not negotiable, does the new policy meet the criteria required for unilaterally imposed rules?

Arbitrators have found jurisdiction to hear grievances involving employer smoking policies on the basis an express "reasonableness" requirement governing employer rules and regulations in the collective agreement (Re Thameswood Lodge (1984) 15 LAC (3d) 228 (Verity)) or, where there is no such express requirement, based on a "just cause" provision requiring management to enforce rules fairly and reasonably (St. Joseph's General Hospital North Bay held on March 18, 1988 (Dissanayake)).

With regard to the rights issue, one arbitrator held that smoking was not a privilege or working condition because it had not been enjoyed consistently or absolutely but rather had depended on "the whims and dictates of people in charge at the various facilities" and was, therefore, "licensed to a limited degree" (Re Board of Education for the City of Toronto, (1988) 33 LAC (3d) 149 (Knopf)). Another found that smoking was an "unintentional benefit enjoyed at the pleasure of the company by reason of its failure to exercise its power to make a rule..." and was therefore not subject to union agreement (Re Thibodeau-Finch Express Inc. (1987) 31 LAC (3d) 191 (Brent)).

Where collective agreements require discussion with the union before changing company rules, decisions vary. One arbitrator found that, although a hospital's smoking ban was reasonable, union representation on an omnibus non-smoking committee, by itself, did not fairly and reasonably satisfy the obligation to discuss the rule -- particularly in light of the "unseemly rush" with which the employer implemented it (Re Ottawa General Hospital (1986) 27 LAC (3d) 64 (Frankel)). However, another award held that discussion of a new smoking policy with the union on two occasions met the requirement for prior discussion (Re Van Dresser Ltd. (1986) 24 LAC (3d) 63 (Solomatenko)).

Central to the issue is whether a smoking rule is reasonable. The accepted criteria for unilaterally imposed rules were laid out by arbitrator Robinson in KVP Co. Ltd. ((1965) 16 LAC 73). Most arbitrators would apply these criteria to smoking rules which, when enforced, require discipline: 1) The rule must not be inconsistent with the collective agreement. This could apply in the unlikely event that there is a provision expressly permitting smoking at work (Soltan, 1985). 2) The rule must not be

unreasonable. This is the key element and to determine it, arbitrators assess the extent to which the rule is necessary to protect the employer's interest in operating the plant, in preserving its property, and generally in carrying out its operations in a reasonably safe, efficient and orderly manner (Brown and Beatty, 1984, 181). Obviously, if concern for the health of non-smoking employees is given as a rationale for a no-smoking rule, evidence of the second-hand smoke hazard would have to be assessed both objectively and in its application to the employer's workplace. 3) The rule must be clear and unequivocal. Generally, a precise identification of smoking and no-smoking areas would meet this criterion. 4) The rule must be brought to the attention of the employee affected before the employer can act on it. This is a requirement for notice of the intention to adopt the rule and its effective date, which will involve balancing the interests of smokers and non-smokers. 5) The employee concerned must have been notified that a breach could result in discipline or discharge. 6) The rule should have been consistently enforced by the employer since it was introduced. For example, preferential treatment of non-union smoking employees might violate this criterion.

Generally, arbitrators have upheld partial smoking restrictions where business necessity can be shown -- usually safety or health reasons. Business necessity has included the risk of fire (Re Van Dresser, supra; Re Thibodeau-Finch, supra) and product contamination (Re CIP Inc. (1983) 11 LAC (3d) 375 (Hinnegan)), but it should be noted that these cases did not involve total smoking bans. It seems that total bans have been upheld where the special nature of the employer's operation makes it reasonable -- so far in health care and education. For example, smoking bans have been upheld at a cancer outpatient clinic (Re Thameswood Lodge, supra), a residence for handicapped persons -some with respiratory problems (Re Plainfield Childrens Home (1985) 18 LAC (3d) 267 (England)), and a school board where the determinative issue was the employer's exemplary duty as an educator (Re Board of Education for the City of Toronto, supra).

