Housing Bylaw

HOW TO IMPLEMENT A BYLAW RESTRICTING OR PROHIBITING SMOKING IN A MULTI-UNIT BUILDING

ASSOCIATION POUR LA SANTÉ ENVIRONNEMENTALE DU QUÉBEC-ENVIRONMENTAL HEALTH ASSOCIATION OF QUÉBEC (ASEQ-EHAQ)

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** This document was prepared for ASEQ-EHAQ and adapted from the document "*Protocol for Condominiums and Housing Co-operatives in Ontario*" developed by Smoke-free Housing Ontario **

- The following steps are guidelines only. Depending on the size and nature of the co-ownership or rental property, as well as applicable laws, the path to a smoke-free bylaw will vary.

- There is usually more than one method available to achieve residential second-hand smoke-free status.

- This document focuses on the development of building bylaws or rules intended to be included in a declaration of co-ownership or lease agreements.

1. LEGISLATIVE CONTEXT SURROUNDING CANNABIS AND TOBBACCO

1.1 LEGALIZATION OF CANNABIS

Since October 17, 2018, cannabis has been legal across Canada. In Quebec, the regulation of cannabis use includes several measures to protect the safety and health of the population. On this occasion, the *Act to tighten the regulation of cannabis* (the "Act") came into force on November 1, 2019.

The Act amends *the Cannabis Control Act* to prohibit anyone from smoking or vaping cannabis in any indoor or outdoor public place. In residential buildings, smoking cannabis is prohibited in some areas, including common areas of apartment buildings with two or more dwelling units.

It is important to note that the *Cannabis Control Act* provided transitional provisions to allow landlords to amend the terms of their residential leases before January 15, 2019, that is, 90 days after the Act came into force, in order to prohibit their tenants from smoking cannabis in certain premises, such as dwellings, balconies, common areas, storage rooms, garages or land. The landlord was required to provide the tenant with a notice of change describing this prohibition.

1.1.1 TRANSITIONAL PERIOD AND CANNABIS PROHIBITION

Before the legalization of cannabis and apart from the 90-day transition period, it was also possible for landlords to prohibit the use of smoking cannabis by tenants by amending the terms of their leases to include a prohibition on smoking cannabis inside their building. On this occasion, they had to deliver a notice of modification of the lease within the time limits prescribed by the Civil Code of Quebec to modify lease conditions.[1] As of October 17, 2018, any tenant of legal age to consume cannabis and has not received a notice of lease amendment following the Act is therefore entitled to smoke cannabis in their dwelling.[2]

However, for landlords who have missed the boat, the future is not without its challenges. The same is true for members of a co-ownership who were unable to take advantage of the measures provided for in the transitional provisions.

1.2 A TOBACCO-FREE QUEBEC

The *Tobacco Control Act* prohibits anyone from smoking in enclosed public places (section 2). This prohibition applies to enclosed common areas of a building with two or more dwelling units in co-ownerships. It should be noted that the expression "common areas" and "common portions" are not synonymous in the context of the *Tobacco Control Act*, which only applies to enclosed public areas of a co-ownership.

Therefore, the prohibition does not necessarily apply to every co-ownership common area, such as balconies. This ban also applies to outdoor patios and areas that are operated as part of a commercial activity. These same principles apply in the context of *the Cannabis Control Act* (section 12, paragraph 8).

Moreover, the year 2020 saw the Strategy for a Tobacco-Free Quebec (the "Strategy"). The Quebec government's goal is to reduce the smoking rate from 17% to 10% of the population by 2025. The Strategy is one of the latest initiatives in the fight against tobacco use.

The Quebec government recognizes that although fewer and fewer Quebecers are exposed to tobacco smoke, environmental tobacco smoke remains a significant problem. In fact, in 2015-

[1] Article 1942 of the *Civil Code of Quebec*, c. CCQ-1991 (C.C.Q.).
[1] Article 1942 of the *Civil Code of Quebec*, c. CCQ-1991 (C.C.Q.).
[2] LANGLOIS (Dec. 17, 2018), Cannabis: the impending end of the 90-day deadline for amending a residential lease," (online: https://langlois.ca/cannabis-larrivee-imminente-du-terme-du-delai-de-90-jours-pour-modifier-un-bail-logement/).

2016, among non-smoking adults, 4.3% were exposed to tobacco smoke at home, and 10.3% were exposed in public places, with exposure occurring on a daily or almost daily basis.[3]

[3] GOUVERNEMENT DU QUÉBEC (2020), ISBN: 978-2-550-86177-5 (PDF version), (online: https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/sante-services-sociaux/publications-adm/strategie/STR_19-006-04W_MSSS.pdf); see also LASNIER B., and S. O'NEILL (2019), "Disparities between Quebecers aged 18-34 and those aged 35 and over in cigarette use and exposure to environmental tobacco smoke, Institut national de santé publique du Québec, (online: https://www.inspq.qc.ca/sites/default/files/publications/2566_disparites_usage_cigarette_exposure_fume_environnement.pdf).

2. QUEBEC LEGAL REGIME APPLICABLE TO RENTAL HOUSING AND CONDOMINIUMS IN THE LEGISLATIVE CONTEXT

2.1 RENTAL APPARTMENTS

Applicants must apply to the Rental Housing Administrative Tribunal (the "Tribunal") for residential lease applications, formerly the Régie du Logement. The Tribunal governs the relationship between landlords and tenants. In addition to the litigation process, this adjudicative body also provides conciliation services to resolve disputes out of court.

The Tribunal's mission is mainly to decide disputes between landlords and tenants, inform citizens about the rights and obligations arising from the lease to prevent conflicts from developing simply because of ignorance of the provisions of the law, and promote conciliation in landlord-tenant relations.[4]

Generally, the Court of Quebec hears appeals from the Administrative Rental Tribunal (formerly the Régie du logement).

WHERE TO FIND MORE INFORMATION?

The Rental Housing Administrative Tribunal recently launched a web-based tool for landlords and tenants wishing to access legal information on the legal implications and practices related to their residential situation:

"The Administrative Housing Tribunal, in collaboration with the e-Justice Lab, is pleased to announce the release of **JusticeBot**, a free and innovative computer tool using artificial intelligence to simplify access to legal information about housing leases.

With **JusticeBot,** simply answering a series of factual questions about a dispute will provide legal information about its specific situation, concrete case law examples, as well as information about available resources that can help resolve it." [5]

⇒ Online: https://justicebot.ca/question/%231/

[4] *The Administrative Housing Tribunal Act*, c. T-15.01; Administrative Housing Tribunal, (online: https://www.tal.gouv.qc.ca/fr/a-propos/mission-et-competences).
[5] Administrative Housing Tribunal, (online: https://www.tal.gouv.qc.ca).

2.2 DIVIDED CO-OWNERSHIP

Co-ownership Litigation and disputes

Concerning disputes and conflicts in matters of co-ownership, the particular regime to which it is subject deserves some explanation.

