June 26, 2001

Physicians For A Smoke Free Canada
and
Ottawa Council on Smoking and Health
c/o 1226A Wellington Street
Ottawa, ON
K1Y 3A1

Dear Sirs/Mesdames:

Re: City of Ottawa Non-Smoking By-Laws, No. 2001-148 (public places) and No. 2001-149 (workplaces)
Our Reference: PFSF001

You have asked us to review the City of Ottawa By-Law No.2001-148 and the City of Ottawa By-Law No. 2001-149 enacted by the Council of the City of Ottawa on May 9, 2001 and to provide you with our opinion on the question of whether the By-Laws are valid in law and, therefore, enforceable.

By-Law No. 2001-148 prohibits smoking of tobacco products in public places and By-Law No. 2001-149 prohibits the smoking of tobacco products in workplaces. As it is our opinion that the issues involving the validity of these By-Laws are almost identical for each By-Law we have, for purposes of this opinion, treated both By-Laws the same unless indicated otherwise. A copy of By-Law No. 2001-148 is attached as Schedule "A" to this letter. A copy of By-Law No. 2001-149 is attached as Schedule "B" to this letter.

There are a multiplicity of grounds upon which municipal by-laws can be attacked. In this letter we will deal with several grounds upon which an attack against the By-Laws could be based. It is our view in reviewing the entire surrounding circumstances related to the enactment of these By-Laws that these would be the grounds used to attack the By-Laws. However, should a legal challenge to the By-Laws be commenced, it will be necessary for us to review the form of that challenge to see if any grounds are being relied upon that are not dealt with in this letter.

As you are aware, we have prepared and delivered to you under date of June 19th, 2001, a Case Book which sets out copies of the significant court decisions in Canada with regard to challenges to municipal

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non-smoking by-laws. We would suggest that this opinion be read in conjunction with that Case Book in order that the judicial precedents we are referring to be available and fully understood. For ease of reference we will deal the grounds we consider likely to be utilized in attacking the By-Laws in numbered sections of this letter.

1. Does the City of Ottawa Have the Statutory Authority to Enact the By-Laws?

Our Opinion: The City of Ottawa has the authority pursuant to subsection 213 (2) of the *Municipal Act*, and possibly pursuant to section 102 of the *Municipal Act* to enact the By-Laws.

Section 213 of the *Municipal Act* provides the statutory authority for municipal councils to enact smoking control by-laws.

As well, it should be pointed out that Section 102 of the *Municipal Act* provides:

"Every council may pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act and for governing the conduct of its members as may be deemed expedient and are not contrary to law."

Subsection 213 (2) of the *Municipal Act* provides:

" The council of a local municipality may pass a by-law regulating the smoking of tobacco in public places and workplaces within the municipality and designating public places or workplaces or classes or parts of such places as places in which smoking tobacco or holding lighted tobacco is prohibited."

The By-Laws explicitly state in the first whereas clause of each of the By-Laws that they are made pursuant to section 213 of the *Municipal Act*. Accordingly, it is clear that the Council of the City of Ottawa in enacting the By-Laws was relying upon the authority given to it by Section 213 of the *Municipal Act*. Although there is no specific reference in the By-Laws to Section 102 of the *Municipal Act*, it could be argued that if there is anything contained in the By-Laws that is not specifically authorized by Section 213 of the *Municipal Act*, it is still within the authority of the Council of the City of Ottawa to enact pursuant to Section 102 of the *Municipal Act*. The second whereas provision in each of the By-Laws does refer to a determination that second hand tobacco smoke is a health hazard. That may be a sufficient qualification for reliance upon Section 102 of the *Municipal Act*, which refers to By-Laws for "...the health...of the inhabitants of the municipality...", with regard to anything contained in the By-Laws that is not specifically provided for by Section 213 of the *Municipal Act*.

The plain meaning of the words in subsection 213 (2) of the *Municipal Act* makes it quite clear that the Council of the City of Ottawa has the legislative authority to regulate and to prohibit smoking of tobacco in public places and workplaces. This position was unequivocally accepted by the Ontario Court (General Division) in the case of *The Ontario Restaurant Association et al v. The Corporation of the City of Toronto* (Tab 9 Case Book), where Mr. Justice O'Brien held: "I accept the respondent's (*that is, The Corporation of the City of Toronto*) argument that there is clear legislative authority for the By-Law..."

Even if the explicit wording of Subsection 213 (2) did not exist in the *Municipal Act* or if the By-Laws were found to contain provisions not specifically provided for by subsection 213 (2) of the *Municipal Act*, there is authority for the position that the City of Ottawa could rely upon Section 102 of the *Municipal Act*, as empowering it to pass a by-law to regulate smoking. This was the decision of Justices Cory, Craig and Holland of the Ontario High Court of Justice, Divisional Court in the case of *Re: Weir et al and the Queen* (see page 2 of the decision a copy of which is at Tab 2 of the Case Book which dealt with what was then Section 242 of the *Municipal Act* which section became the current section 102 of the *Municipal Act*). In view of the decision of several courts to adopt the view that they should take a liberal approach to statutory construction of municipal enabling statutes (see the decision of Mr. Justice Reilly of the Ontario Superior Court of Justice in *Cambridge Bingo Centre Inc v. Waterloo (Regional Municipality*) (Tab 4 Case Book)), there is further support for liberally interpreting Section 102 of the *Municipal Act* so as to treat it as authorizing such By-Laws.

However, the clear wording of subsection 213 (2) of the *Municipal Act* as supported by the court in *The Ontario Restaurant Association et al v. The Corporation of the City of Toronto* (Tab 9 Case Book) will probably make this argument relying upon section 102 of the *Municipal Act* unnecessary.

We would also refer to the decision of Mr. Justice Reilly in *Thirsty's Bar and Grill v. Waterloo (Regional Municipality)* (Tab 5 Case Book) where the court at page 7 referred to the By-Law in that event as being "...passed pursuant to specific enabling legislation." Accordingly, this a further court decision supporting the clear wording of subsection 213 (2) of the *Municipal Act* as providing authority to a municipality to enact by-laws of the type enacted by the Council of the City of Ottawa.

We would, however, point out that the precise wording of subsection 213(2) of the *Municipal Act* does leave open an argument for those attacking the By-laws. In dealing with the right of a municipal by-law to prohibit smoking subsection 213 (2) of the *Municipal Act* states that such prohibition applies to public places or workplaces designated by the by-law. This leaves open the argument that by using the word "designating" in subsection 213 (2) the legislature only authorized a municipal council to prohibit (as opposed to regulate) smoking in certain portions of a municipality and not in all public places and workplaces throughout the municipality. In other words, does the legislative authority require the municipality to designate some public

places and/or some workplaces for the prohibition and, therefore, not authorize a by-law that covers all public places and workplaces? As far as we are aware, such an argument has never been put forward before the courts and accordingly, there is no judicial precedent dealing with such an argument.

We are of the view that such an argument would not succeed before the courts, but in the absence of any prior judicial discussion on such an argument, we cannot be conclusive in this regard.

2. Are the By-Laws Too Vague and Uncertain?

Our Opinion: The By-Laws are not so vague, uncertain or ambiguous that a court would hold they are invalid and unenforceable.

Challenges to municipal by-laws are very often brought upon the basis that a by-law is too vague and uncertain. In law, an obligation created by a municipal by-law must be sufficiently explicit that a well-intentioned citizen seeking to observe the provisions of the by-law may, from a reading of the by-law be able to satisfy himself or herself that he or she has complied with its requirements.

On the other hand the courts have held that by-laws should not be ruled out as too vague, uncertain and ambiguous unless it is impossible to resolve such ambiguity and, even if there is some ambiguity, the words should be given a meaning as to make them reasonable and valid. The courts have also held that a by-law is not necessary invalid merely because its terms call for construction.

In this regard we would refer to the following judicial authorities: *Regina v. Sandler [1971] 3 O.R. 614; Montreal (City) v. Morgan (1920) 60 S.C.R. 393; Harrison et al v. City of Toronto (1982) 39 O.R. (2d) 721*.

In addition to the courts' views on how to approach an argument attacking a by-law based upon vagueness, uncertainty or ambiguity, the courts have adopted the general principle in applications to quash municipal by-laws of avoiding interference with the legislative functions of the municipal councils except in cases when there has been a clear excess or abusiveness of statutory authority or a disregard of some statutory condition upon which the right to exercise such authority is based. As stated by Mr. Justice O'Brien in *The Ontario Restaurant Association et al v. The Corporation of the City of Toronto* (Tab 9 Case Book) at page 5: " The modern attitude of the courts has been even more pronounced where the by-law is designed to authorize the undertaking for the general benefit of the community or some part of it. The judicial approach is therefore that municipal by-laws are to [be] benevolently interpreted and supported if possible".

The Supreme Court of Canada as long ago as 1945 in the case of *Kuchma v. Rural Municipality of Tache [1945] 2 D.L.R. 13 (S.C.C.)* held: "Upon the question of public interest, courts have recognized that the municipal council familiar with local conditions is in the best position of all parties to determine what is or is not in the public interest and have refused to interfere with its decision unless good and sufficient reason be established".

Mr. Justice O'Brien in *The Ontario Restaurant Association et al v. The Corporation of the City of Toronto* (Tab 9 Case Book) at page 7 in dealing with the challenge to the City of Toronto By-Law on tobacco control on the grounds of it being vague or uncertain held: "I adopt the statements in both *Harrison (Harrison v. City of Toronto)* and *Morgan (Montreal (City) v. Morgan)* and add to them the general "benevolent approach" to interpretation of municipal by-laws to which I refer earlier. Merely because hypothetical cases may be suggested which create some doubt (as applicant's counsel did) do not render the words uncertain or void. I conclude, as did Galligan J. in *Harrison (Harrison v. City of Toronto)* that there is a sensible or ascertainable meaning to the words and requirements of the by-law...reasonably explicit and are not rendered void because they may require some interpretation. I therefore reject the argument based on vagueness and uncertainty".

In challenging a by-law based upon vagueness and uncertainty the challenger must specifically indicate what such vagueness and uncertainty consists of in the wording of the by-law. Because no challenge has yet been commenced in relation to the City of Ottawa By-Laws, it is not possible to determine what will be put forward, if anything, as an argument that the By-Laws are too vague and uncertain. In *The Ontario Restaurant Association et al v. The Corporation of the City of Toronto* (Tab 9 Case Book), the challenge for vagueness and uncertainty was based upon the by-law failing to define "public place", having an uncertain reference to "seating area", that the determination of a designated seating area was vague, lacking particulars relating to a proper ventilation standard and that it did not deal with the situation when a facility was remodelled or the seating arrangement changed. There was also an argument that it was difficult to determine if some facilities would be "public" or "private".

In the case *Cambridge Bingo Centre Inc. v. Waterloo (Regional Municipality)* (Tab 4 Case Book) the alleged vagueness was with relation to the obligation to "ensure compliance" with the by-law.

Until it is known what are the alleged uncertainties or vagueness in the City of Ottawa By-Laws, it is difficult to be conclusive with regard to this area of challenge. However, our review of those By-Laws leads us to the opinion that there is nothing contained in them that could be alleged to be vague and uncertain, other than allegations similar to those raised in *The Ontario Restaurant Association et al v. The Corporation of the City of Toronto* (Tab 9 Case Book) and *Cambridge Bingo Centre Inc. v. Waterloo (Regional Municipality)* (Tab 4 Case Book) where such allegations were rejected by the courts.

An extensive discussion of the issue of a municipal by-law invalid for vagueness or uncertainty can be found in the decision of Mr. