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Spring Spring Spring... finally!

Happy Spring... I think! While the weather does not seem to want to cooperate yet, there are other clear signs that Spring is definitely here: The Spring Director's Course, the joint ACMO/CCI Tradeshow & Conference, and inaugural pub night, and I even see that some of the tulips are blooming!

Over the next few months, there are many events and opportunities for education, networking, and socializing. A full schedule of events is being kept up to date

If you have an interesting idea for an event, or have a burning question that may form the basis for an educational session that could benefit other members as well, please let us know! You can communicate with us by phone, email, snail mail, linked-in, twitter...

And on that note... are you following us on twitter and linked in? If not, join in the conversation! As we work hard to increase our communication with all of our members, we are improving our presence in social media. We hope you will join us there!

Looking forward to seeing all of our members at upcoming events, or "chatting" online.

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on our website. Cci-easternontario.ca. Your CCIEO Board hopes that you will take full advantage of all of these opportunities.

In the next few weeks, your Board will also be sitting down to plan the fall roster of events and seminars.

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Rod Escayola

Smoke, BBQs and smells in condos

This Spring Edition will bring you everything you ever wanted to know on smoke and odours in condominium corporations. Indeed, there are few disruptions or nuisances worse than the smoke or smell from the neighbouring unit. And few topics bring out strong opinions like someone's right to smoke or someone's right to a smoke-free environment. Two camps which appear irreconcilable at times. Living in close quarters often requires compromises from everyone. So when is too much too much? And what can be done... *once the smoke clears up?*

In our **engineer's corner**, Dan Templeton presents a piece on odour transfer between units. How they happen and how to minimize them? I propose a piece in our **legal corner** on the "do's and don'ts" as they pertain to smoking in condos in Ontario. Courts are certainly keeping up with changing societal views on the topic.

Dorothy Church, an experience property manager, offers a pretty comprehensive piece on the various options for condominiums considering converting to a smoke-free environment.

Finally, as the BBQ season opens upon us, Kristen Bailey offers some insight on this thorny and smokey topic.

The topic may be a sensitive one. Still, it is one that cannot be avoided and should be tackled with a balance approach and with an opened mind. We hope to have accomplished that.

Happy reading and happy summer to all!

Following our expansion to all of Eastern Ontario, we have updated our LinkedIn and Twitter pages!

We now invite you to follow us on LinkedIn (at CCI Eastern Ontario) and on Twitter (at @cciEastOntario).

We invite, once again, any comments or suggestions you may have about this newsletter and invite you to submit questions for our Q&A or stories for future publication.

Rod Escayola is a partner with the law firm Gowling WLG in Ottawa.

Contributing to CCI Condo Contact Editor's Contact Information

A benefit of CCI membership is the opportunity to share perspectives with one another by contributing and reading articles in CCI-Eastern Ontario's quarterly newsletter *Condo Contact*.

If you are a condominium director, owner or manager, and have a unique tale to tell or advice to relay to other condominium boards, let us know! If you are a professional or represent a trade company offering services or products to condominiums and have a relevant article, let us know! The subject matter should be current, concise and helpful. Topics should relate to management and operation of condominiums and not be of a commercial nature.

ARTICLES MAY BE FORWARDED TO:

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By Dan Templeton

WHAT IS THAT SMELL?!

ODOUR TRANSFER BETWEEN SUITES

"I smell cigarettes! I smell fish! I smell; what is that smell?!" These phrases are passed to condo managers daily from suite owners and occupants in new and old multi-unit residential buildings across the country. Owners expect the results of their own cooking expertise to delight their olfactory senses, but when the aromas of a neighbour's noxious cigarettes, cooking disasters and mystery activities enter your home, it can become an assault on one's senses, if not a risk to one's health. So why does it happen and how can we limit these occurrences?

What are odours and how do they move?

Odours are nothing more than microscopic air borne particulate carried along by air currents. So how does Suite 201's cigarette smoking continuously challenge Suite 301's freedom to breathe? The basic concept we start with is air flow. Air moves as a result of pressure differentials. We get wind in the great outdoors because one area has a higher air pressure than another. Air currents continually move from high pressure areas to low pressure areas, seeking to correct the imbalance. The same concept governs the movement of air within buildings. If you are living in a suite with a lower air pressure than the suite where odours originate, air currents will seek to even out the pressure differential by flowing to the low pressure area (your suite), carrying that wonderful burnt kipper particulate with it.

- In a typical multi-unit residential building, we have multiple natural occurrences, and man-made building systems, which impact air pressures, and thus air movement within suites and the building as a whole;
- mechanical air supply systems pump fresh air into the building creating higher pressures areas;
- exhaust systems force air out of the building creating lower pressure areas;
- in winter, the building heating system warms air, reducing its density, causing it to rise and create low pressures in the



lower parts of the suite or building, and higher pressures in the upper areas of suite or building;

- in summer, air conditioning systems cool air, increasing its density, causing it to drop and creating low pressures in the upper parts of the suite or building and higher pressures in the lower parts of suite or building;
- openings in the building envelope, whether intentional (e.g. opened windows) or unintentional (e.g. discontinuities in caulking), can significantly impact suite pressures by creating pressure differentials between interior space and exterior space, which results in infiltration or exfiltration, changing suite pressures by the minute;
- compartmentalization of areas within the building, usually to provide fire protection, will restrict free air flow and their pressure balancing effects; and
- movement of equipment such as elevators can impact air pressures as cabs push air up and down elevator shafts to different floor levels.

These are just a sampling of the dynamic forces that must be managed to limit odour migration in a multi-unit building. It sounds like a daunting task when you look at the problem from that perspective.