Depending on the type of recourse or the plaintiff, such as **the co-owner of the Syndicate of co-owners**, the legal recourse may be heard by the Court of Québec – when an amount is claimed which is less than $15,000 without interest – or by the Superior Court for the contestation of an amendment to the declaration of co-ownership, for example.

That said, under a recent amendment to the Act, a Superior Court judge could make decisions where co-owners are unable to do so at an assembly of co-owners.[6]

In addition, it is now possible for any co-owner or director to ask the court to annul or, exceptionally, to modify a decision of the board of directors if it is biased or if it was made with the intention to harm the co-owners or disregard their rights. The action must, on pain of forfeiture, be brought within 90 days of the decision of the board of directors.[7]

Similarly, if the directors are unable, because of an impediment or because of the systematic opposition of some of them, to act by the majority or in the proportion provided for, the court may, on the application of a director or a co-owner, make any order it considers appropriate in the circumstances.[8]

In the case of a **tenant in a co-ownership**, the Housing Administrative Tribunal is generally the competent body.

Summary of the legal framework of divided co-ownership

The **legal structure of co-ownership** is divided into two distinct modalities: divided co-ownership and undivided co-ownership. In this document, we will deal with residential divided co-

[6] LACOPROPRIÉTÉ.INFO, *Le fonctionnement de l'assemblée des copropriétaires*, Changements législatifs, ISSN 2369-5390, (online : http://www.lacopropriete.info/main.cfm?l=fr&p=14_100),(consulted on August 10, 2021).

[7] Article 1086.2 C.C.Q; new article introduced by article 46 PL 16 in C. BÉLAND and S. CROISETIÈRE, "Aide-mémoire relative aux modifications législatives apportées au code civil du québec en matière de copropriété divise (PL 16, PL 141, PL 41, DÉCRET 442-2020 ET ARRÊTÉ 2020-032)", Chambre des notaires du Québec, June 13, 2020, (online: https://naimgs.s3.amazonaws.com/cdn/FIVE/10343/sGvLhdTT920Nt5rnj6p8_aide_memoire_07_05_2020.pdf?utm_campaign=606571_microsite_MINUTE_%7C_4_juin_2020_HTTPS_-_Copie&utm_medium=email&utm_source=Message@cnq-All_Users).

[8] Article 1086.3 C. c.Q; new article introduced by article 46 PL 16 in C. BÉLAND and S. CROISETIÈRE, supra note 6.

ownership. Although there are many different forms of residential co-ownerships, the two main types of residential co-ownerships are high-rise apartments and townhouses. In common parlance, they are often referred to as "condos" or "condominiums."

The **divided co-ownership** is governed by a **declaration of co-ownership**:

⇒ The directors, co-owners, tenants, and occupants of the divided co-ownership have a duty to respect and enforce the declaration of co-ownership.

⇒ For the tenants and occupants, this duty exists insofar as they have received a copy of the bylaws of the building, part of the declaration of co-ownership prescribing the conditions of enjoyment and use of the common portions and private portions.[9]

⇒ As for the co-owners, they are required to respect the entire declaration of co-ownership as soon as they sign the deed of sale of their fraction.

Furthermore, it is impossible to talk about the system of co-ownership without mentioning the **syndicate of co-ownership** (the "Syndicate"), which includes all the co-owners subject to the declaration of co-ownership.

⇒ Managed by a board of directors and an assembly of co-owners, the Syndicate must, by law, decide on all important matters relating to the co-ownership.

⇒ In fact, it is a legal entity constituted by the community of co-owners. Its purpose is the preservation of the entire building, the maintenance and administration of the common portions, the safeguarding of the rights pertaining to the building or the co-ownership, and all operations of common interest.

⇒ The Board of Directors is composed of one or more administrators who manage the Syndicate's affairs and make decisions regarding the usual operations of the co-ownership.

Given the nature of the system of divided co-ownership, co-owners exercise their individual rights within a collective framework.

⇒ Moreover, the Quebec Court of Appeal has recalled on numerous occasions that the rights of co-owners must sometimes give way to those of the community represented by the Syndicate.[10]

[9] Article 1057 C.c.Q.

[10] *Bourbonnais v. 9168-3615 Québec inc.,* 2013 QCCA 1511.

⇒ This observation stems from the fact that life in a co-ownership has a definite communal or social aspect that does not fit well with the absolute nature of the right of sole ownership.[11]

In the same vein, it should be noted that **the system** of divided co-ownership has undergone **numerous legislative changes** over the last five years (2016 to 2021).

⇒ Indeed, the Quebec legislator, the law-making authority, has adopted several laws and regulations. Some legislative amendments prescribe new rules to be followed, while others clarify old guidelines in the field of co-ownership.

⇒ Among these legislative projects[12]:

- An *Act to improve primarily the supervision of the financial sector, the protection of deposits of money and the operating regime of financial institutions* (referred to as "Bill 141"),
- An *Act to provide a framework for building inspections and divided co-ownership, to change the name of the Régie du logement and to improve its operating rules, and to amend the Act respecting the Société d'habitation du Québec and various legislative provisions concerning municipal affairs* (referred to as "Bill 16"),
- An *Act relating primarily to the implementation of certain provisions of the budget speeches of March 17, 2016, March 28, 2017, March 27, 2018, and March 21, 2019* (referred to as "P.L. 41"); and
- The *Regulation establishing various measures respecting divided co-ownership insurance and amending the Regulation respecting certain transitional measures for the application of the Act primarily intended to improve the supervision of the financial sector, the protection of deposits of money, and the operating regime of financial institutions* (the "Financial Regulation").

[11] *Lord* v. *Construction Serricinc.*, 2008 QCCA 398.

[12] https://naimgs.s3.amazonaws.com/cdn/FIVE/10343/sGvLhdTT920Nt5rnj6p8_aide_memoire_07_05_2020.pdf?utm_campaign=606571_microsite_MINUTE_%7C_4_juin_2020_HTTPS_-_Copie&utm_medium=email&utm_source=Message@cnq-All_Users C. BÉLAND and S. CROISETIÈRE, "Aide-mémoire relative aux modifications législatives apportées au code civil du Québec en matière de copropriété divise (PL 16, PL 141, PL 41, DÉCRET 442-2020 ET ARRÊTÉ 2020-032)", Chambre des notaires du Québec, June 13, 2020, (online: https://naimgs.s3.amazonaws.com/cdn/FIVE/10343/sGvLhdTT920Nt5rnj6p8_aide_memoire_07_05_2020.pdf?utm_campaign=606571_microsite_MINUTE_%7C_4_juin_2020_HTTPS_-_Copie&utm_medium=email&utm_source=Message@cnq-All_Users).

It should also be noted that *Order Number 2020-032 of the Minister of Health and Social Services dated May 5, 2020* ("Order 2020-032") was published following the adoption of these legislative amendments. It is intended to be an explanatory and reference document summarizing the changes made by the legislator in co-ownership law.

