

Landlords & Condominium Corporations: Qs & As on Drifting Second-hand Smoke

1. What is drifting second-hand smoke?

Drifting second-hand smoke (SHS) is tobacco smoke that drifts or seeps into a residential unit from various sources:

- from a neighbour's patio or balcony, or from outdoor common areas
- through open windows or doors
- through electrical outlets, cable or phone jacks, or ceiling fixtures
- through cracks and gaps around sinks, countertops, windows, doors, floors, walls or dropped ceilings
- through the ventilation system
- from the off-gassing of objects, especially soft furnishings such as carpets and draperies.

2. As a landlord, why should I be concerned about tenants smoking in my building?

There are some very compelling reasons to make your building smoke-free:

Fire risk – a smoke-free building reduces the risk of fire. In Ontario, the Office of the Fire Marshall reports that lit smokers' materials is the #1 ignition source in fatal fires.¹

Paint: smoke-free apartments mean less painting to try and cover up the tar adhered to the ceiling and walls.

Carpets: no smoking means no cigarette burns in carpeting and less frequent shampooing to try and remove the smell.

General upkeep and maintenance - smoke-free units cost less to maintain. In fact, one American Housing Authority reports that non-

¹ Office of the Fire Marshall. Ontario 1995 to 2004 Ignition source: Lit smokers' materials excluding matches or lighters. www.ofm.gov.on.ca.

smoking rooms cost approximately half as much to maintain as those where smoking is permitted.²

Increased marketability - a large majority of Canadians (80%) are non-smokers and smoke-free rental properties are increasingly in high demand.

Reduced legal risks - less chance of non-smokers breaking their leases because of drifting smoke, and less chance of being sued by tenants over harm to health from exposure to SHS.

Health - SHS is a toxic mix of more than 4,000 chemicals. In 1992 the U.S. Environmental Protection Agency (EPA) classified SHS as a "Group A" carcinogen - a category reserved for the most dangerous compounds proven to cause cancer in humans. More recently, the California EPA identified SHS as a toxic air contaminant.³ Sixty-nine cancer-causing chemicals have been found in SHS.

Research shows that the greater the exposure to SHS, the greater the health risk. However, many people have health conditions, such as asthma, emphysema, angina, high blood pressure, and diabetes that are worsened by even brief exposure to SHS. The bottom line is that health authorities, including the World Health Organization, have concluded that there is no safe level of exposure to second-hand smoke.

² Sanford Housing Authority, 2004-2005. *How much does second-hand smoke cost a landlord?* www.smokefreeforme.org/presentation/maintenance_cost.pdf

³ California Environmental Protection Agency, Proposed Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant, As Approved by the Scientific Review Panel on June 24, 2005. URL: [ftp://ftp.arb.ca.gov/carbis/regact/ets2006/app3exe.pdf](http://ftp.arb.ca.gov/carbis/regact/ets2006/app3exe.pdf)

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3. Do I have the right to make the self-contained apartments of my house/multiplex building smoke-free?

YES, you have the right to protect your investment and ban smoking in your units. Smoking is not identified under provincial human rights laws as grounds for protection from discrimination, and the NSRA is not aware of any case law where smoking was found to be so. Just because someone exercises their freedom to smoke it does not mean they have an absolute right to smoke. In addition, smoking is not the only way to feed an addiction to nicotine – there are nicotine replacement therapies like the patch or gum, as well as a variety of smokeless tobacco products.

Landlords have the right to impose additional obligations or restrictions on tenants beyond the standard lease agreement, as long as these requirements do not conflict with the provincial/territorial tenancy law.

4. Can I evict a tenant for smoking in a self-contained apartment of my house/multiplex building?

If a no-smoking clause is written into the lease, a landlord has the right to seek penalties for non-compliance. The usual first step is to issue a written warning, as prescribed in the law.

In most provinces/territories, a landlord has the right to seek eviction of a tenant for breaching a smoking ban, but must follow a specific process laid out in the law.

If you had a verbal agreement with the tenant, you may still have the right to seek an eviction depending on whether the residential tenancy law in your province/territory considers verbal agreements to be binding. Consult the NSRA Backgrounder document *When Neighbours Smoke* for a more detailed summary, which includes links to the residential tenancy law in your province/territory.

5. I have received several complaints about a tenant who smokes in the common areas of my building even though this is

not permitted in the lease. What action can I take? Do I personally have to 'catch' the tenant smoking?

The residential tenancy law in your province/territory specifies the remedies available if a tenant violates a term of the lease. Issuing a written warning to the tenant is usually the first step. You do not have to personally witness the tenant breaking a condition of the lease.

You may also want to verify that there are no-smoking signs posted and visible wherever smoking is not permitted. It is possible that the tenant was unaware of the no-smoking policy.

6. I am a board member of a condominium corporation. We have received several complaints about a resident who smokes in some of the common areas even though this is not permitted in the declaration/rules. What action can be taken?