While these three decisions addressed the issue of a secondhand smoke hazard, clearly, the fragility of health care customers and the malleability of young minds were the overriding considerations. Whether the second-hand smoke evidence is enough, by itself, to uphold a smoking ban in an environment of healthy adults remains to be tested. In one case, although presented with such evidence, an arbitrator preferred to rely on the employer's alternative rationale of a fire hazard in finding the smoking rule reasonable, pointing out that the evidence of the risk was easier to assess (Re Thibodeau-Finch, supra).

With regard to the accommodation of smokers by the provision of separate smoking areas, one arbitrator addressed the issue in light of human rights laws and rejected the notion, stating that smoking is not a human right but "...can at best be viewed as a 'privilege' in the workplace, in the sense that employees have no implicit entitlement to demand...a facility or area in which they can smoke without interfering with the employer's operations..." although such an issue is bargainable (Re Plainfield Children's Home, supra). Agreeing with this conclusion, another arbitrator rejected the argument that a smoking policy was discriminatory per se because it would likely result in inequitable enforcement (Re Ottawa General Hospital, supra).

With regard to accommodation of sensitive non-smokers, in Re de Havilland Aircraft of Canada, supra (see Claims for Disability Benefits), an arbitrator upheld a previous decision that the employer did not have a duty to accommodate an employee who had a particular sensitivity to tobacco smoke by moving her desk, since the location of employees is a management right.

V. CONCLUSION AND RECOMMENDATIONS

The smoking issue has given employers a new social responsibility with significant implications for the workplace. The resulting restrictions on personal freedoms that might not be tolerated elsewhere in society are perhaps consistent with the special nature of an industrial enterprise which has never placed such high value on those freedoms (Soltan, 1985).

Smoking is not the first issue to present employers and unions with the challenge of balancing competing interests but it is certainly the first that pits the rights of the majority so blatantly against those of the minority. Perhaps, unlike other divisive workplace issues, such as mandatory retirement, daycare or pay equity, there is not much pretense of understanding or sympathy for the position of the smoking minority. And, although employers may not hesitate to yield to the will of the majority to fulfill this social obligation, unions still have a duty to represent all members, regardless of whether society—at large believes smokers have no rights. Until one public policy dominates, unions' greater experience than traditionally autocratic management at balancing such rights may leave them, if not better equipped, then more understanding of the issues.

The social dimension of the issue is complicated by the fact that, as the U.S. Surgeon General and others have pointed out, it is largely a white-collar phenomenon. New smoking policies concerning health are simply not as common in blue-collar environments where, not only are smoking rates higher, but the population is also at higher risk for exposure to industrial hazards, in some cases exponentially increasing the risk of disease. On the one hand, it may be objectionable to think that white-collar fitness values are being imposed on lower status employees; on the other, experience with long latency occupational diseases seems to justify a strong proactive nonsmoking stance.

The legal implications tend to be more straightforward. Currently, the position of the healthy non-smoker still hinges on the strength of the medical evidence about second-hand smoke as a general hazard -- witnessed by the hesitation of the courts and human rights and arbitration boards to burden employers with accommodating them. And, despite the clear evidence that sensitive non-smokers -- one in five Canadians -- have a serious problem with environmental tobacco smoke, they have no protection at common law or health and safety laws, which do not recognize an employer's obligation to adjust the workplace to the disabled. Ironically, sensitive individuals also have limited protection under workers' compensation and human rights laws because of the temporary nature of the disability and the costs of accommodation, respectively. Smokers, however, would appear to have even less legal protection than non-smokers, as it is unlikely that human rights legislation would be interpreted to their advantage.

To a great extent, the legal quandaries will be resolved by public policy as workplace smoking laws are enacted. However, legislators and employers alike should be cognizant that there are limits to the effectiveness of legal regulation. The effect of such laws may be to shift the social burden onto the individual without consideration for the effects of alienating work or lifestyle factors (Chapman Walsh and McDougall, 1988), such as family smoking status and other addictive behaviours, that make rehabilitation difficult.³⁷ To ensure their social obligation is successfully met, employers can make smoking restrictions effective by combining them with treatment for smokers.