WHERE TO FIND MORE INFORMATION?

At the request of the Ministry of Justice, the Chambre des notaires du Québec has created a website on co-ownership: **LaCopropriété.info**

This online medium aims to provide the public with quality information on co-ownership law. It brings together, on a single platform, the professional orders and self-regulatory organizations whose members play an important role in matters of co-ownership.

⇒ Online: http://www.lacopropriete.info

Another rich source of information on co-ownerships is the website **condolégal.com**

The mission of this web platform is to inform Quebecers of their rights and obligations in matters of co-ownership. It includes numerous publications written by lawyers specializing in co-ownership law and publishes service offers for syndicates of co-ownership and their members.

⇒ Online: https://fr.condolegal.com/condolegal/offre-de-services/

In addition, the **Guide de procédure et de fonctionnement des assemblées des copropriétaires (3rd edition)** is recommended for those who prefer to read hard copies or for those who wish to learn more about how to hold an assembly in accordance with the law. The book also offers many tools and forms related to assembly of co-owners, including notices of assemblies, agendas, and minutes. The summary of the book includes the following:

> "This 3rd edition of the Guide to the Procedure and Operation of Meetings of Co-owners has been prepared to consider new legislation, jurisprudence, and practices in deliberative assemblies and in co-ownerships in Québec. It aims to present to the administrators of syndicates, co-owners, lawyers, and building managers, in a very accessible manner, a legal

framework for the preparation and holding of co-owner assemblies whether they are held in person, virtually, or in a hybrid format."[13]

⇒ To order it online: https://www.wilsonlafleur.com/wilsonlafleur/CatDetails.aspx?C=347.292.21.

⇒ You can also find it in any other specialized bookshop.

3. GUIDELINES

These guidelines address the development of a proposed smoke-free bylaw. They have been developed based on the co-ownership system.

However, there are several elements that may be appropriate for a homeowner wishing to implement such rules within their building.

STEP 1: PREPARE AND CREATE THE OPPORTUNITY FOR THE DRAFT REGULATION

⇒ Since a smoke-free bylaw will ultimately have to be adopted by the co-ownership corporation, it is important to ensure that you have the support of the co-ownership members. To do this, talk to your neighbours and other residents in the building to find out who else is experiencing second-hand smoke infiltration. This step is crucial. It is too easy for an isolated resident to be singled out and become the problem simply because he or she raises the issue of unintentional exposure to second-hand smoke. On the other hand, a board of directors or property management company will have a much harder time dismissing a group of reasonable, concerned owners or members.

⇒ Collect and document as much information as possible about the number of residents affected, where smoke appears to be entering homes, and the impact on people's health and well-being.

⇒ Learn about the dangers of exposure to second-hand smoke and the benefits of a smoke-free environment. A document on the ASEQ-EHAQ website is available for this

[13] C. GAGNON and Y. PAPINEAU (2021), Guide de procédure et de fonctionnement des assemblées des copropriétaires, 3rd edition, Wilson & Lafleur / Yvon Blais, Cowansville, 2021, 382 p.

purpose. Many other governmental and local organizations offer this type of informational material.

⇒ Read and study all relevant co-ownership documents, including the Declaration of Co-ownership and the current building bylaws. Consult the websites, laws, and regulations dedicated to co-ownerships to gain an understanding of the applicable legal regime.

STEP 2: CONSULT WITH THE BOARD OF DIRECTORS OR PROPERTY MANAGEMENT COMPANY

⇒ Indicating the support and interest of a group of co-owners for the implementation of a smoke-free bylaw project can sometimes be an indicator to the administrative and management actors of the co-ownership to get involved in the creation and implementation of a smoke-free bylaw and to make it a common project.

⇒ In the event that the Board of Directors does not support the project, you can proceed on your own or as a group of co-ownership owners. You can initially communicate your interest in this type of project at a general assembly or by going door-to-door to seek support from other co-owners.

- For example, to collect the percentage of votes - if not the number recorded in the declaration of co-ownership, 10% of the votes of all co-owners – necessary to convene a special assembly.

STEP 3: GATHER INTERESTED CO-OWNERS OR FORM A WORKING GROUP TO FOCUS ON THE SMOKE-FREE BYLAW PROJECT

⇒ Examine the current situation of co-ownership life, especially for complaints related to smoking or cannabis use, odour, dirt, pollution, etc.

⇒ Identify options, both in terms of the scope of regulation and how it might be implemented - for example, through an amendment to the declaration, regulation, or rule. Consider whether to proceed by secret ballot.

This last choice will have an impact on the percentage of votes approving the draft bylaw without smoke at the assembly of co-owners. An amendment to the bylaw of the immovable, which requires the approval of 50% + 1 of the votes present or represented at the assembly of co-owners,

has proven to be sufficient in Québec. In particular, because of the non-airtight nature of the co-ownership, the residential destination, and the concerns for the health of the individuals residing there.

The introduction of a penalty clause related to the application of the bylaws. It is possible that the Declaration of Co-ownership or a bylaw of the immovable already provides for a general penal clause according to which any co-owner risks penalties in case of contravention of the voted bylaws of the immovable and included in the Declaration of Co-ownership. Otherwise, the adoption of a penal clause requires the approval of ¾ of the votes in the assembly and the consultation of a notary for its drafting since it must be notarized.

The opportunity to provide for exceptions for certain persons (medical reasons, occupants of the building with physical disabilities, etc.) and a grace period before implementing the bylaw. For example, a six-month period during which co-owners will not incur penalties in case of contravention of the bylaw by themselves or their tenants and occupants.

⇒ Offer to assist the board in developing a draft policy. Consider input from all stakeholders (i.e., residents, property management company, board of directors) and decide on the scope of the policy:
- Include patios and balconies?
- Include buffer zones around doors, operable windows, and/or air intakes?
- Include the entire property?
- Provide one or more outdoor smoking areas?

⇒ You may also want to conduct a resident survey. A survey will help you gauge support for a potential smoke-free policy, as well as identify the extent of the ban that a majority of residents would support. Remember, most smokers want to quit. About half of them support a smoking ban because they think it will help them cut down or even quit smoking - which is true. A survey could answer questions such as:
- How big is the problem of second-hand smoke infiltration?
- How many co-ownerships already prohibit smoking inside their homes?
- How many households have one or more smokers?
- What are the main concerns of the co-owners and tenants living in the building? For example, their health, odour infiltration in their dwelling, costs incurred by the maintenance of the building, fire risks, etc.

⇒ Decide on a start date:

- Allow time for appropriate consultation and education. Emphasize the benefits of a smoke-free bylaw for all residents: safety, improved indoor air quality, and increased property values.
- Spring and summer are the best times for residents to get used to smoking outside.

⇒ Keep in mind that a smoke-free co-ownership bylaw can be achieved in several phases.

- For example, a first draft bylaw could be limited to balconies and provide a smoke-free buffer zone around building entrances. A second draft prohibiting the use of tobacco and smoked cannabis inside private areas could then come into effect within a year.

STEP 4: CONSIDER THE NEED FOR A GRACE PERIOD

⇒ There is no legal obligation to grandfather current co-ownership members who do not support a smoke-free bylaw in Quebec. The same is true for including a grandfather clause in a proposed bylaw: allowing current residents to smoke indefinitely is counterproductive and undermines the very success and objectives of such a proposed bylaw. Particularly when one considers the benefits it can bring, including eliminating health risks for those unwillingly exposed to second-hand smoke. Especially since new co-ownership owners may feel unfairly discriminated against, and the bylaw may not be taken as seriously as a total ban.

⇒ However, a grandfathering provision could be for a fixed period of time, i.e., six months or one year. In the form of a grace period clause, it would be possible to provide a transitional period for those co-ownership owners who are smokers and present as such when the adoption of the proposed smoke-free bylaw to allow for a less drastic transition period.

⇒ The opportunity to grant this type of delay allows co-owners to take certain actions to comply with the new bylaw and become fully aware of it. Among the actions to be taken, the possibility of registering for smoking cessation programs or getting used to smoking outside, for example, while an outdoor smoking room is being built.

STEP 5 : DEVELOP A COMMUNICATION STRATEGY

⇒ Check all relevant laws and legal documents (i.e., bylaws, rules, declaration). There will be specific steps that must be followed to ensure that an amendment to the

declaration, a new bylaw, or rule is properly communicated to the owners and members of the co-ownership. Failure to follow a specific procedure could jeopardize the entire process. The procedure is usually provided for in the Declaration of Co-ownership, and if the declaration is silent, it is supplemented by the rules of the Civil Code of Québec.

⇒ Once a start date has been selected for the smoke-free bylaw project, give property owners and residents plenty of notice. Again, as required by law, there will be specific deadlines for communicating any type of change and guidance on how people should be notified.

⇒ An existing practice or bylaw will also likely dictate how a new bylaw or rule is communicated to potential buyers/members. In addition, in the case of a co-ownership, it may also be prudent to communicate with local real estate agents about the new smoke-free feature of the building.

⇒ Beyond what is legally required, consider a broad communication strategy to raise awareness of the problem of second-hand smoke infiltration and the benefits of a smoke-free bylaw. Your local public health department and tobacco control organizations can help with fact sheets, articles, etc.

⇒ Use different vehicles to communicate with landlords and tenants:
- Use a newsletter or website (if applicable).
- Send individual notices.
- Organize meetings, face to face.
- Post a "countdown to the smoke-free bylaw."

⇒ Keep the message positive and focus on the health benefits as well as the financial gains.

⇒ In addition to those prescribed and mandatory by the *Tobacco Control Act* and the *Cannabis Control Act* for common areas and other targeted premises, post signs indicating that the building is "smoke-free." That is that it prohibits vaping or smoking tobacco and cannabis products in the building. You can use or be inspired by the ones distributed by the Ministry of Health and Social Services.[14]

[14] (Online: https://publications.msss.gouv.qc.ca/msss/document-002164/?&date=DESC).

STEP 6: DEVELOP AN IMPLEMENTATION PLAN

⇒ The law provides specific requirements for how the declaration,[15] bylaws, or rules are to be enforced. In addition to the enforcement of penalty clauses in the Declaration of Co-ownership, which provide for penalties for delinquent co-owners, other practices may be considered:

- Keep excellent records of incidents, complaints, etc. This is especially important if a resident denies violating the smoke-free bylaw.
- Send a written reminder or warning letter clarifying the smoke-free rule on the first reported violation.
- Discuss possible accommodations. For example, team up with your local public health department or tobacco control organization to provide smoking cessation information and support.
- Declarations of co-ownership increasingly provide for a mediation mechanism in case of conflict. In fact, recourse to the courts against syndicates of co-owners or its members is on the rise. Because of the delays and high costs which may be involved, mediation, a private and even less formal method of dispute resolution, is sometimes favoured in the declaration of co-ownership.[16]

⇒ Alternatively, mediation may be used at any time as part of a legal proceeding before the Superior Court of Quebec. In addition, it is often provided that if mediation fails, the dispute will be submitted to arbitration.

- If the defect persists, the Syndicate's lawyer can prepare a formal notice and send it to the offending co-owner.
- However, recourse to the courts may be considered when notice, demand, and other means have failed.

The Syndicate may ask the court to issue an order against the co-owner, directing the tenants or occupants to cease the contravention and comply with the declaration of co-ownership. The lawsuit may also include a claim for damages.

Ultimately, the sale of a dwelling in a co-ownership (condo) could be ordered (article 1080 C.c.Q.), or the tenant's eviction could be obtained by the landlord when they incur

[15] C.GAGNON (2020), "La destination de l'immeuble", *La copropriété divise*, 5th edition, Éditions Yvon Blais, 2020, EYB2020COD17.

[16] C. GAGNON (2020), "Les autres conventions relatives à l'immeuble ou à ses parties privatives ou communes y compris la clause pénale*", La copropriété divise*, 5th Edition, Éditions Yvon Blais,2020, p.2, EYB2020COD22.

neighbourhood disturbances, for example.[17] *Insofar as proof of inconvenience caused by the smoking tenant, not by the landlord, is available.*[18]

Suppose it is the behaviour of a tenant which causes serious prejudice. In that case, the Syndicate can exercise a legal recourse in order to terminate the lease between the co-owner and his tenant or the loan for use between the co-owner and the occupant (article 1079 C.c.Q.).

CASE STUDY: THE *SIDOROV* DECISION OF THE HOUSING AUTHORITY (Now the Tribunal administratif du logement)

The study of a decision of the Régie du logement, now acting under the name of the Tribunal administratif du logement, by the author Me Christine Gagnon adequately illustrates a case of application of these rules. This decision was rendered in the context of a small three-story building is divided into co-ownership composed of five residential units:

"One of the apartments is rented to a tenant who has a heavy smoking and cannabis habit. The physical characteristics of the building mean that the odour is very strongly felt in the other apartments and permeates the neighbours' furniture and carpets. The other occupants of the building are bothered daily. It is to such a point that one of the co-owners decides to rent his apartment and to go live elsewhere. It is relying in particular on article 976 C.c.Q. [- prohibiting neighbourhood disturbances -] and noting the disturbances suffered by the other occupants because of the smoke and persistent odours, the Régie du logement terminated the lease and ordered the eviction of the offending tenant. It is interesting to report certain excerpts from this decision:

[43] The undersigned [...] believes that the presence of cigarette odours in a dwelling and possibly second-hand smoke may prevent other occupants of the building from enjoying their dwelling peacefully, even though second-hand smoke is more tolerable for other individuals. What is unpleasant for some may not be for others.

[44] Thus, to succeed in this case, the landlord must show that the tenant's smoking or allowing others to smoke in the dwelling unit *interferes with the normal enjoyment of the premises by the other occupants of the building because of the strong, persistent, and unpleasant odours*.

[45] In this case, the uncontradicted evidence shows that the tenant interferes with the enjoyment of the premises by other occupants of the building. [...]

[17] "The tenant is required to conduct himself in such a way as not to disturb the normal enjoyment of the other tenants. He is liable to the landlord and other tenants for any damage resulting from a breach of this duty, whether the breach is caused by him or by persons to whom he allows the use of or access to the property. The lessor may, in the event of a breach of this obligation, apply for the resiliation of the lease": article 1860 C.C.Q.
[18] *Koretski* v. *Fowler*, 2008 QCCQ 2534.

> [46] As for the landlord, the fact that he receives complaints from the other co-owners disturbs him in the management of his building and exposes him to legal recourse by them, in addition to jeopardizing the condition of his dwelling because of the cigarette smoke. (Italics of the author).[19]

4. HOW TO PROCEED

4.1 POSSIBLE PROCEDURE IN THE HOUSING CONTEXT

The owner of one or more residential rental buildings who wishes to implement a smoke-free bylaw in their residential rental building has the option of entering an amendment in the lease at the time of its renewal. To do so, the landlord must:

1. Send a **notice to the current tenant of** the content of the amendment to their lease;

2. Respect the **legal deadlines** for sending the notice (article 1942 C.c.Q.);
   - « **1942.** On renewal of the lease, the landlord may vary the lease terms, including the term or rent. However, he may not do so unless he notices the variation to the tenant for at least three months. However, not more than six months before the term expires. If the lease term is less than 12 months, the notice must be given at least one month, but not more than two months, before the term expires.
   - The lease is for an indefinite term. The landlord may not change the lease unless he or she gives the tenant at least one month's notice, but not more than two months' notice.
   - These periods are respectively reduced to 10 days and 20 days if it is a lease of a room."

3. Wait for the **landlord's reply to** accept or refuse the modification within one month of receiving the notice (article 1945 C.c.Q.). In the event of a:

   a. Refusal by the landlord to **renew the** lease and remain in the unit. The landlord shall:

   i. Submit an application to amend the lease to the Administrative Housing Tribunal by the landlord within one month of receiving the landlord's response. Or;

   ii. Suppose no application is made to the Tribunal within one month of receiving the notice of refusal. In that case, the lease is automatically renewed on the previous terms (article 1947 C.C.Q.).

   b. Refusal by the landlord when he does **not intend to renew** his lease.

[19] C. GAGNON (2020), supra note 15 at 32.

- The lease amendment, i.e., the no-smoking clause, can be written into the new tenant's lease without further formalities.

EDUCATION: CONSISTENCY IN RULES OR PROHIBITIONS AGAINST SECOND-HAND SMOKE IN THE BUILDING -

In order to have a lease amendment accepted, it is preferable to bring before the Tribunal rules to restrict or prohibit the use of tobacco or cannabis products that are consistent.

For example, a ban on all indoor areas of a building covering both tobacco and smoked cannabis will be more consistent than a ban on cannabis alone.

In addition, where the Housing Authority is seized of an application for a ban on smoking cannabis or tobacco and the tenant objects, the Housing Authority must consider, among other things, the consequences of the failure to comply with the ban on smoking cannabis or tobacco on the peaceful enjoyment of the premises by other occupants of the building and, where applicable, whether the tenant is properly licensed to possess cannabis for medical purposes.

Regardless of whether its source is tobacco or cannabis, second-hand smoke can disturb other occupants of a building. In fact, if this disturbance exceeds the normal tolerance level expected of the neighborhood, the tenant may be at risk of a health hazard. In fact, if this disturbance exceeds the normal threshold of tolerance expected from the neighborhood, the tenant may risk eviction or the payment of damages. Even if a tenant has the right under his or her lease to smoke in his or her dwelling or uses cannabis for medicinal purposes, he or she is still subject to the obligation to comply with the law. He or she is still subject to the obligation not to disturb the enjoyment of the other tenants in the building, failing which he or she may be subject to legal action by his or her landlord before the Administrative Housing Tribunal.

4.2 POSSIBLE PROCEDURE IN THE CONTEXT OF DIVIDED CO-OWNERSHIP

Whether the directors or the co-owners initiate the initiative, the vote on a smoke-free bylaw project will be submitted to the assembly of co-owners for approval at an annual or special general assembly.

Since a draft bylaw prohibiting or restricting the use of cannabis and/or tobacco in a co-ownership may raise concerns within the co-ownership, it is sometimes preferable to proceed by way of a special assembly of the co-ownership owners rather than adding this subject to the agenda of an annual assembly. Indeed, the agenda of the annual assembly can be very busy with the regular business of the co-ownership. It is important that each of the co-owners have the opportunity to express their views on the draft bylaw, to ask questions and receive answers, and, above all, to understand the content and scope of the draft bylaw.

1. Collect the number of votes (10% or the number of votes registered in the Declaration of Co-ownership, article 352 C.c.Q.) necessary to ask the Board of Directors to convene a special assembly of co-owners;

2. Prepare the draft bylaw prohibiting second-hand smoke. Including:
- Seriously consider the opportunity to conduct expertise on the non-airtightness or smoke permeability of the private and/or common parts of the building;
- Draft or have drafted by a lawyer or notary specialized in co-ownership law;
- Ask a lawyer or notary specialized in co-ownership law to verify the conformity of the draft bylaw prohibiting or restricting the smoking of tobacco and/or cannabis in the co-ownership;
- Keep in mind that the involvement of a legal professional is usually recommended, although not mandatory, for the amendment of the bylaws of the immovable, which is not related to the addition of a penal clause in the declaration of co-ownership. A professional sworn by the Barreau du Québec or the Chambre des notaires will be able to ensure the conformity of the bylaw, advise you and give you legal opinions to this effect, ensure the conduct of the assembly of co-owners, and, above all, minimize the risks for the viability of the bylaw without smoke in case of contestation before the courts;

3. Sending of the notice of a general or special assembly of co-owners with the draft bylaw or the final bylaw as well as the relevant documentation (proxies, sources of information on second-hand smoke, etc.) if applicable, by the board of directors;
- The board of directors may fail to act to convene the meeting of co-owners following receipt of the request by the required number of votes of the co-owners to convene the meeting (notice to convene). Then, if a period of 21 days from the receipt of the notice to convene by the board of directors has elapsed, any member who signs the notice may convene the meeting (article 352 C.c.Q.). It is possible that any signatory member who has acted will be reimbursed for the expenses incurred in holding the meeting.

4. Vote at the assembly of co-owners. It will be necessary to consider the opportunity to:

- Proceed by secret ballot;
- Accurately tally the votes cast for and against the adoption of the smoke-free bylaw.

EDUCATION: CONSISTENCY IN THE RULES OR PROHIBITIONS IN THE PROPOSED BYLAW TO ADDRESS THE PRESENCE OF SECOND-HAND SMOKE IN THE CONDOMINIUM -

Although it has already been admitted, a building bylaw prescribing a ban on smoking in private or common areas for exclusive use remains contestable before the Quebec courts.

One of the practices to consider when drafting a bylaw is to "be cautious and clearly define what is prohibited and even explain why.[20] For example, a bylaw prohibiting the smoking of tobacco and cannabis in private areas must be justified by the purpose of the building, its characteristics, or its location. The Quebec courts have accepted such a prohibition for buildings where ventilation and air circulation allowed smoke and odours to travel throughout the building.[21]

This is so because article 1056 of the Civil Code of Québec allows restrictions to the rights of co-owners when they are justified by the destination of the immovable, a destination which includes the characteristics of the immovable, including the quality of the construction of the immovable.[22] A building expert's report, attesting to the non-permeability of the immovable or the defects in the ventilation system, allows to give a solid basis to a draft bylaw without smoke covering all the parts of the co-ownership as the replacement costs of this type of part can prove to be extremely onerous for buildings with a long history.

In addition, it is important to ensure consistency in the regulation. In this regard, consistency must be reflected in the purposes of the prohibitions and restrictions: a bylaw prohibiting the use of cannabis but allowing the use of tobacco because of odour would be inappropriate.

[20] C. GAGNON,supra note 15, at 33.
[21] *Sidorov* v. *Thérien*, 2018 QCRDL 3482.
[22] C. GAGNON,supra note 15, at 33.

5. DETAILS ON THE LAW APPLICABLE TO THE GENERAL MEETING OF CO-OWNERS AND THE SYNDICATE OF CO-OWNERS

5.1 SIMPLE MAJORITY AND ABSOLUTE MAJORITY

By differentiating between simple and absolute majority, it is easier to understand majority rules in an assembly of co-owners. It is common for these terms to be used synonymously for amendments to the bylaws of the immovable. However, for clarification purposes, the majority explained as "absolute" refers to the majority required to adopt a draft bylaw of the immovable.

As a general rule, the power to amend the bylaws of the immovable and the other two parts of the declaration of co-ownership, namely the act constituting the co-ownership and the description of the fractions, rests with the assembly of co-owners.[23] Their exclusive competency to vote on an amendment to the bylaws is clearly named in the Civil Code of Québec. It should be noted that a declaration of co-ownership cannot, among other things, derogate from the majorities provided for by the Civil Code of Québec. Any clause providing for other majorities is considered unwritten, and the Declaration of Co-ownership must be read without them.[24] With the sole exception of the rule of unanimity of the co-owners to modify the destination of the immovable in an Assembly.[25]

The Civil Code of Quebec clearly states:

- The majority required to **amend the bylaw of the building** is in article 1096 C.c.Q. This article requires that a majority of the votes present or represented at the assembly be in favour of the amendment for it to be adopted.
- In other words, an **absolute majority** is the majority of the votes present or represented and is formed by a group of votes that is half plus one of the votes cast during a vote. A simple majority is reached when the number of votes favouring the decision is greater than the number of votes against. In the former, an abstention (the blank vote of a person present or represented) has the same effect as a vote against, which is not the case in the latter.

[23] Articles 1096, 1097 and 1098 C.C.Q.
[24] Article 1101 C.c.Q
[25] *An Act to implement the reform of the Civil Code,* R.S.Q., c. C-1992, s. 53(2) derogating from article 1098 C.C.Q. for co-ownerships created before [1] January 1994.

EDUCATION: EXAMPLE

For further explanation, we refer to an example of a vote on a proposed bylaw to be added to the building rules, published on condolegal.com with some explanation:

- "In a vote in which 80% of the votes of the co-owners (present or represented) are cast, 38% of the voices of the vote "for", 22% of the voters' vote "against", while the remaining 20% of the votes abstain. The draft bylaw will thus be rejected, as only 38% of the votes are in favour, whereas 40% +1 would have been required."[26]

Before a vote can be taken, the chairperson of the assembly must count the percentage of votes of the co-owners present or represented to establish the number of votes required to decide and verify that a quorum is reached. This number must be equivalent, at a minimum, to at least half of the votes of the co-owners. Thus, the **quorum** will be reached, and the assembly will be able to proceed to make its decisions with full knowledge of the facts: "being attentive to the arrivals and departures of co-owners during the assembly is another important factor, in order to avoid an error in the calculation of the votes."[27]

So, in the example, there is mention of 38% vs. 40 +1%, the "40 +1%" was required since the latter is the "absolute majority" of the number of votes present or represented at the assembly (80%), even though 38% carries the majority (in the sense of the largest percentage) over those who voted against (22%). Mathematically the rule is: **40% + 1** (*80% X 50% +1*).

An absolute majority does not mean, in this case, more than half of the total votes, that is, half plus one of the members entitled to vote. Rather, it means more than half of the votes present or represented at the assembly voting in favour. Again, it is not the simple majority where the % in favour is the highest number.

6. IMPACTS OF BILLS ADOPTED BY THE LEGISLATOR OVER THE PAST FIVE YEARS (Chambre des notaires

FOR THE SYNDICATE

[26] (Online: https://fr.condolegal.com/syndicat/fiches-pratiques/sousfiches/637-majorites-en-assemblee).
[27] *Ibid*.

- **Amendment to the building bylaw**

Amendments to the bylaws of the building must be made expressly, in minutes, or a written resolution of the co-owners. They must be deposited in the register kept by the Syndicate. (Article 1060 C.c.Q. modified by article 31 P.L. 16)

The Syndicate must transmit to the co-owners the **minutes** or any **resolution -** rules which amend or add to the bylaws of the building usually referred to as the "new bylaws of the building" or "draft bylaws" **-** within 30 days of the assembly or the adoption of the resolution [of the draft bylaw proposed and adopted at the assembly].

- **Penal Clause**

Any penal clause applicable in case of contravention of the declaration of co-ownership must be provided for in the constituting act. (Article 1053 C.c.Q. modified by article 30 P.L. 16). I.e., an amendment to the constituting act after January 10, 2020, to insert a penal clause in case of contravention of the declaration of co-ownership must be notarized in minutes and published in the land register (articles 1050 and 1060 C.c.Q.). The modification of the act constituting the co-ownership, i.e., the addition of a penal clause, must be adopted with the co-owners' agreement, representing three-quarters of the votes of the co-owners, present or represented at the assembly of co-owners. This is the "reinforced" majority.

Any penalty clause applicable to contraventions of a declaration of co-ownership and adopted before January 10, 2020, is considered valid and part of the constitution, regardless of how it was adopted - for example, if the clause was adopted with one-half plus one of the votes of the co-owners present or represented rather than three-quarters of those votes. (Section 150 PL 16)

- **Consultation of the registers**

The register and the documents held at the disposal of the co-owners shall be available for **consultation in the presence of a director or a person designated** for that purpose by the board of directors, at reasonable hours and in the manner prescribed by the bylaws of the building. Upon payment of a reasonable **fee, every co-owner is entitled to** obtain a **copy of** the contents of the register and of such documents. (Article 1070.1 C.c.Q.; new article introduced by article 38 P.L. 16).