Consult the applicable smoke-free legislation in your province or territory. There is a good chance that smoking is prohibited in the common areas, in which case the condo board, acting as a proprietor, is obligated by law to intervene. Request no-smoking signage from your local public health unit and post them in the common areas. You would also be wise to send a letter to all condo owners reminding them that smoking in the common areas is prohibited by law.

Be sure to also check the legislation in your jurisdiction governing condominiums. It sets out the processes that condominium corporations must follow in establishing and enforcing the declaration/condo rules. The declaration and rules pertaining to your building will detail the consequences of breaching the no smoking requirement.

Usually the first step following a complaint is to issue a written warning. If the tenant continues to smoke, options may include imposing a fine or

denying the tenant use of the recreational facilities. If the resident repeatedly violates the smoking restriction, the board may have grounds for requiring the offender to sell his/her unit.

7. Our building is going smoke-free. To what extent is the off-gassing of second-hand smoke from carpets, furniture, and walls a problem and for how long?

The off-gassing of second-hand smoke is the result of two processes:

absorption, whereby carpets, draperies, and various soft furnishings absorb certain chemicals in tobacco smoke and then re-emit them into the air over time, and adsorption, whereby certain chemicals in tobacco smoke adhere to solid surfaces and then are re-emitted into the air over time.

The length of time for a room or dwelling to off-gas cannot be precisely measured, because it depends on many factors, including the concentration of SHS, the ventilation rate, the surfaces in the room, etc. Experts agree that off-gassing could take weeks, months, or even years.

8. What is the best way to make my apartment building smoke-free?

You will first need to decide exactly what you mean by smoke-free, as a number of different scenarios are possible:

- smoking is banned in some of the indoor areas, including some private units
- smoking is banned in all indoor areas including all private units
- smoking is banned inside all areas and outside except for in designated smoking areas
- smoking is banned anywhere on the property, both inside and out

Survey tenants to find out the extent of their support for or opposition to a smoking ban in the building. Find out how many smoke, what units they live in, and whether they smoke in their homes - don't assume that all smokers will

oppose the smoking ban.

If smoking is not already banned in the common areas of your building, start there. Send a letter to all tenants informing them of the new policy and the reasons for it. Give sufficient notice and post highly visible no-smoking signs in the common areas wherever smoking is not permitted. Provide tenants with regular information about the dangers of SHS.

With respect to banning smoking in private units, a new policy will only apply to new tenants signing new leases. Existing tenants with existing leases will be exempt unless they agree to sign a new lease upon renewal that includes the smoke-free policy. As such, your building will gradually become smoke-free as the smokers move out.

Make sure you consult the residential tenancy law in your province/territory first. Most tenancy laws have detailed rules regarding how lease agreements can be modified. See the NSRA Backgrounder for links to the residential tenancy law in each province/territory.

9. Some condominium owners want to ban smoking in our building. Do they have the right to do this? What role does the condo board play?

Condominium owners absolutely have the right to ban smoking in the building, provided the rules for amending the condominium declaration/rules are respected. It is the responsibility of the condominium corporation to ensure that these rules are followed.

A logical first step would be to survey the current owners to determine the degree of support for a smoking ban. Assuming there is a strong majority in support, the next step would be for the owners who are spearheading the initiative to make a formal presentation to the condominium corporation's board of directors.

The rules governing the corporation will specify the process that must be followed in order for the policy change to be adopted (number of votes

necessary, amount of advance notice to be given, etc.)

If there are owners residing in the building who smoke, it may be necessary to include a "grandfather" clause, which basically accords existing owners the right to continue smoking in their units. While any prospective new owners would be informed that smoking is not permitted anywhere in the building, the building would only become completely smoke-free when all current smokers had moved out.

This would be a lengthy process and arguably defeats the purpose of a smoke-free policy. Currently there is no case law to indicate how such a situation might play out, but it is hoped that the courts would support and enforce restrictions to maintain a level playing field within the condo. Avoiding enclaves of greater "rights" would also avoid resentment and confusion amongst residents.⁴

Consult the law governing condominiums in your province/territory (see the NSRA Backgrounder for links) and your condominium declaration/rules.

10. I own a rooming house. Some tenants have been complaining about breathing tobacco smoke, but most of the tenants smoke. What are my options?

Breathing second-hand smoke is a serious health hazard for both smokers and non-smokers. As well, there are major cost savings from going smoke-free. You have the right to restrict or ban smoking in your rooming house. There is no legal right to smoke enshrined in Canadian law.

Start by discussing the problem with the tenants and give them information on the health risks of SHS. Set a date on which smoking will be banned in all the common rooms, providing

⁴ Shoenmarklin, S. Analysis of the Voluntary and Legal Options of Condominium Owners Confronted with Second-hand Smoke from another Condominium Unit. Smoke-free Environments Law Project. The Centre for Social Gerontology, Inc. May 2006.

reasonable advance notice. Consider extending the smoking ban to the entire rooming house. For more information on how to phase in a smoking ban, consult the NSRA Backgrounder.