

# Waterpipe Update: Legislation and Bylaws

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## Introduction

Tobacco control in Canada is changing rapidly. Where cigarettes once held a virtual monopoly on smoking, the popularity of waterpipe smoking has been steadily increasing. Waterpipe (shisha) smoking is described as a youth-focused global epidemic,<sup>1</sup> and Canada is not immune—its popularity has been growing since it was first included as a question on the Canadian Tobacco Use Monitoring Survey in 2006. In 2015, 8.3% of Ontario students in grades 7-12 (n=10,000+) reported using a waterpipe in the past year compared with 8.6% who reported the use of tobacco cigarettes. Prevalence increases with age, with 14.4% of grade 12 students reporting past year use, just behind cigarettes at 15.3%.<sup>2</sup> The numbers are higher still among Canadian young adults ages 20 - 24, with 29% reporting having ever tried a waterpipe in 2013.<sup>3</sup>

New and different shisha products continue to appear on the market, some of which contain tobacco and/or nicotine, and others that purport to be herbal and tobacco-free. As well, a Supreme Court of Canada ruling in June 2015 expanded Health Canada's definition of medical marijuana beyond the dried form, which is typically smoked, to include fresh marijuana and cannabis oil.<sup>4</sup>

This means that medical marijuana can now be legally



consumed in a variety of ways, including being smoked in a waterpipe as well as vaped in e-cigarettes.

Enforcement of smoke-free public places and workplaces has become increasingly problematic over the last decade, as most legislation is specific to tobacco, as are most smoke-free bylaws. Enforcement officers in Ontario report that in some public places where hookah is served, proprietors remove tobacco shisha from its

<sup>1</sup> Maziak W et al. The global epidemiology of waterpipe smoking. *Tobacco Control* 2014;0:1-10. doi:10.1136/tobaccocontrol-2014-051903.

[http://tobaccocontrol.bmj.com/content/24/Suppl\\_1/i3.full.pdf+html?sid=abc3c442-278a-4c47-a94e-1a148f809d88](http://tobaccocontrol.bmj.com/content/24/Suppl_1/i3.full.pdf+html?sid=abc3c442-278a-4c47-a94e-1a148f809d88).

<sup>2</sup> Boak, A. et al., (2015). Drug use among Ontario students, 1977-2015: Detailed OSDUHS findings (CAMH Research Document Series No. 41). Toronto, ON: Centre for Addiction and Mental Health.

[http://www.camh.ca/en/research/news\\_and\\_publications/ontario-student-drug-use-and-health-survey/Documents/2015%20OSDUHS%20Documents/2015OSDUHS\\_Detailed\\_DrugUseReport.pdf](http://www.camh.ca/en/research/news_and_publications/ontario-student-drug-use-and-health-survey/Documents/2015%20OSDUHS%20Documents/2015OSDUHS_Detailed_DrugUseReport.pdf).

<sup>3</sup> Canadian Tobacco, Alcohol & Drugs Survey (CTADS): Summary of results for 2013. <http://healthycanadians.gc.ca/science-research-sciences-recherches/data-donnees/ctads-ectad/summary-sommaire-2013-eng.php>.

<sup>4</sup> R. v. Smith, 2015 Supreme Court of Canada 34; File No.: 36059. 2015: March 20; 2015: June 11. <https://www.canlii.org/en/ca/scc/doc/2015/2015scc34/2015scc34.pdf>.

original packaging and store it in unlabelled plastic containers. Claiming the shisha is herbal, proprietors can circumvent the law and allow customers to smoke indoors. Enforcement officers must test shisha samples for the presence of tobacco before laying charges, which is time-consuming and expensive. Allowing the smoking of anything in public places and workplaces risks confusing the public, risks renormalizing smoking and undermines enforcement efforts. To protect public health, smoke-free legislation and bylaws must keep pace with smoking behaviour.

## Provincial legislation

Five provinces have passed smoke-free legislation that includes the smoking of other weeds and substances. These acts implicitly include marijuana, and will not need to be amended again if marijuana is legalized.