FOR THE BOARD OF DIRECTORS

- **Duty to transmit minutes or resolution**

The board of directors must **transmit to the co-owners** the **minutes** or any **resolution** within **30 days** of the meeting of the directors or the adoption of a resolution [e.g., management bylaw, decision relating to the current affairs of the co-ownership, etc.]. (Article 1086.1 CcQ; new article introduced in the C.c.Q. by article 46 P.L. 16).

- **Amending or rescinding a decision of the Board of Directors or granting a court order**

The court may annul or modify a decision of the board of directors if it is **biased** or made with the intent to **harm** the co-owners or **disregard** their rights.

The court may also, at the request of a co-owner or a director, make any order it deems appropriate - for example, to replace the board of directors by a provisional director or to order the board of directors to act or a director to cease obstructing the performance of his duties - if the directors are unable to act because of an impediment or because of the systematic opposition of some of them. (Articles 1086.3 and 1086.4 CcQ; new articles introduced in the C.C.Q. by article 46 P.L. 16).

- **Special contribution**

The board of directors must consult the assembly of co-owners before deciding on any special contribution to common expenses. (Article 1072.1 C.c.Q.; new article introduced by article 41 P.L. 16).

- **Maintenance Booklet**

The board of directors must establish a maintenance booklet for the immovable, which describes, in particular, the maintenance carried out and to be carried out, and to keep this booklet up to date and at the disposal of the co-owners as well as to have it periodically revised. (Article 1070.2* C.c.Q.; new article introduced by article 38 P.L. 16). **This article is not yet in force as of August 10, 2021.*

FOR THE MEETING OF THE CO-OWNERS

- **Vote on the building rules**

Decisions to amend the bylaws of the building are taken by a majority of votes of the co-owners present or represented at the meeting. That is to say, by an "absolute*" majority of 50% +1%. (Article 1096 C.c.Q. modified by article 52 P.L. 16).

This addition to the text of the Act by the legislator is declaratory: it establishes the rule of law which had to be followed before the written specification, and that which must be followed afterward, concerning the majority required at an assembly of co-owners to amend the bylaws of the immovable.

- **Vote of the undivided co-owner - who is not a sole owner, but a joint owner of his fraction**

An undivided co-owner of a fraction - where the co-ownership is owned by more than one individual - who is absent from an assembly is presumed to have given a mandate [e.g., a power of attorney] to represent him to the other undivided co-owners, unless he has, in writing, given a mandate to a third person for that purpose or indicated his refusal to be represented. (Article 1090 C.C.Q. as amended by article 48 P.L. 16).

- **Deprivation of voting rights**

A co-owner who is deprived of his right to vote because he has not paid his share of the common expenses may exercise it again as soon as he pays **all the common expenses he owes**. (Article 1094 C.c.Q. modified by article 51 P.L. 16)

- **Cancellation or modification of a decision of the assembly of co-owners or granting an order by the court.**

For the same reasons as for decisions made by the directors, and in the same manner, either against a co-owner or the assembly, if applicable. See the section to this effect above. (Articles 1103 and 1103.1 C.c.Q. amended by articles 57 and 58 P.L. 16).

7. DECISIONS* IN QUEBEC LAW ON ODOURS AND SMOKE

7.1 TRIBUNAL ADMINISTRATIF DU LOGEMENT (*RÉGIE DU LOGEMENT*)

The *Chartier* Decision (2018)[28]

The facts:

- A tenant was legally using cannabis for medicinal purposes.
- High consumption and inconvenience to other occupants have been proven.
- The decision of the Régie du logement was ultimately confirmed by the Court of Quebec.

Excerpt:

[28] *Chassé c. Chartier*, 2018 QCRDL 235 ; *Chartier c. Chassé*, 2018 QCCQ 2823.

> "[49] ... the tenant's use of cannabis is clearly causing **serious harm** and the evidence, including the tenant's **medical certificate** allowing her to use the drug for its therapeutic aspect, clearly demonstrates that such **use will not cease** yet just because a person does **not commit a criminal offence** by possessing or using marijuana prescribed by a physician does not **create a right to inconvenience neighbours** by **imposing what is** commonly referred to as **second-hand smoke."**

The *Stefanelli* Decision (1996)[29]

The Quebec courts have recognized the health risks of second-hand smoke as a **reason for** an **internal** building **rule** prohibiting smoking in a multi-unit building **since 1996.**

The Court of Quebec upheld a lower court decision that authorized the termination of a lease and ordered the eviction of a tenant for smoking, among other reasons.[30]

Excerpt:

> "[34] As for the smell of cigarettes, it should be noted that society is becoming more and more severe towards smokers; the legislator has decreed no-smoking zones; it seems that **a landlord could enact such a prohibition** in his dwellings since a smoker cannot force his neighbours to be **passive smokers**, especially since medical science has now established that cigarettes and smoke are a **cause of cancer**.

The *Sidorov* Decision (2018)[31]

Even in the absence of specific rules, the rights of other co-owners must be respected, as must the **obligation not to cause a neighborhood disturbance**.

- On the one hand, accept **normal** neighbourhood **inconveniences *but***, on the other hand, refrain from behaviours that force others to suffer **abnormal inconveniences** from the presence of neighbours.

The facts leading to the eviction of the tenant:

- Context of a **three-story** co-ownership building that consists of **five units**.

[29] *Stefanelli* c. *Lavigne*, 1996 CanLII 12011 (QC C.Q.).
[30] C. GAGNON, supra note 15 at 32.
[31] *Sidorov* c. *Thérien*, 2018 QCRDL 3482.

- One of the apartments is rented to a **tenant** who has a **heavy,** albeit medical**, use of** tobacco and cannabis.
- The **physical characteristics of the** building mean that the odour is very strongly felt in the other units and is also present in the furniture of non-smoking residents (furniture and carpets).
- The other occupants of the building are continually bothered by second-hand smoke. Even one of the co-owners decides to rent out his apartment and leave the building.

Excerpts:

"[16] A petition transmitted to the landlord by all the co-owners of the building enjoins him to ask for the eviction of his tenant because they can no longer bear "the continuous smell of drugs" coming from the dwelling despite several interventions to make him stop smoking [...]

[19] The tenant replies that he has an air purifier for which only the filters need to be replaced. He also wrote that he had replaced the sticky paper already installed to better seal the opening in the ceiling. However, despite these actions, [the landlord] has not noticed any improvement; on the contrary.

[20] [The landlord] also notes that the tenant receives many friends who also smoke. Thus, from April to November, he was bothered daily, several hours a day, by the smoke of cigarettes and other substances.

[21] The smell is so strong because of the smoke circulating through the interior pipes and permeated the carpets.

[24] [The landlord] believes that he has done everything possible to avoid the inconvenience caused by his tenant to the other occupants of the building for a long time, by caulking the areas from which the smoke can spread and by regularly notifying the tenant of the situation, but without success.

[43] [The] **presence of cigarette odour** in a dwelling and possibly **second-hand smoke** may ***prevent other occupants*** of the building from enjoying their dwelling peacefully even though second-hand smoke is more tolerable for other individuals. What is uncomfortable for some may not be for others. ***BUT*** a **discomfort** becomes a **neighbourhood disturbance** when "the fact [...] of **smoking** or permitting others to smoke in [a] dwelling unit **disturbs the normal enjoyment of the premises by other occupants of** the building because of ***strong, persistent, and unpleasant odours***."

The *Korestki* Decision (2008)[32]

Excerpts:

"[71] The evidence also reveals that, since the duplex is not of recent construction, the smoke is spreading in the landlady's dwelling, despite the work done by her spouse to try to seal the openings [...].

[83] In *Feaver v. Davidson*, the Ontario Landlord and Tenant Board (the equivalent of the Régie du logement) had to decide the following question:

> The landlord sought to evict the tenant occupying the basement unit because the smoke was disturbing his peaceful enjoyment of the premises. The tenant was occupying the unit under a verbal lease, and smoking had never been discussed.

[84] The Tribunal summarized the problem before it as follows:

> **a) Does the tenant have the right to smoke in his unit?**
> **b) If he does, is the exercise of the tenant's right having a significant effect on the landlord's use or enjoyment of her unit?**
> **c) If there is a significant effect, should a limit be placed on the tenant's right?**

[85] In its decision, the Ontario Court denied the eviction application on the condition that the tenant ceases smoking in his unit.

[86] The arbitrator thus justified his decision:

> **"24. Not so long ago, this application may have been considered frivolous. People smoked as though it were their inalienable right. It was acceptable to smoke in almost all public places. It would have been considered inhospitable to deny a guest the right to smoke in one's home, and one certainly had a right to smoke in one's own home. Whether or not smoking was a threat to one's health was open to debate.**
> **25. This is no longer the case.**
> **27. The legislated limits that have been placed on smoking have come about because of the overwhelming evidence that smoking and second-hand smoke pose serious health risks. There can be no debate... It is clear that the risks associated with smoking are so grave that it is prudent to avoid inhaling cigarette smoke...**
> **29. Fear of the threat alone is enough to cause the prudent person to take the landlord's measures and cause continuing anxiety about her health. She has a right to be free of the risks of smoking in her unit.**
> **30. It is not reasonable for the tenant to expect to continue smoking in this unit where he shares the air with other occupants of the complex when another occupant**

[32] *Koretski* c. *Fowler*, 2008 QCCQ 2534.

> **perceives a threat to their health. Although the tenant may choose (sic) to accept the risks associated with smoking, he has no right to require the landlord to share them... 31. I find that the tenant's smoking has substantially interfered with the landlord's reasonable enjoyment of the residential complex..."**
>
> [87] As can be seen, the Ontario Court did not hesitate to intervene and change the rules of the game during a lease, considering the health risks created by cigarette smoking.
>
> [88] In recent years, the legislator has prohibited smoking in public places. This smoking ban includes, among others:
>
> (a) common areas of apartment buildings containing more than six units.
>
> (b) common areas of residences for the elderly.
>
> (c) daycare centres in private residences during the hours when children are on the premises.
>
> (d) automobiles in which children are seated.
>
> [89] The legislature has prohibited smoking in the public sphere because it recognizes the risks that exposure to tobacco smoke poses to non-smokers.
>
> [90] No law expressly prohibits smoking in a person's home. However, the smoker's right to privacy is limited by the right of other occupants of a building to the peaceful enjoyment of their dwelling.
>
> [91] This peaceful enjoyment includes the right to be free from the adverse effects of smoke.

From these jurisprudential examples in the area of housing, we can make the **analogy** and **conclude** that, in **the absence of any clause in the declaration of co-ownership,** the smell of cigarette smoke, tobacco smoke, or other substances such as cannabis emanating from a private area can **constitute an abnormal** neighborhood **annoyance** *insofar as* this smoke **reaches the other** private **areas** or even the common areas.[33]

In other words, it is a matter of controlling smoke and odours by **prohibiting harmful activities** in private areas *when* the **physical characteristics of** the building allow it and **fuel the nuisance of these activities.**[34]

[33] C. GAGNON, supra note 15 at 33.
[34] *Id*.

7.2 THE SUPREME COURT OF QUEBEC (CO-OWNERSHIP)

The *El-Helou* Decision (2019)[35]

The facts:

- context of a small building of three apartments in a co-ownership.
- The co-owner of the first floor challenged the validity of the bylaw adopted by the assembly prohibiting smoking in private areas.
- The evidence showed that the smoke spread throughout the building, including the private areas of other non-smoking co-owners.
- The building was not smoke-tight (special proof to that effect).

Summary and excerpts of reasons for the decision:

In response to the argument of the smoking co-owner that *"a special vote of 90% of all co-owners was required for the adoption of the draft "smoke-free" bylaw since it modifies the destination of the building*," the Honourable Chantal Massé, Justice of the Superior Court of Quebec writes that:

- In this case, the building bylaw prohibiting smoking "does **not change the purpose of** the building but is an **extension of its residential purpose** given the **non-sealed nature of** the dwelling units involved."
- The Court **confirmed the validity of** a smoke-free bylaw prohibiting smoking in the private portions of the building, which was **adopted by 50% of the votes of the co-owners.**

In response to the argument of the co-owner who smokes cannabis to the effect that "*this smoking ban does not enter into the right of a syndicate of co-ownership to regulate or arrange the right to smoke which is an inalienable right of each co-owner*"...

- The Superior Court of Quebec confirms that **there is no inalienable** - inviolable/untouchable - **right to smoke in one's unit for each co-owner**. In this case, **a right is not acquired* until** it has been enshrined, even written in clear and express terms, law or declaration of co-ownership.

[35] *El-Helou* c. *Syndicat de la copropriété du 7500, 7502 et 7504 Saint-Gérard*, 2019 QCCS 2238.

- "[14] [There is] no inalienable right to smoke in one's unit for each co-owner; rather, [the applicable law,[36] leans] toward a duty to refrain from smoking in environments that result in others being likely to have their health affected by second-hand smoke, whether in a workplace, hospitals, or residential locations such as [in the El-Helou decision]."

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*For more information on grandfathering, see the Q&A document available at the same location as this document.

[36] "The common law in matters of neighbourhood disturbance, article 976 C.C.Q. and the specific provision of article 1063 C.C.Q., 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 and security and integrity of the person which it enshrines." See *El-Helou v. Syndicat de la copropriété du 7500, 7502 et 7504 Saint-Gérard*, 2019 QCCS 2238, par. 14.

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