

Legal Issues Litigated re Non-smoking By-laws (July 2003)

	Legal Issue		Precedents and Comment
1.	Will court interfere with non-smoking by-law if it is properly constituted?	No	A properly constituted by-law is one that does not exceed the authority granted under the enabling legislation, is passed in “good faith” and is usually one that is simple and easy to read. (see footnotes 2,3,4,5,6)
2.	Can a by-law regulate smoking in public places and workplaces provided it doesn’t cover streets, roads or highways.	Yes	Generally municipal by-laws regulating smoking do not cover streets, roads or highways. (see footnote 6)
3.	Can by-laws define public places and workplaces?	Yes	The enabling legislation should clearly grant authority to define public places and workplaces and classes of public places and workplaces.(see footnotes 2,6)
4.	Can by-laws require owners and operators of public places and employers of a workplace to “ensure compliance”	Yes	The enabling legislation should clearly grant authority for the by-law to require an owner, operator or employer to ensure compliance with the by-law. (see footnotes 1,3,7)
5.	Does a by-law that requires owners and operators of public places and employers of a workplace to “ensure compliance” have to set out all the steps that the person has to take to ensure compliance?	No	A person is only required to do what is reasonable in the circumstances in order to ensure compliance. A by-law can set out the various steps that constitute “due diligence” but it doesn’t have to. For example a proprietor who is dealing with a difficult patron can always call a by-law enforcement officer or the police. (see footnotes 3,5,7)
6.	Will a properly constituted by-law be ruled void for “uncertainty”?	No	If the by-law is clearly drafted. (see footnotes 2,3,5)
7.	Will a properly constituted by-law be ruled void for “vagueness”?	No	If the by-law is clearly drafted. (see footnotes 2,3,5)
8.	Will a properly constituted by-law be ruled void for “being discriminatory”?	No	Not all exemptions are discriminatory, however a by-law that creates an exemption for a single type of premises within a class may be discriminatory. (see footnotes 2,7,8,11)
9.	Will a properly constituted by-law be ruled void for “being unreasonable”?	No	If the by-law is clearly drafted and it falls within the authority granted by the enabling legislation. (see footnote 2)

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10.	Will a properly constituted by-law be ruled void because it improperly sub-delegates enforcement to municipal staff or to owner, operators or employers?	No	The enabling legislation should clearly grant authority for inspectors to enter premises and should permit the by-law to state that an owner, operator or employer has to ensure compliance with the by-law. (see footnotes 2,3,5,6)
11.	Will a properly constituted by-law be ruled void for violating Human Rights legislation if it prohibits entry in certain types of premises to patrons under the age of majority?	No	Human Rights legislation across Canada is not likely to support an action by a patron who is refused entry to a premises where smoking is permitted based on the age of the patron. In any event an action based on discrimination would have to be made before the applicable Human Rights Commission before the courts would deal with it. (see footnote 2)
12.	Will a properly constituted by-law be ruled void for violating Human Rights legislation if it prohibits entry in certain types of premises to employees under the age of majority?	Maybe	Human Rights legislation across Canada is likely to support an action by an employee who is refused employment in a premises where smoking is permitted based on the age of the employee. In any event an action based on discrimination would have to be made before the applicable Human Rights Commission before the courts would deal with it.
13.	Does a municipality have to consult or hold public hearings before passing a by-law?	Maybe	Although most municipal legislation does not require consultation or public hearings before passing a by-law it is always a good idea so as to show "good faith". Some jurisdictions like B.C. require consultation or hearings before a by-law can be passed. (see footnotes 4,12)
14.	Does a patron who is smoking contrary to the by-law have to be charged before a charge can be laid against an owner, operator or employer for failing to "ensure compliance"?	No	In fact it may be difficult to charge patrons who refuse to provide identification. It is better to charge the owner, operator or employer who has to "ensure compliance". This helps cut down on the number of required enforcement personnel. (see footnote 5)

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15.	Is a preamble necessary at the beginning of the by-law?	Maybe	Although the preamble does not form part of the by-law it can be used to interpret the by-law and it can go a long way towards indicating that the by-law has been passed to address issues of public health and the hazards of second hand smoke. It can also be used to show “good faith” in passing the by-law.
16.	Is there a conflict with Federal jurisdiction?	No	The enabling legislation and the by-law should both contain sections that state that “the provision that is the more restrictive of smoking applies”.
17.	Can invalid sections of a by-law be severed from the rest of the by-law?	Yes	Sections found by the courts to be invalid can be severed from the rest of the by-law if the rest of the by-law can stand on its own. (see footnote 3, 8)
18.	Are non-smoking by-laws constitutional?	Yes	(see footnote 5)
19.	Do non-smoking by-laws infringe on section 7 or 15 rights under the Charter of Rights and Freedoms or analogous rights under section 15?	No	Non-smoking by-laws do not constitute a denial of fundamental justice or a violation of the right to liberty guaranteed in section 7 of the Charter. There is no discrimination against smokers under s. 15 of the Charter. (see footnote 5)
20.	Can non-smoking by-laws give rise to claims in damages for tort or unlawful interference with economic relations?	No	No if they are passed in good faith. Generally municipal by-laws cannot be challenged merely because they may cause economic hardship. (see footnote 4)
21.	Do non-smoking by-laws give rise to the doctrine of “paramountcy”?	No	Despite Federal legislation governing tobacco and smoking, provincial legislation and municipal by-laws can regulate smoking. The doctrine of “paramountcy” applies only where there is an actual conflict between a by-law and provincial legislation. The mere existence of provincial legislation in a given field does not oust the municipal right to regulate the matter. (see footnote 6)

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22.	Do non-smoking by-laws require persons to be subject to “dual compliance”?	No	They do not require a person to meet the requirements of 2 statutes but only the one that is the most restrictive of smoking. (see footnote 6)
23.	Can by-laws that provide for exemptions be found to be “discriminatory”?	Maybe	Not all exemptions are discriminatory, however a by-law that creates an exemption for economic hardship, special occasions or one which creates an exemption for a single type of premises within a class may be discriminatory e.g. exempting Legions from a general by-law that prohibits smoking in all public places and workplaces would be discriminatory in relation to bars and restaurants. (see footnote 2)
24.	Does the fact that a by-law may impose financial hardship on a particular type of business mean the by-law is not valid?	No	A municipality has no legal obligation to monitor marketplace conditions before passing a non-smoking by-law. In any event the data supports the view that in the long run there is no economic hardship on businesses because of non-smoking by-laws. (see footnotes 4,9)
25.	Can a by-law treat different classes of public places or workplaces differently?	Yes	If the enabling legislation so provides a by-law may treat different classes of premises differently, e.g. some types of premises may become smoke free at an earlier date than others. (see footnotes 2,3,4,5,6)
26.	Can a municipality be found liable for not passing a non-smoking by-law?	No	Although in some jurisdictions employers have been found liable where employees have become ill from second hand smoke there is no case law that indicates that municipalities can be held liable for not passing non-smoking by-laws. (See Ontario WSIB cases)

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27.	Can a municipality pass non-smoking by-laws if there is no enabling legislation?	Yes	<p>It is clear from the Hudson decision that where municipal legislation in a province contains a “general welfare” or “omnibus clause” a municipality can pass by-laws regulating health matters in the municipality even if there is no specific authority with respect to passing non-smoking by-laws. However it is not clear how far such a by-law could go and whether or not it could require an owner, operator or employer to “ensure compliance”. Such a provision may be viewed by the courts as an improper delegation.</p> <p>A by-law passed under an “omnibus clause” would have to drafted so that it did not conflict with any provincial or federal legislation. In any event it is always better to have specific enabling authority with respect to smoking that is as broad as possible. Provinces with “general welfare” provisions in municipal legislation include: Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Northwest Territories, Ontario, Prince Edward Island, Saskatchewan and Yukon. (see footnotes 8,10,11)</p>
28.	Do non-smoking by-laws operate so as to constitute a prohibition or prevention of trade?	No	Non-smoking by-laws do not prevent a person from operating a business. (see footnotes 6,7)
29.	Can a by-law require ashtrays to be removed from the premises?	Yes	Removal of ashtrays can be considered to be part of “ensuring compliance”. (see footnote 7)
30.	Should a by-law contain a preamble?	Yes	A preamble can be used show “good faith” if the by-law is challenged. The Court may use it to interpret the by-law. The preamble should state that the by-law is being passed for health reasons and to prevent exposure to second hand smoke. (see footnotes 2,3,4,5,6)

Case summary

1. *Rigg v Toronto (City)* 1989 46 M.P.L.R. 113 (S.C.O.).
2. Ontario Restaurant Association et al and City of Toronto (1996) (Court file #RE 7096/96)
3. Cambridge Bingo et al and the Regional Municipality of Waterloo 2000 (Court file # 406/00 and 573/00)
4. *Thirsty's Bar and Grill et al and the Regional Municipality of Waterloo 2000*(Court file # 248/00)
5. Her Majesty The Queen v. Ample Annie's Itty Bitty Roadhouse et al, 2001
6. Pub and Bar Coalition of Ontario and Rideau Carlton Raceway v. City of Ottawa, 2001 O.J. No. 3496 (Court file # 01-CV-17948 and CV-17999 and Pub and Bar Coalition of Ontario and Rideau Carlton Raceway v. City of Ottawa, 2002 O.J. No. 2240 (Court file # C36997, Ont. C.A.)
7. *Her Majesty the Queen v. 519653 Ontario Inc., c.o.b. as Puzzles, January, 2002 O.J. No. 1059 (Ont. Ct. Just.) (Switzer J.P.)*
8. *The City of Fredericton and Luna Pizza (1990) Inc, Parkside Holdings Inc., Bobby Manolarakis and Christine Manolarakis, 2002 NBQB 234*
9. *Body Rubs of Ontario v. Vaughan (City), [2001] S.C.C.A. No. 118, File No. 28450 (S.C.C.), 15 M.P.L.R. (3d) 203 (Ont. C.A.), [2001] O.J. No.2*
10. Weir et al and The Queen 1079 26 O.R. (2d)
11. Restaurant and Food Services Assoc. v. Vancouver (City) [1998] B.J. C. No.53
12. B.C. Liquor Licensees & Retailers Association (and Kevin Pugh). v. British Columbia (Workers' Compensation Board), (2000) 5 W.W.R. 575, 74 B.C.L.R. (3d) 319, 21 Admin L.R. (3d) 153, 2000 B.C.S.C. 505, March 22, 2000, Vancouver L000212 (Stromberg-Stein J.).