

## Grandfathering Smokers

# Smoking in condos cloudy issue

By **Denise Lash**



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(August 7, 2019, 1:33 PM EDT) -- As more and more people choose to live the condo lifestyle and developers continue to build larger high density condominium projects, condo boards, managers and lawyers are now faced with some unique challenges.

One issue that has been the focus over the past year with the legalization of cannabis, is whether a condo corporation should or could impose restrictions on residents living in a condominium and if so, how far should those restrictions go.

Although the *Smoke-Free Ontario Act* applies to condo corporations, it only deals with the prohibition of smoking in indoor common areas. Whether a condo corporation chooses to further restrict smoking within certain other areas, such as outdoor spaces or within the units, is done

through either amending its declaration or enacting rules.

For many years condo residents in Ontario have been free to smoke tobacco within their units and often are permitted to do so on their balconies. Most standard condominium rules, however, prohibit smoking on outside common area spaces and some rules go so far as to prohibit residents from smoking on their own exclusive use balconies, terraces or patios.

Without rules restricting smoking, condo corporations would need to rely on "nuisance clauses" contained in the rules or in the declaration, in order to take steps to prevent a resident from continuing to smoke or to force the resident or unit owner to take measures so that the smoking does not interfere with others.

Condo corps often struggle with balancing of interests of residents. With diverse lifestyles and communities with different age groups, ethnic backgrounds and sometimes disabilities/health related issues — each with different expectations, coming up with the most appropriate rules is a very difficult task and may result in controversial and highly charged owners meetings.

The legalization of cannabis on Oct.17, 2018, resulted in many condo corporations making the decision to go entirely "smoke free" in their buildings — treating both tobacco and cannabis in the same manner. The position that many of us had taken prior to legalization, was that as long as a rule was "reasonable" that the rule should be enforceable.

Restrictions to outright prohibit smoking within a unit was usually not recommended — since preventing residents from doing something within their units that is not currently interfering with others — is not a reasonable restriction. If smoke should later interfere or impact on another person, nuisance provisions in the rules or declaration should be sufficient to remedy the situation.

Prior to legalization of cannabis, the general position taken by those advising condo corporations, was that outright prohibitions on smoking within a unit, could only be done by amending a declaration which requires 80 per cent consent in favour of this approach of all the voting units in a condo corporation.

However, with more and more concerns being raised about the impact that cannabis could have in condo corporations, with the assumption that more and more residents would smoke cannabis (more smoke penetration issues), residents would grow cannabis in their units (impact on common

elements due to moisture) and cannabis would be delivered to the concierge (liability issues should it get in the wrong hands), the position then shifted with many of us recommending to our clients to enact rules prohibiting smoking of tobacco and cannabis in units, cultivation of cannabis and in certain cases the delivery (or any combination of these) of cannabis.

For those condo corporations that have struggled with smoke penetration issues and issues with cigarette butts thrown off balconies — they welcomed this change.

Of course those residents who smoked prior to the rules being enacted were grandfathered and would be permitted to continue to smoke for the term of their residency or some other period as determined by the condo corporation.

Not all condo corporations felt that restrictions on smoking in units was appropriate for their communities and adopted rules that contained certain restrictions, such as a prohibition on smoking on exclusive use areas and/or cultivation of cannabis in units.

As the process for enacting rules involves circulating the rules to the owners and then giving owners 30 days to requisition a meeting and vote against the rule if they choose to, some condo corporations have had to drop or amend their non-smoking rules after hearing from their owners who vehemently opposed the non-smoking in units approach.

We are now seeing the impact these rules are having on condo communities.

In one case a condo corporation tried to pass non-smoking rules and the owners voted against it.

One owner who has a severe cannabis allergy lives in fear on a daily basis that she may suffer the effects of smoke penetration in the hallway or in her unit. This issue raised human rights concerns which forced the board to advise the owners that despite there not being rules, that owners are still prevented from smoking cannabis.

Another resident required cannabis to treat a terminal illness and needed to smoke cannabis rather than ingest it. An interesting issue and one that should be kept in mind that the *Human Rights Code* always plays a part when dealing with rules or other matters arising in a condominium and should always be considered.

Those with outright smoking prohibitions in units are now dealing with those residents that have been grandfathered and who registered their names with management.

The determination as to which units are grandfathered, is private information that other unit owners are not entitled to under the provisions in s. 55 of the *Condominium Act*. Monitoring which units are permitted to smoke and which are not along with trying to enforce breaches of these new rules, is the new challenge for condo boards and management and one that we will have to see how it plays out.

*The founder of Lash Condo Law, Denise Lash has over 25 years' experience as a condominium lawyer, is a director of Community Associations Institute (CAI) Canada and served as president for its first year. Denise has been qualified as an expert in condominium law in the Ontario courts and is a writer, lecturer and sought after by many media outlets for her expertise.*

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