Evaluation of worksite smoking cessation programs has shown that altering smoking behaviour is complex. In light of their modest success, these programs should be designed to fit varying worksite norms and attitudes towards smoking (USDHHS, 1987) as well as tailored to individual needs and concerns. Employees should be supported before, during and after the decision to stop smoking. While studies show that the presence of incentives tends to improve participation rates in cessation programs, the absence of co-workers' support probably reduces quit rates (USDHHS, 1987), and evaluators state that non-smokers and families should be enlisted to support smokers' attempts to quit (USDHHS, 1987). Workplace programs appear to have better quit rates than community programs, although better evaluation of these programs is still needed (USDHHS, 1987). The most common workplace approaches to cessation have been education, self-help information, counselling and group support sessions.

It is important for employers to put in place policies and enforcement mechanisms that will protect non-smokers from the long-term risk of disease and to help reduce smoking rates. However, because smoking policies are an entirely new area of workplace regulation and there is, as yet, no conclusive evidence that they are associated with reduction in smoking prevalence or attempts to stop smoking (USDHHS, 1986, 314), policymakers should combine smoking restrictions with intervention programs and supportive actions from management, unions and co-workers.

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ENDNOTES

¹ In support of the view that cost is not a primary issue, I rely on the U.S. Surgeon General's 1986 report, which cites three different surveys showing that, "economic considerations do not appear to be a major reason why businesses adopt smoking policies" (USDHHS, 1986, 296). This is consistent with reasons given by both employers in my case studies. The U.S. report also notes that recent studies indicate that, although it is generally agreed that employees who smoke cost their employers more than do non-smoking employees, there is as yet little evidence that implementing policies will reduce the extra smoking-related costs.

² Several surveys confirm that a higher percentage of non-smokers than smokers are annoyed by cigarette smoke and the most frequently reported symptom is eye irritation (House, 1985, iii).

³ Sidestream smoke refers to the mixture of chemicals released into the air between puffs from the burning tip of the cigarette, cigar or pipe. It is the main source of environmental tobacco smoke, accounting for 80 to 90 percent of the total release of most chemicals (Balter et al., 1986).

⁴ Mainstream smoke is that inhaled by the smoker during a puff. Filtering of mainstream smoke through the cigarette and the smoker's lungs, coupled with the less efficient combustion that creates sidestream smoke (because of lower temperatures at the tip between puffs), means that sidestream smoke contains greater amounts of the organic constituents of smoke, including some carcinogens. For example, in contrast with mainstream smoke -- per milligram of tobacco burned -- sidestream smoke contains greater amounts of ammonia, benzene, carbon monoxide, nicotine and the carcinogens 2-naphthylamine, 4-aminobiphenyl, N-nitrosamine, benz[a]anthracene and benzo-pyrene (USDHHS, 1986, 7).

⁵ The best available biological marker for long-term exposure to cigarette smoke is cotinine, the major metabolite of nicotine. It is a better measure than nicotine because it has a longer plasma half-life and reaches higher concentrations in plasma and urine, facilitating identification.

Matsukura et al. measured the urine cotinine levels in 392 smokers and 472 non-smokers and related this to the "smokiness" of their environment. Non-smokers living with those who smoked more than 40 cigarettes per day had urinary cotinine levels nearly identical to those of smokers of less than three cigarettes per day. These levels increased with the number of smokers in the workplace (House, 1985, 8).

⁶ Epidemiological studies look at the longer-term development of diseases known to be associated with a particular agent.

⁷ Epidemiological studies by Hirayama (1981, 1983); Trichopoulos et al. (1981, 1983); Correa et al. (1983); and Sandler et al. (1985) are the most frequently cited to show the pattern of association between passive smoking and lung cancer (House, 1985).

⁸ Studies by White and Froeb, 1980 and Kaufmann et al., 1977 (House, 1985, 40).

⁹ Studies by Comstock et al., 1981 and Shilling et al., 1977 (House, 1985, 40).