<i>Jurisdiction</i>	<i>Details</i>
Quebec (2006)	<ul style="list-style-type: none"> <li>• For over a decade, Quebec’s <i>Tobacco Act</i> regulation has prohibited any product that does not contain tobacco and is intended to be smoked.</li> <li>• Approximately 30 cafés and restaurants were grandfathered to allow indoor cigar or pipe (but not cigarette) smoking before the new rules came into force; however, it appears there are dozens of illegal establishments.</li> <li>• The smoking of anything is prohibited in all enclosed workplaces and public places, as well as on bar and restaurant patios if they have more than 2 sides and a roof.</li> </ul>
Alberta (2014, not yet proclaimed)	<ul style="list-style-type: none"> <li>• The smoking of “tobacco-like products” will be prohibited in all workplaces and public places where smoking is already banned, including on all patios.</li> <li>• No date has been set for proclamation.</li> </ul>
Nova Scotia (2015)	<ul style="list-style-type: none"> <li>• The definition of smoke was changed to address secondhand smoke from waterpipes and vapour from e-cigarettes.</li> </ul>
New Brunswick (2015)	<ul style="list-style-type: none"> <li>• The smoking of anything is prohibited in all indoor workplaces and public places, and in certain other outdoor areas including patios.</li> </ul>
Prince Edward Island (2015)	<ul style="list-style-type: none"> <li>○ NB also has a 3m smoke-free buffer zone around patios</li> <li>○ PEI permits smoking on patios between 10 pm and 3 am</li> </ul>

The Ontario government has proposed amendments to the *Smoke-Free Ontario Act (SFOA)*, the *Electronic Cigarettes Act (ECA)* and their regulations that would, among other things: make the ‘no smoking’ rules apply to medical marijuana (including the vaping of medical marijuana in e-cigarettes), and expand the definition of e-cigarette to include e-substance. Unfortunately, without a broad definition of smoke and smoking that includes other weeds and substances beyond medical marijuana, waterpipe smoking and enforcement will likely remain a problem in Ontario. The *SFOA* and/or its regulation will also require amending again if marijuana is legalized.

## Municipal smoke-free leadership

Municipalities in Ontario, as well as across Canada, are recognizing the importance of keeping smoke-free bylaws current and are leading the way to protect public health. The scope and impact of these bylaws vary widely. Some explicitly mention waterpipe or hookah, and specify that smoking applies to both lit and heated tobacco. Others have gone further to include other weeds and substances in the definition of smoking. However, many of these bylaws only apply outdoors on municipal property, or in enclosed municipal buildings. Very few offer better protection by prohibiting waterpipe smoking in all enclosed public places and workplaces, as well as outdoors on patios.

## Expanding the definition of smoking

An expanded definition of smoking in smoke-free bylaws started in British Columbia in the late 1980s. For example, in 1989 Salmon Arm defined smoking as “the inhaling of, or exhaling of, the smoke from tobacco or other organic substance, or the carrying of a burning cigarette, cigar or any device in which tobacco or any other organic substance is burning.”<sup>5</sup> Waterpipe or hookah smoking was not explicitly mentioned, as this form of smoking only became popularized worldwide in the mid-1990s.

Today, Canada’s strongest and most comprehensive smoke-free bylaws have definitions of smoking that cover waterpipes and even e-cigarettes. Vancouver, BC, is arguably the country’s best example.<sup>6</sup> Smoking is prohibited in all enclosed public places and workplaces, patios, parks and other outdoor places, and includes a 6 m buffer zone around patios, doorways and windows. Marijuana is not specifically mentioned, but doesn’t need to be. Definitions are as follows:

- “Burning” means to produce smoke, vapour or other substances that can be inhaled.
- “Smoke” or “smoking” includes burning a cigarette or cigar, or burning any substance using a pipe, hookah pipe, lighted smoking device or electronic smoking device.
- “Vapourize” or “vapourizing” means to inhale or exhale vapour produced by an electronic cigarette, electronic pipe, electronic hookah or other similar device that can be used to deliver nicotine or other substances.

In 2015 Vancouver’s bylaw was upheld by the Supreme Court of British Columbia. Two café owners claimed that the bylaw violated their fundamental freedoms of conscience and religion under the *Canadian Charter of Rights and Freedoms*. They also claimed that it was too vague, that herbal waterpipe smoking was not harmful to health, and that because shisha was not burned directly, waterpipe use fell outside the bylaw’s definition of smoking. Significantly, the judge rejected all their arguments, clearing the way for other municipalities across the country to move forward and prohibit all waterpipe smoking in public places and workplaces.<sup>7</sup> For more analysis on culture and prohibiting waterpipe smoking, consult *Waterpipe Smoking: Public health protection over traditional cultural practices*.<sup>8</sup>