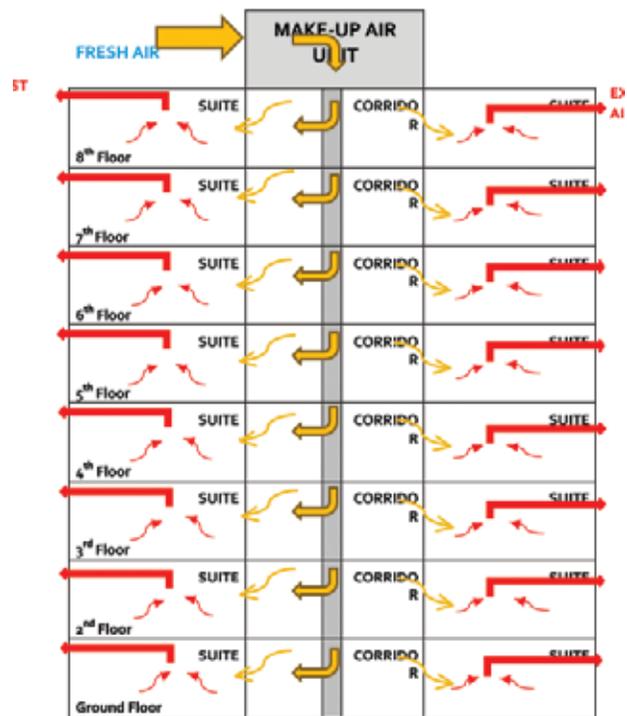
So why is it only MY suite or corridor that stinks?

So, why is it only my unit or corridor that stinks? The answer to that question is explained by a simple concept; modern buildings today are pretty well engineered. The vast majority of suites in multi-unit residential buildings enjoy a fresh and continually renewing air supply because engineers have designed a mechanical system that can generally overpower other air flow dynamics in a building. Codes and construction techniques have evolved to the point where it is generally a failure in installation or maintenance that results in one suite negatively impacting a neighbor with odours.



So what are the main engineering and construction techniques that are saving your nose? Let's start with compartmentalization. This concept seeks to isolate various areas of the building, largely to restrict smoke and fire movement. One floor is isolated from the next, the corridor is largely isolated from the suites, and suites are isolated from each other. The isolation is generally accomplished by having smoke tight and fire-rated walls, floors and ceilings. Where we have services that have to penetrate these structures, they are required to be fire-stopped to restrict the potential for smoke or fire migration through those openings. This helps control the direction air flow can take in a building. And the bonus of smoke control is that it works for odours as well!

Now that we have restricted the direction that air can flow, the engineer adds a mechanically driven air supply into the equation. This is known as a makeup air supply. Makeup air systems should be found in all multi-unit residential buildings (although we have seen instances where old systems are completely non-operational). Working in conjunction with the make-up air supply system, the engineer also designs an exhaust system. The combination of the supply and exhaust is designed to create a controlled air flow path from a high pressure area to a low pressure air on each floor. Normally the supply units are large intake fans on the roof of a building with filters and heating /air conditioning units to temper the air from the exterior. The fresh air is driven under pressure, through ducting, to each floor of the building, and exhausts into each corridor. Louvres in the supply ducts are used to balance the air pressure flow so there is equal distribution into each corridor. This creates a similar high air pressure region in each corridor. Each suite door is also designed with a small gap around its perimeter and at its base. These openings allow an air current to flow from the corridor into the suite. Each suite is equipped with an exhaust system of some sort. This can be a centralized system where fans at the roof draw out air from multiple suites through common exhaust ducts, or the system could rely on individually ducted exhaust fans in the



kitchen and bathrooms, and serving clothes dryers. Simple air leakage through the building envelope is also assumed to occur.

So if everything is working as designed, we have a suite that is relatively air tight from their neighbor to the right and left, above and below, and we have fresh air entering the lower pressure suite from the higher pressure corridor, picking up whatever odours are present in the suite, and exhausting them through the envelope or the mechanical exhaust system. Odours trying to push their way into the corridor are pushed back by the air flow. If that is the case at everyone's suite, you could have a fish fry and it would not bother your neighbor.

So where does it go wrong?

As we all know, there is always the Friday afternoon before the weekend; the day the worker should have run back to the supplier for additional tubes of fire sealant to seal the floor penetrations before leaving for the cottage and that cold one...but he didn't. So, the drywall closed the walls in on Monday morning and our compartmentalization was not quite as smoke tight as intended. In older buildings, the products used for smoke tight fire stopping were also less effective.

Next, the building energy committee has a great idea on how to save money; by turning down (or off!) the makeup air system at night, and recouping the energy savings! Or maybe you've just gone 15 years without checking the balancing louvres that your staff move every time they clean, so the makeup air system is now balanced to provide the penthouse corridor with 5 times the standard air flow and the ground floor with none. Or perhaps your exhaust vents have not been cleaned in 20 years and laundry lint or kitchen grease has completely closed the exterior grill. Once the engineered system is allowed to falter, the mayhem of the various air flow dynamics we discussed earlier take over. Welcome to the world of fishy corridors and smoky suites!

While we've mentioned a couple of the general odour transfer causes above, it can often be difficult to pin-point the specific system deficiencies or contributors that are the root of the problem. Identifying an experienced engineering consultant who can bring a touch of Sherlock Holmes to your site is the key to resolving your dilemma expeditiously. An experienced consultant will gather and assess the facts related to the issue before jumping into tearing apart walls searching for problems. Issues could be occurring with the exhaust system, the air supply system, and /or compartmentalization. If your consultant is not asking some or all of the following questions before chopping walls, find one who does:

- Are there drawings available for the mechanical systems, plumbing systems and floor plans?
- Are the odours experienced within a suite(s), and/or corridor(s)?
- Can the specific suite with the originating odours be identified?
- Will the affected and odour originating suites cooperate with the investigation?
- Are there specific times of the day the odour transfers occur?
- Do the odour occurrences correlate to exterior weather conditions (i.e. high winds)?
- Does the odour originating, or affected suite, leave windows open regularly?
- Do these occurrences relate to changes in mechanical system operations?
- Has the makeup air system been balanced or serviced recently?
- Is there a central or individual exhaust system serving the suites?
- When was the exhaust system last serviced and cleaned?
- Is there a history of winter window condensation issues in specific suites or at specific floors?



Once this information is gathered and assessed, your consultant should be able to narrow down the scope of work including specific site investigation, testing and/or wall openings. Your consultant should be capable of tracking local air flow currents with different techniques, from simple smoke pencils to theatrical smoke generators and suite pressurizing fans (remember to set the fire alarm system to safe mode before you start smoking out corridors!). They should be able to measure intake air flows into corridors and exhaust flows from suites.

Once your Sherlock can put together all the pieces gathered from the answers and investigations above, it is usually possible to eliminate most of the potential problem areas and focus wall openings or equipment servicing on the most likely contributors. Correction of corridor pressurization repair of floor and/or wall penetrations (which are not correctly fire-stopped), and removal of suite door weather-stripping are the three of the most common repairs required, and often all three are required.

Once you repair your suite compartmentalization, and return your exhaust and makeup air systems to their original design specifications, you'll soon be back to meditating in your castle, enjoying the aromas of your fresh baked bread, and wondering: "Now, what do I do about the barking dog?!" ■

Dan Templeton is an engineer with WSP Canada Inc, with 27 years of experience in the construction and consulting industry. He is a Senior Principal with the Buildings Group, specializing in Building Science Services, including project management, most aspects of building assessments and restoration, capital planning and reserve funds. He is located in the Yonge and Eglinton office of WSP and can be reached at 416-644-2896.

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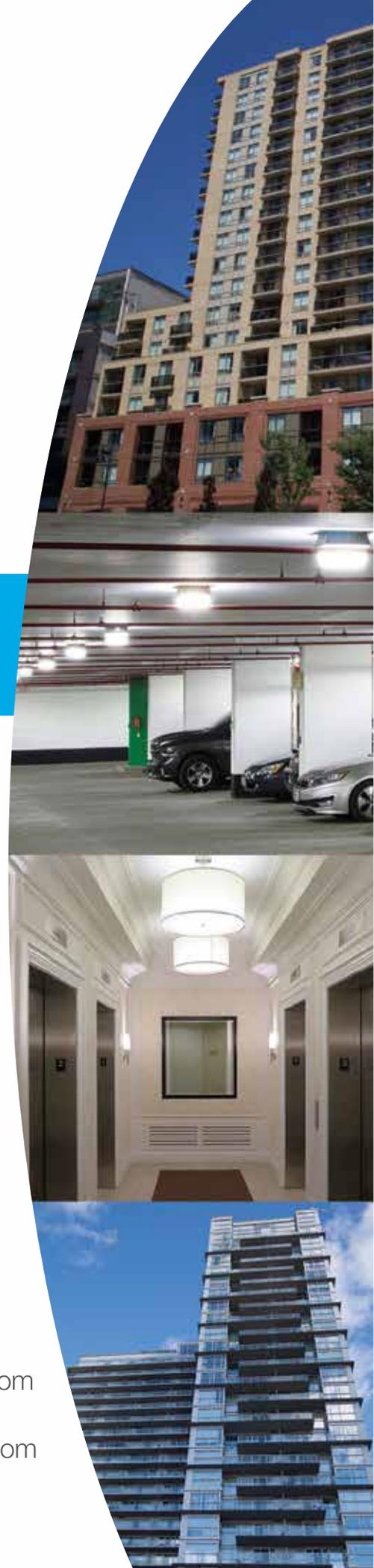
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LEGAL FOCUS ON SMOKING IN CONDOMINIUMS



By Rod Escayola



Societal views on smoking in public places have definitely changed over recent years. Not so long ago, smokers would likely have been the majority amongst adults. Smoking was permitted at the workplace, in dark movie theatres, in planes and, until recently, in bars and restaurants.

As society's views changed, smokers were eventually pushed out to the great outdoors... and pushed further and further away from public entrances. Many municipalities have by-law establishing a minimal smoke-free perimeter around public entrances.

Still, smokers could enjoy lighting up in their homes and cars. That was slowly becoming the last frontier... until provincial legislation even prohibited smoking in one's own vehicle in the presence of children under the age of 16 – even if the windows, doors and sunroof are opened. Smokers were left with their home as their sole smoking refuge. But even this may no longer be permissible if one lives in a condominium.

Smoking in common elements is actually prohibited by the *Smoke-Free Ontario Act*, a provincial legislation. In addition to this provincial prohibition, there is little doubt that a corporation can also prohibit smoking in units. In Ontario, such a prohibition would have to be enshrined in the declaration or in a rule adopted by the corporation.

Until recently however, there was very little guidance from the courts as to whether these smoking bans were enforceable. Sure, there were some cases dealing with a corporation's obligation to promptly deal with complaints of smoke migration between units. But these cases generally dealt with nuisance complaints between owners or with a corporation's obligation to maintain common elements – when the source of the smoke migration could be attributed to issues with common elements.

Three recent cases shed some further light on this thorny question of smoking in condominiums.

So what is the law on smoking in condos in Ontario?

Is Smoking permitted in common elements?

The *Smoke-Free Ontario Act* prohibits smoking (or holding lit tobacco) in any common area of a condominium – which includes the elevators, hallways, parking garages, party room, laundry facilities, lobbies and exercise areas. While no one would likely think of lighting up in the exercise room (these two activities being somewhat mutually exclusive) one may

mistakenly think that occupants are entitled to light up in the party room during a private function. This is not permitted under the Smoke-free Ontario Act.

This Act further imposes a positive obligation on the proprietor of the common areas to prevent smoking in them. A “proprietor”, for the purpose of this section of the act, is the “owner, operator or person in charge”. In my view, in this context of the *Smoke-Free Act*, the proprietor refers to the condominium corporation. It is therefore the Corporation who has this positive obligation to prevent smoking in the common elements.

The legislation imposes on condominium corporations a positive duty to:

- Ensure compliance with the *Smoke-Free Ontario Act*;
- Give notice to each person in the common areas that smoking is prohibited;
- Post signs prohibiting smoking throughout the common area, including washrooms;
- Ensure that no ashtrays or similar equipment remain in the common area; and
- Ensure that individuals not complying with the smoking prohibition do not remain in the common area.

The signs prohibiting smoking must be posted at each entrance and exit of the common area or enclosed public space, in appropriate locations and in sufficient numbers, to ensure that the public is aware that smoking is prohibited. The regulation is very specific as to the specification, size and colour of these no-smoking signs. Failure to comply with these obligations may expose the corporation to hefty fines.

Is smoking permitted on the balconies?

As of January 1st, 2015, it became illegal in Ontario to smoke on or around children’s playgrounds, publicly owned sports fields/surfaces and all bar and restaurant patios (whether covered or not). For many, this raises again the question of whether it was permitted to smoke on condominium exclusive-use balconies or terraces.

In my view, this new provincial prohibition does not apply to condominium exclusive-use terraces and balconies.

What the *Smoke-Free Ontario Act* does is prohibit smoking in any “**enclosed public place**”. An “**enclosed public place**” is defined as including the inside of any place, building or structure *that is covered by a roof and to which the public is ordinarily invited or permitted access*. This likely excludes exclusive-use balcony.

It is also safe to assume that the prohibition against smoking in “common areas” (as opposed to “common elements”) was not meant to apply to exclusive-use balconies – although courts may be called to interpret this. On this, the Court of Appeal ruled that the *Smoke-Free Ontario Act* must be interpreted in a manner consistent with its objective, which is to eliminate smoking in public places in order to protect members of the public from contact with second-hand smoke.

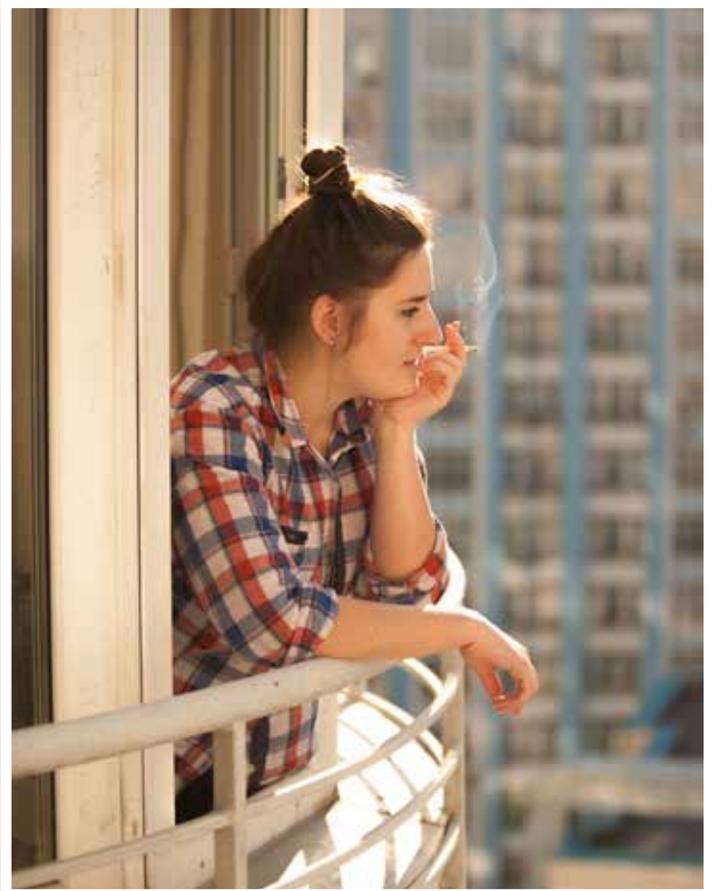
The legislation does not appear to attempt to regulate the use of private dwelling.

Can corporations prevent smoking in units?

As indicated in the introduction, a condominium corporation can prohibit smoking in units provided that such prohibition is found in the condominium’s *declaration* or in its *rules*. By-laws do not deal with smoking bans.

The situation is easy to deal with when the smoking ban is in the declaration from the inception of the corporation. Everyone buying knows (or should know) what he or she is buying into. Still, corporations could amend their declaration if they want to convert an existing condominium into a smoke-free one. Such an amendment to the declaration would require the support of 80% of the owners, which is not an easy task to accomplish. One should also keep in mind that amending the declaration would likely require that all existing smokers be grandfathered.

An alternative to the difficult task of amending the declaration is to adopt a rule preventing smoking in units. Indeed, a corporation can adopt a rule with respect to the use of units if the rule promotes the safety, security or welfare of the owners or prevents unreasonable interference with the use and enjoyment of the units or the common elements. It is to be noted that rules must be reasonable and consistent with the *Condominium Act*, the declaration and the by-laws.



Given society's current views on second hand smoke, a rule preventing smoking in units would likely have a fair chance of passing the test of reasonableness.

As would be the case with amending the declaration, the adoption of a new rule would also require that existing smokers be grandfathered.

It is to be further noted that, while the "new Condo Act" provides some changes to the language pertaining to the adoption of rules, it does not bring any substantive changes on this question.

Cases until now

As indicated in the introduction, we had little court guidance on the enforceability of smoking bans. Most cases dealt with situations where, in the absence of a smoking ban, condo neighbours were complaining of the nuisance coming from the neighbouring unit. Indeed, many corporations prohibit any form of nuisance between neighbour (be it noise ...or smoke). Corporation felt they could intervene (of felt they had to) if it could be established that one's smoke constituted a nuisance that went beyond the disturbance that one may expect from living in close-quarters. The reader should note, however that not all noise and not all smoke amounts to nuisance. One should expect some disturbance when living in close quarters.

Other cases, imposed on the corporation the duty to intervene when/if smoke migrated between units through common elements. The question was to determine the extent to which condominiums had to go to ensure complete air tightness between units? This was addressed in the lengthy battle involving MTCC 985 and two of its owners.

The MTCC 985 case of smoke migration

It all started when the owners of a unit perceived a strong smell of cigar in their unit one quiet June evening of 2013. It turned out that cigar smoke had migrated from the unit immediately above theirs, most likely through opening in the slabs separating the unit.

In one of the first hearing in this matter, in 2014, the judge found that, while the corporation was not in breach of its obligations to repair units/common elements after damage and to maintain common elements, it had not acted with sufficient dispatch to address the owners concerns. At the time, all felt that a solution was in sight and expected

the experts retained by the owners and by the corporation to find a solution to stop this smoke migration.

Fast forward to 2015, the same parties ended up before the same judge. It appeared that the parties were still unable to reach a consensus as to what work needed to be done. The question became "*the reasonable fix versus the perfect fix*".

- The corporation's expert felt that the building was performing as it should, according to its age and design and that a certain amount of smoke migration was to be expected and tolerated. To complete the perfect repair, the corporation felt it would be required to tear out the expensive finishes in many units.
- The owners' expert felt that, even after the repair of the drywall, there remained numerous other opening such as recessed lights, exhaust grills, smoke detectors, sliding door tracks, pictures hung on the walls – all of which would remain potential pathways for smoke transfer. He felt that event equalizing the air pressure in the hallways would not necessarily resolve the issue. It was felt that *all opening* between *all units* were required to be sealed.

The judge felt that what the owners were seeking amounted to a guarantee that there would be no further reoccurrence. The judge felt that this went further than what was reasonably required. He felt that this would be wholly disproportionate considering the expense and disruption and the likely outcome of such repair. The judge reminded the parties that a board of director must balance the private versus communal interests of owners. This standard requires reasonableness, not perfection. He concluded that the corporation had met its obligations.

The judge felt that the matter had gone far too long and had mushroomed out of all proportion to the issues involved. For this reason, amongst other, the judge ordered each party to absorb its own legal costs, leaving each of them with legal fees exceeding \$100,000 each (on a partial indemnity scale).

The BC case involving Paul Aradi

On January 25, 2016, the Supreme Court of British Columbia (comparable to our Superior Court of Justice despite its name) issued an interesting decision where it had to balance the corporation's right to enforce its smoking ban and the interests of a stubborn smoker.

Mr. Aradi is a 70-year old veteran, with reduced mobility. He was a life-long smoker. When he bought his condo in 2002, there were no restrictions with respect to smoking in the units. However, in 2009, the strata corporation (as condos are known in BC) passed a by-law which prohibited smoking inside the units. This by-law was not enforced against him until December 2013. This is when complaints started to come in from neighbouring units. Mr. Aradi ignored the various warnings from the corporation, other than to complain that there was no prohibition when he moved in and that this by-law was creating two classes of citizens. He was eventually fined by the corporation (something that cannot be done in Ontario) but he did not pay these fines, which totalled \$2,300. He eventually contested these fines in court – as he appears allowed to do.



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Eventually, the strata went to court, seeking an order that he immediately cease and desist from contravening the by-law. The corporation argued that, in addition to breaching the by-law, he was causing a nuisance and a disturbance to other owners. It also expressed concerns about the health risks of second hand smoke, the fire risk associated with smoking and the fact the smell of smoke diminished the use and enjoyment of other owners (and perhaps even the value of other units).

Mr. Aradi eventually brought an application to the Human Rights Tribunal, seeking to be accommodated based on his disabilities. Indeed, he argued that he had a disability resulting from his addiction to cigarettes and from his limited mobility, which affected his ability to get to the sidewalk to smoke outside of his unit. The Human Rights hearing had yet to take place when the Supreme Court heard the matter. The strata corporation, however, felt that it could not wait for this hearing to take place considering the existence of the by-laws, the repeated offenses and the complaints from other owners.

In BC, when occupants fail to abide by the by-laws, the strata is authorized to fine the owner, remedy the contravention or deny access to a recreational facility. When this fails, the strata can then seek the assistance of the courts to order a person to abide by the rules. Much like in Ontario, a strata corporation appears to have the obligation to enforce its by-laws.

It is interesting to note that one of the expert witness called to the hearing testified that the addiction is not to cigarettes but to the chemical nicotine. This expert opined that Mr. Aradi could satisfy his addiction by using nicotine patch, gum or inhalers – which appear to be provided free of charge by the BC government. Mr. Aradi had his own expert which opined that the second hand smoke could be mitigated by better sealing the units, replacing the bathroom exhaust, installing an air cleaning device and by replacing the carpet.

The judge concluded that the “no smoking by-law” was valid and that the strata and other residents had a reasonable expectation that

it would be enforced. The judge noted that he was not referred to any decisions of the Human Rights Tribunal which suggested that a strata occupant should be accommodated by allowing him to smoke in his unit despite a by-law preventing smoking in units. The judge felt that waiting 6 months for the Human Rights Tribunal to rule on Mr. Aradi’s case would not be reasonable for the other owners who had expressed concerns about the smell of cigarette and the second-hand smoke effect on their health.

It is to be noted that the judge concluded that Mr. Aradi could walk (albeit with some difficulties) to the sidewalk to smoke and that he was able to drive his car to go to a location where smoking is permitted.

Finally, the judge wrote:

While I accept that the respondent may have an addiction to cigarette smoking and has limitations on his mobility in terms of walking and standing, I must consider [his] wish to be able to smoke within his unit in the context of the scheme of the *Act* which includes [...] the duty on the strata corporation to enforce the bylaws and the rights of other owners to enjoy their units without being exposed to nuisance such as smoking in areas prohibited under the bylaw.

The Ontario case involving a tenant

The above case emanated from BC. One would assume that many of the legal principles found in this case would apply here. Having stated this, it is important to keep in mind that the BC legislation is different from the Ontario one.

Still, 3 days before the BC case, the Ontario Superior court of justice rendered a decision involving a smoking tenant. In this case, the unit belonged to Mr. Dong, who leased the unit out in August 2015. The lease specifically provided that the tenants would abide by the corporation’s rules and regulations. While the reasons of the decision do not make that clear, it appears that the corporation likely had rules preventing smoking in the units. In addition to this, the tenants had expressly agreed not to smoke in the unit.

Shortly after the tenants moved in, the adjoining neighbours started to complain about the smell of tobacco smoke originating from the unit. The corporation notified the owner, who immediately advised his tenants of the allegations of smoke coming from the unit. He instructed the tenants not to smoke in the unit.

The tenants ignored this and the complaints kept coming in. More warning letters came from the corporation, and the owner kept trying to convince his tenants to comply with the rule, the lease and their promise not to smoke.

On November 27, 2015 (2 months after the first warning letter) the corporation brought a court application seeking compliance. Once the owner became aware of the court proceeding, he applied to the Landlord and Tenant Board for an early termination of the lease but the hearing was scheduled to proceed after the compliance hearing commenced by the corporation. Eventually, the tenants agreed not to

smoke in the unit anymore and they consented to an early termination of the lease.

What is interesting about this case is that it focused, as often is the case, on who should pay the legal fees. The corporation sought to have its \$32,000 fee paid by the owner and by the tenant. The owner submitted that he should not pay any of this and sought to have the tenant pay the owners own costs of \$25,000. The tenant did not seek any legal costs but requested that they pay none of the corporation or of the owner's costs.

The judge agreed that the corporation has a duty to control, manage and administer its common elements and to take all reasonable steps to ensure that owners and occupiers comply with the Act, the declaration, the by-law and the rules. It is also clear that a corporation can seek costs from the owner when the tenant breaches the corporation's rules. But this is not a case of strict liability. The owner must be advised of the issue and one would assume the owner needs to be provided with a reasonable opportunity to resolve the issue.

In this case, the court felt the owner took reasonable steps to obtain compliance. The owner felt that an application to terminate the tenancy was a faster, cheaper and more effective method of resolving the issue. Still, the corporation was of the view that the owner should have acted earlier.

The judge concluded that the owner took all reasonable steps required under the *Condominium Act* to ensure compliance. This was not a case where he sat on his hands and did nothing. He was very active in his attempts to resolve the situation. He threatened his tenants with termination and hoped that he could convince them to move out voluntarily so as to avoid a lengthy eviction process. The judge also reminded the parties that nothing prevented the owner from renting out to third parties and that he even took the precaution of putting in the lease the smoking prohibition. The judge also suggested that the corporation should have provided the owners with copies of the various complaints to assist him in building his case against the tenants.

The judge was less sympathetic to the tenants. Still, the judge did not feel that it would be fair to impose on them the totality of the corporation's and of the owner's costs. The judge felt that the corporation

was too quick to "jump the smoking gun". The judge felt that the corporation was too quick to go to court without first trying to assist the owner in his efforts.

At the end of the day, the tenants were ordered to pay \$10,000 to each of the corporation and of the owner. The corporation therefore had to absorb some \$22,000 in fees and the owner some \$15,000.

Conclusion

The old adage "*a man's home is his castle*" stands for the proposition that people should be free to do as they please in their own homes. This is not entirely true in a condominium setting.

Modern condominium living necessarily involves the surrender of some degree of proprietary independence in exchange for the benefits of common ownership. The degree of what is given up is set out in the condominium's declaration, by-laws and rules. Owners must therefore be prepared to live by the rules in place in the condominium community they are joining. If they are not, they are perfectly free to join another community whose rules may be more in keeping with their particular needs, wishes or preferences.

The restrictions imposed on ownership usually deal with what can be done on common elements. Owners are usually left to fully enjoy their unit – provided that they do not cause a nuisance which negatively impacts the neighbour's enjoyment of their own unit. Still, a growing exception to this is the corporation's ability to prevent smoking even in one's units.

* This article was originally published on www.CondoAdviser.com and is reprinted with permission. ■

Rod Escayola heads Gowlings' Condominium Law Group. He is the editor of Gowlings' condo law blog the Condo Adviser.ca. He is on the board of directors of the Ottawa chapter of CCI and is the co-editor of its quarterly magazine Condo Contact. He also sits on the board of directors of his own condominium corporation. Rod co-founded the Condo Directors Group, a not-for-profit organization, providing a forum for condo directors to share knowledge and experience on a range of issues of common interest, through meetings and presentations by experts and service providers.

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BBQ Season in Condominiums



By Kristen Bailey

Does your condominium corporation permit barbeques on the common elements and/or balconies? If not, does your condominium have an adequate provision in its declaration or rules restricting this activity?

Many condominium corporations pass a rule to prohibit all barbeques on balconies. In our view, such a rule is valid and enforceable in most cases. Sometimes, a condominium corporation will only limit the types of barbeques permitted. Whenever barbeques are permitted, a condominium should have a rule in place regulating the use of any barbeques (and in particular, on balconies).

A well drafted rule will address issues such as: types of barbeques permitted (electric, propane, charcoal), and steps that an owner must follow for addressing fire prevention, safety, inspection of equipment, nuisance issues, and various other matters.

While all barbeques are a potential fire hazard (which is one of the reasons that rules governing use are recommended), it is important to be aware that there are specific restrictions on the use of propane barbeques. The TSSA (Technical Standards and Safety Authority) regulates the use of propane barbeques. The specific regulations, as well as other important safety tips regarding the use of fuel burning barbeques, can be found on websites for the TSSA and the City of Ottawa. Below are some of the key points to remember:

- Electric barbeques are often preferred for condominium balconies;
- Be aware of the risks of carbon monoxide for fuel burning barbeques. These barbeques are not permitted in an



enclosed space (such as an enclosed balcony, or, for townhouse condominiums, in an attached garage);

- Propane cylinders must be stored outdoors. The release valve must be at least one metre horizontally from any building opening below it (doors and windows) and three metres from a building air intake;
- Propane cylinders must be transported in service elevators. If there are no service elevators, only the person transporting the cylinder is allowed in the passenger elevator;
- Barbeques must be kept clear of all combustible materials;
- Never leave a barbeque unattended when in use.

The consequences of improper barbeque use can be profound due to carbon monoxide and fire risks. On a condominium balcony, improper use of a barbeque, leading to a fire, can result in damage to the common elements and units, and is a threat to the life safety of residents. Ensure that your Condominium Corporation has rules in place regarding barbeques and that residents follow them! ■

Kristen Bailey is a lawyer in the Condominium Law Group at Nelligan O'Brien Payne LLP, with over eight years of experience exclusively in condominium law. She assists condominium corporations to develop solutions to a wide range of condominium issues.

SMOKE-FREE CONDOS: FROM CONSTRUCTION TO CONVERSION



By Dorothy Church

“ Just as you are talking about this, a lit cigarette butt falls onto the chair beside you or in a planter nearby. You immediately get up to try to identify the unit or the individual who threw the cigarette from above...”

Imagine this: you and your neighbors are enjoying a beautiful evening on your condominium balcony. The new condo being built across the street comes up as part of the conversation. You tell your neighbour that it's going to be a smoke-free condo. Your neighbour is surprised by that and wonders whether it is possible for condos to be smoke-free.

Just as you are talking about this, a lit cigarette butt falls onto the chair beside you or in a planter nearby. You immediately get up to try to identify the unit or the individual who threw the cigarette from above... but there is really no use. How could you possibly identify who did this? You're not about to start knocking on every door on the floors above.

Does this sound familiar? It sure is to property managers and condo boards! The difficulty always lies with how to identify who is the smoker (or more importantly, who throws their cigarette butts overboard rather than use an ashtray). This then often leads to a discussion at a board meeting on whether the condominium should go smoke-free. This is immediately followed by a second question: are condominiums allowed to go smoke free?

In this article, I propose to share my experience as a property manager on this delicate topic. It is important to keep in mind that this topic (like any other one in my line of busi-



ness) is not about hunting down culprits. It is important to always approach this issue (and any other complaint) with tact and keeping in mind that condominium occupants live in a community.

The difficulties of living in close proximities

We already know that it is prohibited to smoke in common areas. Indeed, the *Smoke Free Ontario Act* (the SFOA) prevents anyone from smoking in enclosed areas and public places. The purpose of this legislation is mainly to protect workers and the public from second hand smoke *in public areas*. This legislation certainly prohibits smoking in common areas. However, it does not prevent smoking in units. I'm not a lawyer but the reason why this law does not apply to units is likely because condominiums are comprised of both "units" (which are private areas) and "common elements" (which are common or public).

So owners are legally allowed to smoke in their units and on their terrace or balconies (unless the corporation specifically



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prohibits this). Having occupants allowed to smoke in units or on balconies often lead to difficult neighbour relationships – just like in the scenario I illustrated in the introduction.

Boards and property managers regularly receive complaints from occupants as a result of smoking neighbours. Some complain about the smell of cigarette, others complain of cigarette butts being tossed over balconies, which land on patio chairs or plants. Finally, some (including site staff) complain of cigarette butts being discarded on the grounds, in planters or by the main entrances which recently caused a fire in a planter at the front of a building I have managed for years without any similar incidents.

Even when smoking is limited to one's unit, often neighbours complain about smoke or smell infiltration in their unit. Smoke can indeed penetrate the neighbouring unit through windows and doors from someone who is smoking on their balcony or in their unit. Smoke migration can also happen through ceiling fixtures, electrical outlets, phone jacks, cracks and gaps from under a sink where the pipe enters your unit or around a window or poorly installed caulking. For some you can smell the smoke from a neighbor from an exhaust fan in a bathroom or a ventilation fan above the stove. It does not matter how it gets into an owner unit, it can be very disturbing to non-smokers.



When these complaints come in, the Board and Management usually do not take sides, despite their own opinions. More often than not, they find themselves caught in the middle, between the smoker and the non-smoker. The non-smoker is claiming his or her rights to a healthy, enjoyable and smoke-free environment. The smoker argued that he or she should be able to do as he pleases in his home. Some time, they claim addiction to cigarette and sometimes they claim discrimination under the Human Rights Code. Still, at the end of the day, the Corporation has a responsibility to deal with it as best as it can.

So what can be done? It is important to consider the difference from condos who are smoke-free from the beginning and those who chose to convert to smoke-free complexes.

Smoke free from inception

There is an increasing number of new condominium corporations which are being developed as smoke-free complexes. This is a decision which is taken by the builder at the time of construction. Such condominiums are marketed and sold as “smoke-free”. The smoke-free nature of the complex is all over the marketing material and is also found in the Declaration. For the first generation of owners, the job is fairly easy since these complexes attract smoke-free purchasers – at least when speaking of the original purchasers.

Still, property managers may have to address the odd party or odd guest, who decides to light up [usually on the balcony]. However, these instances are usually rare at the beginning of the life of such new smoke-free condos.

However, as the building ages, and as the original owners start to move out, the smoke-free concept of this corporation may be lost on the new prospective buyers. Sure, the “smoking ban” is still found in the Declaration. ... but which prospective purchaser reads it? Certainly not all of them which then results in leasing of unit without a no smoking clause.

A good precaution to be taken, if you are managing a smoke-free condominium, is to also include it in the Status Certificate. While this is not mandatory, a Status Certificate has more chances of being consulted by the purchaser than the full-blown declaration.

Another good idea is to proudly place a sign in the lobby indicating for all who come that the complex is smoke-free. It would be difficult for prospective buyers, or for visitors, to claim ignorance if the sign is visible as well as a cigarette receptacle by the front door, maintained by the corporation

Another potential problem with these “new” smoke-free complexes appears when an owner leases his or her unit to tenants. Tenants may not be as keen as the owner to preserve the smoke-free nature of the complex.

In the case of tenancies, it often becomes a question of enforcement. Corporations have an obligation to enforce the rules and regulations, especially in a smoke-free complex. In such cases, the board and management really cannot turn a blind eye. All of the owners have a right to expect that their building will remain smoke free. It is important for property managers to therefore treat these smoking bans seriously and to act quickly. Remember to always provide notice to the unit (tenants) as well as to the owner of the unit who at the end of the day is responsible for their tenants.

Conversions to smoke-free condos

A more difficult situation to tackle is when the board decides to convert an existing condominium building to a smoke-free facility.

When a board member raises this suggestion with me, I often ask them what kind of smoking ban would best suit their community. I remember once, when I asked this question to an owner, he looked at me hesitantly and slowly said “...without smoke.” For the next hour

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or so, we sat in my office and I explained the numerous issues to be considered. It all goes back to those three (3) questions our English teacher always asked:

Who?

- Will every unit be smoke-free?
- Will some units who currently have smokers be grandfathered?
- Once a grandfathered occupant moves out, does the unit then become a smoke free unit?
- What if we have a smoking tenant? Is the tenant grandfathered or is the landlord grandfathered?

The grandfathering provision is a question best posed to your lawyer. But a corporation should really turn their minds to this matter. Grandfathering may be a good way to compromise on this difficult question. However, it also means that the corporation will not immediately benefit from the smoke-free conversion. Occupants may have to wait for all of the grandfathered occupants to leave the building before the change can be fully felt.

Where?

- Will smoking no longer be allowed *anywhere* on the property, including inside and outside units?
- Will smoking no longer be allowed anywhere on the property except in a designated smoking area provided by the corporation?
- Will smoking no longer be allowed indoors including individual private condo units?
- Will smoking no longer be permitted in private units but be permitted on balconies and patios only?

How? As in, how will we implement this change?

- The corporation can either make this conversion by making a change to the Declaration. This will require 80% of the owners to

vote and agree on this. This may be a difficult task. Still, with the importance and sensitivity of becoming a smoke-free building, having every owner's involvement maybe the best method of ensuring a united approach.

- Alternatively, the corporation can decide to, instead, pass a Rule. In this case as well, it is important to get the owners to "buy in". If all you do is circulate the Rule and hope for the best, the board may be sadly disappointed... and surprised.

Changing the Declaration seems to give it more strength. The new Declaration is registered on title for all to see. Moreover, the Declaration does not have to be reasonable – whereas a Rule has to. Adopting a rule, on the other hand, can be cheaper and easier to do.

Conclusion

There is no question that there are many factors to consider when moving forward towards a smoke-free condo. Some owners may focus on the health and immediate well-being. Others may be concerned about the marketability of unit (when you either sell them or lease them). At the end of the day, it is up to each corporation and their owners to make the best decisions which work best for them.

Regardless of the approach you are considering, or whether you are a smoker or a non-smoker, a Board Member, Manager or an owner. The success of any of the above will depend on the approach and on properly balancing everyone's interests, feelings and opinions. ■

Dorothy has been a PM for over 15 years and has been part of the Condominium Management Team since 2006. High-rise building systems and guiding newly established Condo Boards is her pleasure. Her long term relationship with clients continues to be her focus as owners but also as an extension of family. When she can get away from her busy schedule she, loves spending time with friends, family and her German Shepherds as well as cooking, and gardening.

The advertisement features a green background. On the left is a thumbnail of the 'CCI National News' magazine cover for the Spring 2016 issue. The cover includes the title 'CCI National News', the subtitle 'THE NEWSLETTER OF THE CANADIAN CONDOMINIUM INSTITUTE (INSTITUT CANADIEN DES CONDOMINIUMS)', and a 'Message from the President' by Bill Thompson. The main text of the ad reads: 'We are pleased to present the latest issue of the CCI National News (Spring Edition) for you to enjoy. The edition can be found in both print and web editions in PDF HERE.' The word 'HERE' is in large, bold, red letters.

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Exposure to Second Hand Smoke in Condominiums



By Andrew Noble



Exposure to second hand smoke is a daily reality for many condo owners and property staff. The smoke comes from inside units with smoking occupants into the neighbouring units as well as the common areas. In fact, according to the Ontario Tobacco Research Unit, in 2012 about 1/3rd of multi-unit housing residents (800,000 people) reported exposure to second hand smoke coming from outside their units.

Health Effects

Most people understand that second hand smoke (SHS) is not healthy but what many are not aware of is that it is extremely toxic. In fact, after many years of study, the best science points to the fact that there is no known safe level of exposure. In addition to causing cancer and heart conditions, SHS exacerbates asthma and other respiratory diseases and is associated with Sudden Infant Death Syndrome (SIDS).

The effect on seniors and children is especially worth noting. The risk for seniors is heightened because they are more likely to have heart and respiratory conditions. Children breathe more frequently and are developing; this puts them at greater risk of exposure to the dangers of tobacco smoke.

Even with proper ventilation, the smoke does not stay within residents' units. It moves to common areas and other units through a variety of means including: electric sockets, vents,

plumbing, and differences in air pressure. As a result, according to the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHREA) "the only means of effectively eliminating the health risk associated with indoor exposure is to ban smoking activity."

For anyone who has lived in a condo, this information will not come as a surprise. Lynda Leaf's article, "Butt Out: Taking Your Condominium Totally Non Smoking in the Winter issue of Condo Voice, covered this ground well. Boards and property managers regularly receive written and verbal complaints about second hand smoke. Often times these complaints are prompted because the residents suffer from health issues including asthma and COPD. Other times, complaints are made because there is a growing awareness about exposure to toxic substances such as secondhand smoke and a desire to reduce exposure.

Reducing exposure in multi-unit housing complexes, like a condo, is especially important. When a neighbour is smoking, the exposure to second hand smoke is an ongoing issue. Residents spend a considerable amount of time in their unit living, sleeping, and increasingly, working from home.

Property Values

In addition to health concerns, second hand smoke in condos can negatively affect resale values. Real estate professionals

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Rod Escayola, Editor

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were surveyed about smoke and resale value by the marketing research firm, Ipsos Canada in 2013. The study revealed 8/10 real estate professionals agree that smoking reduces resale value by about 9 per cent. Considering that tobacco smoke has a terrible smell and is toxic, this result is not surprising and matches the experience of many buyers and sellers. In fact, a 2010 study by the same firm found that given a choice, 80% of Ontarians would choose a smoke-free building.

Going Smoke-Free

Because of the above-noted health concerns and other issues associated with smoking in condominiums, some developers are creating smoke-free policies prior to occupancy. For example, Ottawa-based Domicile has smoke-free policies in the declaration. According to Domicile: "It's simply the right thing to do and, from what our buyers have said on our last two projects, they unanimously embrace this feature."

Other condominiums are turning to legal avenues in order to tackle the problem of second hand smoke. Under the Condominium Act, condos are able to create smoke-free policies using rules and declarations. These processes have various steps and require different thresholds but all can be used to make a policy that bans smoking from the entire condominium, including the units and balconies.

The legal ability to create and enforce a smoke-free policy exists and is clear but to ensure the policy is effective, it is important to take other steps. In creating the policy, boards need to be conscious of keeping

owners informed and aware. If the policy is seen as coming out of 'nowhere', it is likely that a number of people will be upset. This will make it more difficult to make the change and will impede implementation efforts.

In addition, many condos implementing a policy benefit from a solid communications plan. It is tremendously important the residents understand the reasons behind the policy as well as the timing. Letters, newsletter articles and visible signage can play a key role in ensuring the right message is received. Also, it is helpful to remind people that the policy is not about banning smokers; people can continue to be smokers but after the policy is in force, they will no longer be able to smoke in areas restricted by the policy (e.g. their units, including balconies). Finally, if the policy is being grandfathered (i.e. only affecting new owners), it is critical that everyone, including prospective buyers and real-estate agents, is fully aware of the situation.

Our organization provides support for condominiums and owners who want to find out more about going smoke-free. We offer guides, success stories, videos, and sample policies on our website at www.smokefreehousingon.ca. Thanks to support from Ontario's Ministry of Health and Long-Term Care, our services and information are available free of charge. ■

Andrew Noble is a Policy Analyst with the Smoking & Health Action Foundation. He is co-chair of the Smoke-free Housing Ontario coalition. Andrew holds an MSc and BA from the University of Guelph.

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Contributing to CCI CONDOCONTACT EDITOR'S CONTACT INFORMATION

A benefit of CCI membership is the opportunity to share perspectives with one another by contributing and reading articles in CCI Eastern Ontario's quarterly newsletter *CondoContact*.

If you are a condominium director, owner or manager, and have a unique tale to tell or advice to relay to other condominium boards, let us know! If you are a professional or represent a trade company offering services or product to condominiums and have relevant articles, let us know!

The subject matter should be current, concise and helpful. Topics should relate to management and operations of condominiums and not be of a commercial nature.

Articles may be forwarded to:

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CCI Eastern Ontario would like to present our upcoming educational seminars/events for the 2016. Please visit our website for details and registration information at www.cci-easternontario.ca

MAY Free Seminar – The ABC’s of Tarion, **May 4th**

MAY Pub Night, **May 26th**

MAY ACMO/CCI, Conference / trade show, **May 27th**

SEPTEMBER Free Seminar – A Night with the Experts, **Sept 28th**

OCTOBER Kingston 1 Day Directors Training Course

OCTOBER AGM and Free Seminar, **October 19th**

NOVEMBER Fall Directors Course 2016, **November 19/20**

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to say?

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