¹⁰ The frequently cited study by White and Froeb looked at specific indices of lung function in 2100 middle-aged subjects. Both male and female non-smokers who were chronically exposed to tobacco smoke had statistically significant lower maximal mid-expiratory flow rates than non-smokers who were not exposed to second-hand smoke. Non-smokers in smoke-free working environments had the highest values on lung function testing; passive smokers, smokers who did not inhale and light smokers all scored similarly and significantly lower; heavy smokers scored the lowest.

They concluded that chronic exposure to tobacco smoke in the work environment is deleterious to the non-smoker and significantly reduces small-airways function. The effect on non-smokers exposed to tobacco smoke was comparable to that seen in smokers inhaling one to 10 cigarettes per day (House, 1985).

¹¹ The existence of a specific respiratory allergy to tobacco smoke has not been definitely established, although individuals with a history of allergies to other substances are more likely to report the irritating effects of tobacco smoke. Some state it is uncertain whether this is a psychological or physiological response (House, 1985; Lehrer et al., 1986). Others claim that whether a "specific allergy" can be proved or not is "academic nonsense" -- one need only look at a sensitive non-smoker's reaction in the presence of tobacco smoke (Wigle, August 1988, telephone conversation).

For those suffering from angina pectoris (sudden intense chest pain often accompanied by feelings of suffocation, caused by momentary lack of adequate blood supply to the heart muscle), there is evidence that increased levels of carboxyhemoglobin, capable of being produced by passive smoking, can cause anginal pain to develop more quickly during exercise in some individuals with coronary heart disease (House, 1985, 25).

Finally, there is also evidence from population surveys that some symptoms in asthmatics, such as wheezing, are precipitated by passive exposure to tobacco smoke. However, studies designed to show changes in lung function in asthmatics passively exposed to tobacco smoke have produced equivocal results (House, 1985). Dr. House adds that changes in lung function are possibly limited to a subgroup of asthmatics who are especially sensitive to tobacco smoke and is probably related to non-specific irritation of "twitchy" airways or a psychological reaction to the smell and/or sight of cigarette smoke rather than to a specific allergy to tobacco smoke components.

¹² A good example of the nature of this lobby is provided by

The National Program to Reduce Tobacco Use, which was set up in 1985 with the purpose of uniting groups to develop "an effective, cohesive and comprehensive program to reduce tobacco use." Membership at April 1987 comprised: Health and Welfare Canada; provincial/territorial health departments; Canadian Cancer Society; Canadian Heart and Stroke Foundation; Canadian Lung Association; Canadian Council on Smoking and Health; Canadian Public Health Association; Canadian Medical Association; and Physicians for a Smoke-Free Canada. The program's goals are:

1. To protect the health and rights of non-smokers
2. To help those who are non-smokers to stay smoke-free
3. To encourage and help those who want to quit smoking to do so. Strategies pursued include promoting legislative changes, improving information and services, supporting citizens' groups and research (Associated Press, April 22, 1987).

¹³ Smoking policies were also found to be slightly more common in large companies than in small businesses. In addition, more policies and more recent policies were being adopted in non-manufacturing industries (finance, insurance, health care, pharmaceuticals). This is said to reflect the shift from blue-collar industries and the change in policy orientation from workplace safety to employee health (USDHHS, 1986, 299).

¹⁴ Environmental tobacco smoke is the mixture of exhaled mainstream smoke and sidestream smoke. It comprises both gases and particles and contains more than 3800 chemical compounds of which more than 50 are known carcinogens. The effects of many of these chemicals are unknown and almost nothing is known about their interactive effect with other agents (Kirkbride, 1986, 2).

¹⁵ Bioassays are a method of determining the concentration, activity or effect of a chemical by testing its effect on a living organism and comparing this with the activity of an agreed standard (Collins English Dictionary, 1979).

¹⁶ The particulate phase, as opposed to the gas phase, of tobacco smoke is a concentrated combination (aerosol) of particles and water droplets. The particles are composed of a wide variety of organic and inorganic chemicals and are dispersed in the gas. Most of the important carcinogenic and otherwise toxic agents in cigarette smoke are found in the particulate phase (Wigle et al., 1987, 152).

¹⁷ Compare The Act Respecting the Protection of Employment in Sweden which seeks to increase individual Job security by providing employees with extensive protection from unfair dismissals. The Act asserts that an employee has a right to remain employed and is no longer terminable at will. The concept of normalization is an important policy of the Act as well as the Swedish welfare system and work is considered necessary for the integration of the individual into society. The Swedish approach recognizes that an adult derives not only economic gain from employment, but also increased self-esteem and a stronger personal identity. Thus the Act's purpose is to avoid the creation of two labour markets, one for the healthy and another for the sick. A one-tiered, normalized labour force means that industry must bear some of the social responsibility for handicapped employees. And instead of having the state bear the huge burden of paying benefits to the disabled, the Act mandates that employers must occasionally put up with employees whose performance is less than optimal (Rand, 1982).

¹⁸ Bill C-51 does not relate to the workplace. It prohibits the sale of tobacco advertising and phases out tobacco promotion. Its constitutionality is being challenged under the Canadian Charter of Rights and Freedoms by the tobacco industry.

¹⁹ Providing an opinion to the Non-Smokers' Rights Association of Toronto on the issue of smokers' rights, Canadian law professor Walter Tarnopolsky noted:

"It would be misdirected to equate the 'right' to smoke with such fundamental liberties as the right of free speech, the right of assembly, freedom of religion, etc....A person's freedom to act must certainly be limited when such acts injure or tend to injure others. The claim of a person to a right to unpolluted air must take precedence over a claim to a right to smoke in public....A person's 'right' to smoke might more accurately be described as a limited privilege." (Dewey, 1985, 26).

²⁰ In *Gaspar v. Louisiana Stadium and Exposition District* (1976), the U.S. Court of Appeals for the Fifth Circuit --rejecting the plaintiffs' argument that their First, Fifth, Ninth and Fourteenth Amendment rights were violated by allowing smoking in the New Orleans Superdome -- noted that the Constitution did not provide Judicial remedies for every social and economic ill (BNA, 1987). Since *Gaspar*, claims to a smoke-free workplace have been denied by the U.S. District Court for the District of Columbia in *Federal Employees for Non-Smokers' Rights v. United States* (1978) and the U.S. Court of Appeals for the Tenth Circuit in *Kensell v. State of Oklahoma* (1983), which declared, "We are certain that the United States Constitution does not empower the federal judiciary...to impose no smoking rules in the plaintiff's workplace" (BNA, 1986, 31).

²¹ The *Shimp v. New Jersey Bell Telephone Co.* (1976) decision is frequently cited by non-smokers' rights advocates as a landmark because it recognized the danger of tobacco smoke to non-smokers in general, not just to those with particular sensitivities like the plaintiff. In its injunction requiring the company to restrict smoking to a non-work lunchroom, the New Jersey court noted:

"An employer is under an affirmative duty to provide a work area that is free from unsafe conditions....The evidence is clear and overwhelming. Cigarette smoke contaminates and pollutes the air, creating a health hazard not merely to the smoker but to all those around him who must rely on the same air supply."

This decision was confirmed in *Smith v. Western Electric Co.* (1982) where the Missouri Court of Appeal, recognizing the plaintiff's hypersensitivity to tobacco smoke, also pointed out the employer's duty "to use all reasonable care to provide a reasonably safe workplace....and to protect the employee from avoidable perils."

²² Critics of the *Shimp* decision cite *Gordon v. Raven Systems and Research, Inc.* (1983), where the District of Columbia Court of Appeals ruled that although an employer owes its employees a duty to provide a reasonably safe workplace, "[T]he common law does not impose upon an employer the duty or burden to conform his workplace to the particular needs or sensitivities of an individual employee." This decision is distinguished from *Shimp* and *Smith* because the plaintiff failed to present scientific evidence of the harmful effects of tobacco smoke on non-smokers in general and relied instead on the *Shimp* decision (BMA, 1986).

²³ Opinion cited from Sack et al., 1984. "The Rights of Non-Smokers in the Workplace." *Labour Law News* Vol. 10. 1, January.

²⁴ *Canadian Employment Safety and Health Guide*, part I, No. 39, February 1984, CCH Canadian Limited.

²⁵ *Canadian Employment Safety and Health Guide*, Part I, No. 44, July 1984.

²⁶ Letter dated August 27, 1986, from City of Toronto Department of Public Health to the Charman, Workers' Compensation Board, Ontario. Cited in the participant workbook for the CUPE 4th National Health and Safety Conference on Smoking in the Workplace, November 17-19, 1986.

²⁷ *Peter Wilson v. Treasury Board (Health and Welfare Canada)*, Public Service Staff Relations Board Decision No. 166-2-14734, December 20, 1985. CCH Canadian Employment Safety and Health Guide, New Developments, (1986) para. 95,043.

²⁸ *Canadian Employment Safety and Health Guide*, Part I, No. 53, April 1985.

²⁹ Alberto Timpauer, Air Canada, and Labour Canada Safety

Officer, Canada Labour Relations Board file No. 950-34, Decision No. 502, March 14, 1985. *Canadian Employment Safety and Health Guide*, New Developments (1986), para. 95,022.

³⁰ Alberto Timpauer v. Air Canada and The Canada Labour Relations Board, Decision of the Federal Court of Appeal. CCH Canadian Employment Safety and Health Guide, New Developments, (1986) para 95,046.

³¹ *Parodi v. Merit Systems Protection Board*, 1982 (BNA, 1986, 35).

³² The Ontario Workers' Compensation Board currently does not have a formal policy regarding sensitivity to tobacco smoke and deals with claims on a case-by-case basis. In principle, because disability from tobacco smoke is considered "injury from a co-worker," it would be covered by the Act. Problems in assessing these cases occur specifically because the sensitive individual is usually only disabled as long as he is exposed to smoke and, in many cases, may not be even partially disabled upon returning to work (e.g., see *Re de Havilland*, supra). General problems arise because the Act does not adequately define occupational diseases to anticipate the more complex issues. The Occupational Diseases Department is trying to develop a policy to cover diseases that subside when the individual is removed from the injurious agent (Telephone conversation with William Handler, Occupational Policy Branch, Workers' Compensation Board, Toronto, August 1988).

³³ Focus on Canadian Employment & Equality Rights, Vol. 1, No. 15, 117.

³⁴ *Brooks v. Trans World Airlines, et al.* (1977) (BNA, 1986, 35).

³⁵ At the high end of employer liability for second-hand smoke injury lies the spectre of the Swedish Social Insurance court that awarded occupational injury compensation to the family of a 55-year-old non-smoker who died of lung cancer after having shared an office with six smokers for 18 years. The court's "decision was justified under Swedish insurance law by the overwhelming probability that passive smoking caused the injury" (Canadian Industrial Relations & Personnel Developments, No. 52, Dec. 1985, 915-916).

³⁶ The U.S. asbestos manufacturer, Johns-Manville was prevented by its collective agreement from adopting a no-smoking policy in its manufacturing plant despite the fact that the company produced medical evidence showing that smoking employees in its purified asbestos plant were 92 times more likely to die from lung cancer than non-smoking employees. In another case, when a study revealed that smokers exposed to a synthetic fibre in its plant had higher adverse health effects than non-smokers, U.S. Gypsum Acoustical Products introduced a policy requiring all employees, except those in the corporate head office, to stop smoking if they want to keep their jobs. The policy has not yet been challenged (Crocker, 1987).

³⁷ One scholar notes that it is in the public interest to prohibit even discrimination on such grounds as criminal record or alcoholism "...because such discrimination inhibits rehabilitation, which is as important to the community as it is to the individual." (Berlin at al. 1987 (op. cit. Gibson)).



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