## Waterpipe bylaws in Ontario

There are currently 20 municipalities in Ontario that have passed bylaws addressing waterpipe and/or the smoking of other weeds and substances. However, only 2 can be considered comprehensive: Peterborough and Toronto. Both have prohibited waterpipe smoking (tobacco and other weeds and substances) in all enclosed public places and workplaces. Peterborough’s smoke-free bylaw also applies outdoors on municipal property and on sidewalk and rooftop patios, but only among establishments that have a liquor licence. Peterborough cites the *Municipal Act, 2001*, section 10(2), which permits councils of local municipalities to pass bylaws and make regulations for the health, safety and well-being of persons within the municipality. This is the same as

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<sup>5</sup> Smoke-Free Laws Database. <http://database.nonsmokersrights.ca/>. Current to 1 January 2016. Accessed 22 March 2016.

<sup>6</sup> Red Deer and Bonnyville, Alberta, and Maple Ridge and Harrison Hot Springs, British Columbia, deserve special mention. For example, both AB municipalities define smoking as “...to inhale, exhale, burn, or have control over a lighted cigarette, cigar, pipe, hooka pipe, or other lighted smoking implement designed to burn or heat tobacco or any other weed or substance for the purpose of inhaling or tasting of its smoke or emissions.”

<sup>7</sup> The Canadian Legal Information Institute. Vancouver (City) v. Abdiannia, 2015 BCSC 1058. <https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc1058/2015bcsc1058.pdf>.

<sup>8</sup> Smoking and Health Action Foundation. April 2016. [https://www.nsra-adnf.ca/cms/file/files/Waterpipe-public\\_health\\_over\\_traditional\\_cultural\\_practices\\_April\\_2015\\_FINAL.pdf](https://www.nsra-adnf.ca/cms/file/files/Waterpipe-public_health_over_traditional_cultural_practices_April_2015_FINAL.pdf).

other Ontario smoke-free bylaws that address the smoking of other weeds and substances. Toronto, also referencing its authority to protect the health and well-being of its citizens, amended its *Municipal Code Chapter 545, Licensing*. Hookah smoking is prohibited at all businesses that are licensed or required to be licensed, and includes all outdoor patios. Hookah is defined as “a device, whether called a hookah or any other name, designed to heat or burn a substance and produce smoke intended to be inhaled by a user or users of the device.”

Using information from SHAF’s Smoke-Free Laws Database,<sup>9</sup> the table below depicts Ontario waterpipe bylaws with increasing strength and scope.<sup>10</sup>

**Ontario Waterpipe Bylaws: Increasing Strength and Scope**



<i>Includes waterpipe tobacco smoking outdoors</i>	<i>Includes waterpipe tobacco smoking and/or other weeds and substances outdoors</i>	<i>Includes all waterpipe smoking outdoors with opt-in provisions for businesses</i>	<i>Includes all waterpipe smoking indoors</i>	<i>Includes all waterpipe smoking indoors and select outdoor locations</i>
Hamilton ('12) Mississauga ('15) Niagara Region ('14)	Cochrane ('14) Engelhart ('12) Essex ('15) Kirkland Lake ('13) Niagara Falls ('11) Ottawa ('12) St. Thomas ('09) Tecumseh ('15) LaSalle ('15)	Chatham-Kent ('14) Cobalt ('12)	Bradford West Gwillimbury ('13) Barrie ('13)	Orillia ('13) Peterborough ('12) Toronto ('16)

The best and most comprehensive examples of municipal smoke-free bylaws include other weeds and substances without naming anything specific; prohibit smoking in all enclosed public places and workplaces, as well as outdoors on patios; create smoke-free buffer zones around patios, doorways, windows and air intakes; provide no exemptions for special events; and prohibit smoking regardless of the time of day or age of patrons.

## Conclusion

To remain relevant and protect health, bylaws and legislation must address the use of other weeds and substances, whether they are smoked in a cigarette, waterpipe, or vaped in an e-cigarette or other electronic device. A broad definition of smoking that does not specify any particular substance simplifies enforcement. It also avoids the need for further amendments if recreational marijuana is legalized and as yet more new products with or without tobacco or nicotine come to market.

<sup>9</sup> Smoke-Free Laws Database. <http://database.nonsmokersrights.ca/>. Current to 1 January 2016. Accessed 22 March 2016.

<sup>10</sup> Note that variation in protection within these categories exists, as some bylaws prohibit smoking on some or all outdoor municipal property, and/or within a radius of some or all doorways, operable windows and air intakes.