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OUR CONDO EXPERTISE

## **A DIRECTOR'S GUIDE TO SMOKING AND CANNABIS IN CONDOS**

PRACTICAL ADVICE, CREATIVE  
SOLUTIONS, COST EFFECTIVE

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# A DIRECTOR'S GUIDE TO SMOKING AND CANNABIS IN CONDOS

In the 1950's and 1960's smoking was perceived as glamorous and sophisticated and was permitted everywhere.

As more scientific evidence became available confirming the danger posed by smoking and second-hand smoke, the rights of smokers have steadily been eroded.

With the legalization of cannabis, a new challenge arises for condominium corporations.

This pamphlet provides practical advice that directors need to know about smoking and cannabis in condos.

## THE CANNABIS ACT

As of October 17, 2018, cannabis is legal in Canada. In Ontario, people over the age of 19 will be permitted to smoke recreational cannabis and cultivate up to 4 cannabis plants in their residences. While the federal government has provided the framework for the legalization of cannabis, it is up to the provinces and territories to determine how cannabis will be distributed and sold within their jurisdictions – and up to condominium corporations to govern cannabis use and growth in the units and common elements.



# **SMOKE FREE ONTARIO ACT**

The Smoke-Free Ontario Act (the “SFOA”) prohibits smoking or holding lighted tobacco, lighted cannabis, or electronic cigarettes in any “enclosed public place” and in any “indoor common area in a condominium”.

So, what does this mean in the context of condos?

- Smoking tobacco, cannabis or using electronic cigarettes is prohibited in any indoor common area in a condo, including, elevators, hallways, parking garages, party or entertainment rooms, laundry facilities, lobbies and exercise areas.
- The SFOA does not apply to units in condos – smoking cannabis is permitted within units, subject to any restrictions in the declaration or rules;
- Exclusive-use common elements such as balconies, patios or terraces are similarly not captured by the SFOA; and
- Outdoor common elements that are not enclosed by a roof are also not captured by the SFOA.

The ability to smoke tobacco or cannabis, and cultivate cannabis plants in condos, raises concerns for condos. Cannabis and tobacco smoke can migrate and cause a nuisance and health risks to neighbours. Smoking causes health problems, including second-hand smoke and increases the risk of fire. When it comes to cultivating cannabis, there are concerns with (i) mould and fungi growth that may occur from the increased humidity; (ii) heat that is required to grow cannabis plants; and (iii) odour of the plants.



## CITY OF TORONTO BY-LAW

The City of Toronto has a by-law that prohibits smoking in most indoor public places. It also has a provision making it an offence to smoke within a 9-meter radius surrounding any entrance or exit of a public building. This includes multi-residential buildings such as condos. Many other municipalities have similar by-laws.

## NUISANCE

If there are any complaints about smoke migration into the common elements or the units and the condominium corporation does not have specific rules that address smoking, the board would have to rely on any general provision in its declaration or rules that prohibits the creation of a nuisance. It is, however, preferable to have specific smoke provisions in the rules to minimize any chances of an owner challenging the applicability of the nuisance provision.

Nuisance has a specific meaning in law – it is an unreasonable interference with the use and enjoyment of property. It is not any interference with the use and enjoyment of property that would constitute a nuisance, as some interference has to be tolerated by neighbours. Given the proven health effects of second-hand smoke, this threshold would likely be met with a minor amount of smoke migration.

To prove nuisance, there does not need to be intent, negligence, or even fault of the person causing the nuisance. Only the nuisance has to exist.



# WHAT TO DO ABOUT SMOKING-RELATED COMPLAINTS?

Condominium corporations should not ignore smoke complaints! They should be taken very seriously and investigated and acted upon swiftly. Those who make smoking related complaints should not be branded as complainers.

## Smoke Migration Complaints

First, the corporation has to determine where the smoke is coming from and the reason that smoke is migrating. Sometimes, this can be as easy as walking up next to a unit door and smelling the smoke. Other times, it may be more difficult and will require expert advice, as it involves smoke travelling through ducts, vents or common elements. Where expert advice is obtained, it should not be ignored.

Having owners keep logs and report smoke migration expediently can provide useful information to assist in determining the source and cause of smoke migration.

Section 90 of the Act imposes a duty on the corporation to maintain the common elements. Where smoke migration occurs as a result of a deficiency in the common elements, the corporation is obligated to carry out reasonable remedial work in a timely manner. The corporation should obtain expert advice as to the extent of the remedial work that is required, having regard to the age and construction of the building. The courts have held that the standard imposed on a Corporation is one of reasonableness, not perfection. If a corporation fails to act upon the advice and recommendations of its experts, it risks being found in breach of its duty to maintain the common elements.



Where there is no deficiency in the common elements that is causing the migration of smoke, the corporation's documents may contain provisions that will enable the corporation to require that the smoking unit owner pay for the costs of any work needed to the unit and/or to the ventilation system in order to prevent the smoke from permeating into the common elements or to other units of the building.

Alternatively, the governing documents may require residents not to permit smoke to migrate or may prevent nuisance from occurring; in this scenario the corporation should enforce the governing documents against the smoker to prevent the smoke from migrating, including sending compliance letters, and if necessary, commencing legal proceedings.

### Complaints About Cigarette Butts

Cigarette butts and cannabis thrown from balconies are the source of many issues for condos. Most importantly, a significant safety and fire hazard is created when cigarettes and cannabis butts are thrown and land on other balconies or people below.

Management and boards have the challenge of determining where the cigarette and cannabis butts come from. Owners should be encouraged to report any sighting of people throwing cigarettes and cannabis from balconies or of these items landing on their balconies to management.



# HOW TO MAKE A CONDOMINIUM SMOKE-FREE


Although the SFOA and the Cannabis Act do not prohibit smoking tobacco and cannabis in the units and exclusive-use elements, the right to smoke or vape in these areas may be restricted or prohibited by the declaration or rules.

A complete ban on smoking on the property, including the units, remains a controversial issue, but can be accomplished. As condos and units are not designed to be airtight, going smoke-free is also the best way to ensure that occupants are protected from the threat of second-hand smoke migration.

Generally speaking, a condominium corporation can become smoke-free in two ways, by: (i) amending the declaration; or (ii) implementing rules.

For corporations that want to go completely smoke-free, amending the declaration remains the preferable method, as there a declaration provision prohibiting smoking would undoubtedly be valid and enforceable. This would require the written consent of the owners of 80% of the units and thus, can be a challenging undertaking to achieve.

The board of directors has the authority under the Condominium Act, 1998 (the "Act") to enact reasonable rules created for the safety, security and welfare of the owners and the property or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and other units.



Accordingly, a quicker, although arguably riskier and more controversial way to ban smoking and the cultivation of cannabis in condos is by implementing rules. All rules become effective after 30 days from the date the rule was circulated unless the board receives a requisition from owners who own at least 15% of the units. Any rules prohibiting smoking should include cannabis and tobacco in order to minimize any chances of owners challenging the applicability of the smoking provisions, as both cannabis and tobacco can create migration issues.

Rules relating to smoking can, amongst other things: prevent owners from permitting smoke to migrate to other units or the common elements; require owners to take steps necessary to rectify smoke migration; prevent throwing of cigarette or cannabis butts off balconies; and prohibit smoking and vaping in units and on exclusive use common elements.

When passing smoke-free rules, it is recommended to consider whether to grandfather existing owners and residents who smoked in their units prior to the corporation's smoke-free rules becoming effective; depending on the circumstances unique to your condo, grandfathering may help reduce the risk of the rules being challenged.

Corporations can also pass rules prohibiting the growth or cultivation of cannabis in the units and common elements, and regulating the delivery of cannabis to the units.

Under the Human Rights Code, corporations will also have to accommodate owners and residents who require cannabis to treat a medical condition or a disability. In making an accommodation request, the corporation should request medical evidence confirming the owner's or resident's need to consume cannabis by means of smoking. A balancing of rights must be done to determine the appropriate course of action and what accommodation, if any, must be done by the corporation.







## NOTES

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## LASH CONDO LAW

### PRACTICAL ADVICE, CREATIVE SOLUTIONS, COST EFFECTIVE

We are committed to helping our clients make informed decisions and create strategies to successfully resolve condo issues.

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