

Bylaw Restricting or Prohibiting Smoking in a Multi-Unit Building

Questions & Answers

Association pour la santé environnementale du Québec-
Environmental Health Association of Québec (ASEQ-EHAQ)





***Please note that this document was prepared by the Environmental Health Association of Québec "ASEQ-EHAQ." It has been adapted from the report "*Smoking Bans in Residential Buildings: Exposure, Legislation and Social Acceptability*" issued by the Institut nationale de santé publique du Québec¹ (INSPQ). ***

With the launch of the strategy for a Tobacco-Free Quebec (2020-2025), the Quebec government hopes to reduce the number of smokers from 17% to 10% of the population. It is undeniable that a change of attitude has taken place in society as a whole towards smoking since its harmful effects on the health of smokers and non-smokers who are exposed to it are known. Not to mention that some people are very apprehensive about second-hand smoke since the legalization of cannabis.

Thus, even if building owners missed the boat in 2018 to introduce regulations prohibiting cannabis smoke, other means are available to them to limit, even ban, smoke in their building. This applies to both tobacco and cannabis.

1. Are you a smoker or non-smoker?

Even if you are a non-smoker, a resident of a building who does not smoke in his or her dwelling can be exposed to tobacco and cannabis smoke from his or her neighbors, which seeps in through open doors and windows, ventilation outlets such as the kitchen hood (*especially* when the ventilation system is common to numerous dwelling), and even cracks.

¹ Montreuil et al., (2015). "Smoking bans in residential buildings: exposure, legislative measures and social acceptability". Institut national de santé public du Québec, *Knowledge Review*, ISBN978-2-550-73251-8.

1.1 Cannabis

Concentrations well above detection limits of THC, the psychoactive substance in cannabis, have been found in the blood, saliva, and urine **of non-smoking individuals** exposed to second-hand cannabis smoke.²

While addressing the influence of ventilation (mechanical and natural), studies have shown that these concentrations are generally higher in poorly ventilated environments.³

1.2 Tobacco

Some findings by the INSPQ on the health impacts of tobacco smoke exposure on non-smokers:

- Exposure has been shown to increase the risk of respiratory and cardiovascular diseases, causes breathing difficulties, migraines, eye and throat irritation, and is a trigger for asthma.
- There is no safe level of exposure to tobacco smoke.
- Some of these health risks would be present even at very low levels of exposure.

- ⇒ Residents of dwellings that do not allow smoking inside their residence, but share a partition, as do 54% of private dwellings in Quebec, with another dwelling where smoking occurs, may be exposed to smoke infiltration.⁴
- ⇒ Some studies suggest that **partial smoking bans** (e.g., only allowed in dwellings, but not in common areas) are **associated with more smoke infiltration** into the residence of non-smoking residents who do not allow smoking in their homes. Bans on smoking in common areas would encourage smokers to smoke inside their homes, leading to more infiltration into neighbouring homes.⁵
- ⇒ A large majority of residents in buildings reporting smoke infiltration would be inconvenienced.⁶
- ⇒ In Quebec, a majority of non-smokers would prefer to live in a completely smoke-free building.⁷
- ⇒ Studies suggest that landlords are reluctant to make their buildings completely smoke-free, but that this can be overcome and is possible to achieve.⁸

² Poulin et al., (2018). "Can exposure to second-hand smoke from cannabis combustion be a health risk?" Institut national de santé public du Québec, *Environmental Health Information Bulletin*, (online : <https://www.inspq.qc.ca/bise/l-exposition-la-fumee-secondaire-issue-de-la-combustion-du-cannabis-peut-elle-constituer-un-risque-la-sante>).

³ Holitzki et al., (2018). "Health effects of exposure to second- and third-hand marijuana smoke: a systematic review". *Canadian medical association journal*, 5(4), E814-E822.

⁴ Société d'habitation du Québec (2010). "Logements privés selon le type de construction résidentielle". *Statistics Canada, 2006 census*. Compilation spéciale pour le compte de la SHQ (CO-1049), table n.42.

⁵ Wilson, K. et al., (2014). "Tobacco smoke incursions in multiunit housing". *American journal of public health*, 104(8), 1445-1453.

⁶ Study conducted outside of Quebec, in New York State, but reported by the Institut national de la santé publique du Québec: Montreuil et al. (2015), supra note 1.

⁷ Findings from the Institut national de la Santé publique du Québec study on smoking bans in residential buildings: Montreuil et al., (2015), supra note 1.

⁸ Studies conducted outside of Quebec, but reported by the Institut national de la santé publique du Québec: *Id.*

2. Are you exposed to second-hand smoke migration and infiltration?

In residential buildings, tobacco (and cannabis) smoke can enter through:

- ⇒ open windows and doors
- ⇒ gaps, cracks and crevices in walls, floors or ceilings
- ⇒ electrical outlets, telephones or cables
- ⇒ pipes and light fixtures
- ⇒ ventilation systems (*namely*, through the kitchen hood)

In Quebec, nearly half of non-smoking households report being strongly bothered by tobacco smoke odours entering their home, and most of them to the point of moving or seriously considering leaving their home because of the smoke infiltration.

In addition to the odour and immediate exposure, fine tobacco and cannabis particles that enter non-smoking homes by infiltration are deposited and accumulate on surfaces and furniture in indoor areas.⁹

3. What are the concerns of co-owners and directors/administrators?

The INSPQ has identified some of the main concerns about adopting a smoke-free by-law in residential buildings, including:

- ⇒ doubts about the legality of a smoking ban inside dwellings
- ⇒ questioning the discriminatory nature of such measures

For example, in Quebec, in 2012, nearly half of residents of residential buildings did not believe it was legal to require all dwellings to be smoke-free.¹⁰ Yet, this type of initiative is increasingly achieved in Canada and has been approved by Quebec courts.¹¹ Moreover, the demand from residents for this type of building by-law is an important motivation.

⁹ "Like wood burning, tobacco burning produces fine particles. Grilling a cigarette emits up to 332 particles smaller than 2.5 microns (one millionth of a meter) into a cubic meter of air, according to tests recently commissioned by the Quebec Coalition for Tobacco Control. These particles are not only harmful to health, they are also a basic ingredient of smog." INFO-TABAC, (online: <https://info-tabac.ca/fumer-ca-pollue/>).

¹⁰ Gagnon, C., (2020), *Building destination*, La copropriété divise, 5^e éd., Wilson & Lafleur / Yvons Blais, Cowansville, 2020, EYB2020COD17.

¹¹ *El-Helou c. Syndicat de la copropriété du 7500, 7502 et 7504 rue Saint-Gérard, Montréal*, 2019 QCCS 2238. See also *Kayal c. Jules Poitras Développement enr.*, 2020 QCTAL 8983, *Bangia c. Cap Reit GP inc., s.e.c./Cap Reit*, 2020 QCRDL 10918, and *Laforest c. Therrien*, 2020 QCTAL 11500.

3.1 Acquired rights and the "grandfather clause"

- Unlike Ontario, there is no legal requirement to insert a "grandfather" clause for "former" co-owners in a new by-law of the building that restricts the enjoyment and use of the co-owners.
- If a grandfather clause is not included in the by-laws of the building at the time of the creation of the co-ownership or the rental property, or inserted in a draft by-law of the building and then voted in favour at the general meeting of co-owners, there is generally no "acquired right":

Similarly, one may not cause a neighbor to suffer abnormal neighborly inconveniences or disturb the building's intended purpose if the building is held in co-ownership. Even though they are not written down, these principles apply before the adoption of a by-law wishing to reinforce them.¹²

- In 2019, the Superior Court of Quebec confirmed that there is no inalienable right (i.e., inherent and inviolable) to smoke in one's unit for each co-owner.¹³ It is not illegal to smoke in one's home, but it is not a right enshrined in the law.

4. What to do about second-hand tobacco and cannabis smoke migration problems?

In Canada, there is no provincial legislation that prohibits smoking inside private dwellings in residential buildings. However, 100% smoke-free buildings already exist in the private sector in all provinces.

- Owners and landlords have **the right to adopt policies that prohibit smoking in their buildings**, including the interior of dwellings.¹⁴

4.1 A Co-ownership by-laws for a smoke-free building

In divided co-ownership, the building by-laws stipulate the rules governing **the enjoyment, use and maintenance of the private and common portions of the building**. The modification of the by-laws of the building by the adoption of a draft by-law is subject to a vote of the assembly of co-owners.

Obviously, the legality and feasibility of a ban on smoking inside the residences and on balconies is a concern for the members of the condominium.

Nevertheless, this type of initiative is increasingly encouraged by society, even as the courts inform us of their legitimacy in Quebec.

¹² Gagnon, C., (2020), *Majorities Required to Adopt Decisions at a General Meeting of Co-owners*, La copropriété divisée, 5^e éd., Wilson & Lafleur / Yvons Blais, Cowansville, 2020, p.2, EYB2020COD17.

¹³ *El-Helou v. Syndicat de la copropriété du 7500, 7502 et 7504 rue Saint-Gérard, Montréal*, 2019 QCCS 2238.

¹⁴ Non-smokers' rights association & Smoking and Health Action Foundation (2010). Human rights and no-smoking policies for multi-unit dwellings. Non-Smoker's Rights Association. Available online: https://www.nsr-andf.ca/cms/file/files/Human_rights_and_discrimination_final.pdf.

In 2019, the Superior Court of Quebec had to rule on an anti-smoking building by-law adopted by a co-ownership in the decision *El-Helou v. Syndicat de la copropriété du 7500, 7502 et 7504 rue Saint-Gérard, Montréal*.¹¹

The Court confirmed the validity of such a by-law prohibiting smoking in the private dwellings, when adopted by 50% of the votes of the co-owners.¹⁵ A majority vote can be sufficient when second-hand tobacco or cannabis smoke can easily infiltrate from one unit to another and inconvenience the co-owners.

There would then be a rational connection between the prohibition and the exclusively residential usage of the building; the residential use of its private portion must be understood as use that preserves the right to life and the safety of the other residents, notably in the name of collective well-being.

In other words, the restriction imposed on the rights of a co-owner in the use of his private portion is justified by the residential vocation of the building promised to every co-owner as smoke is a nuisance to their residence.

***However, it is important to note that this situation is a case in point which was the subject of special proof: the non-airtightness of the building had been demonstrated. Before adopting or proposing a by-law prohibiting smoke in a condominium, it is customary to proceed with an expertise, for example by a building inspector or engineer, in order to note in an expertise, report the permeability defects in the building which allow second-hand smoke to migrate.

⇒ *The presence and persistence of cannabis and tobacco odours in common areas or non-smoking units is a good indication of the relevance of proceeding with an expertise since it indicates infiltration of second-hand smoke in the building and implies that the smoke is not contained in one place.*

¹⁵ Gagnon, C. (2020), *Majorities Required to Adopt Decisions at a General Meeting of Co-owners*, La copropriété divisée, 5^e éd., Wilson & Lafleur / Yvons Blais, Cowansville, 2020, EYB2020COD17:

On January 10, 2020, article 1096 of the Civil Code of Quebec was modified by the legislator to specify, in a **declaratory manner**, that the modifications made to the by-laws of the immovable are adopted by an absolute majority.

4.2 Certain rights of co-owners

The expression "The freedom of some ends where the freedom of others begins" illustrates that the interest of the collective takes precedence over the interest of the individual. This is especially true in the context of divided co-ownership where the co-owner must exercise his individual rights within a collective framework.

Although it is legal to smoke tobacco and cannabis in one's private portion and a co-owner, just like a tenant, can choose to assume the health risks related to smoking or marijuana, he cannot expect others to expose themselves to these risks¹⁶ and, at the same time, inconvenience them beyond the limits of the usual tolerance that a neighbor owes to others.¹⁷

- One cannot cause abnormal neighbourly inconveniences without harming the harmony within a community of co-owners.

"There is no absolute right to smoke in one's unit for each co-owner; on the contrary, the common law regarding neighbourhood disturbances, article 976 CCQ and the specific provision of article 1063 CCQ, in competition with the numerous judicial authorities linking the effects of second-hand smoke to the health of persons exposed to it, and the Charter of Human Rights and Freedoms and the right to life, security and integrity of the person which it enshrines, rather, it is the duty to refrain from smoking in environments where other people are likely to have their health affected by second-hand smoke, whether in the workplace, in hospitals or in residential premises such as [in co-ownership]", the Honourable Chantal Masse of the Superior Court in the *El-Helou* decision.

4.3 Measures to consider

In addition to the dialogue between co-owners, other means can be considered during the establishment of a smoke-free by-law project.

- The granting of a grace period to facilitate the transition towards the application of the new by-law and, thus, to allow co-owners to comply with it by taking certain actions in order to help them.
- Evaluating the possibility and feasibility of arranging an outdoor smoking area.
- Defining the type of substance and use that is prohibited (e.g., only smoke inhalation, unless for medical use, substances type, etc.).

¹⁶ Celier, F., (2019), Syndicat de copropriété côte d'azur phase I et II : prohibition totale du pot et du tabagisme, Regroupement des gestionnaires et copropriétaires du Québec. (Online: <https://fr.rgq.org/article-condoliation/prohibition-pot-tabac-copropriete>).

¹⁷ Civil Code of Québec (1991): sec. 976 and 1063 CCQ.



5. The potential benefits of a smoke-free building?

In addition to reducing residents' exposure to smoke and their health risks, including respiratory, cardiovascular, and cancer:

- 1) Savings in building maintenance and repair costs (cleaning, decorating, painting, clogging of ventilation and plumbing systems, etc.).
 - i. Smoking bans in only common areas do not eliminate smoke infiltration from other units, ventilation, and the building exterior.
- 2) Saves time and costs associated with cleaning the unit to eliminate smoke infiltration and odours.
- 3) Reducing Fire Risk (Canadian Association of Fire Chiefs, 2009).
 - i. Decrease home insurance costs; many insurance companies offer a discount if a property is "smoke-free".
- 4) Create a supportive climate for quitting or cutting down, especially for smokers who are considering it.
- 5) Improved air quality and circulation.
 - i. It is common for non-smokers to isolate their dwellings and themselves from second-hand smoke. Therefore, they do not use common areas or outdoor balconies. Nor do they open windows or use facilities that should be accessible to all, respecting everyone's rights.
- 6) Maintain the resale value of the home.
 - i. 74% of Quebec real estate agents and brokers say that it is more difficult to sell a home where smoking has occurred, mainly because of the odour (55%) and health concerns (31%).
- 7) Maintain a clean environment, free of cigarette butts and pollution.

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APPENDIX

TYPES OF SMOKE (DEFINITIONS CONSISTENT WITH TOBACCO AND CANNABIS SMOKING)¹⁸

Primary Smoke: Primary smoke is the smoke inhaled directly by smokers. This type of smoke contains potentially toxic combustion products, some of which are known carcinogens.

Second-hand smoke: second-hand smoke is a mixture of smoke exhaled by smokers and the smoke stream that emerges from combustion between puffs. It is usually associated with environmental tobacco smoke that is involuntarily inhaled by those around the smokers.

Third-hand smoke: Third-hand smoke consists of various chemical compounds adsorbed onto different substrates in the indoor environment (e.g., furniture, carpet, curtain, wall, floor, etc.). These are the constituents of smoke that persist for years in or on porous surfaces, even if the odor has long since dissipated. Some compounds, known as semi-volatiles, can be re-suspended in indoor air and create new contaminants when they react with oxidizing agents in the indoor environment (e.g., ozone).

¹⁸ Definitions provided by the Institut national de santé publique du Québec, (online : https://www.inspq.qc.ca/bise/l-exposition-la-fumee-secondaire-issu-de-la-combustion-du-cannabis-peut-elle-constituer-un-risque-la-sante?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Bise+%28Avis+de+parution+du+Bulletin+d%27informati+on+en+santé+environnementale%29) ;

See also Holitzki et al. (2018). “Health effects of exposure to second- and third-hand marijuana smoke: a systematic review”. *Canadian medical association journal*, 5(4), E814-E822.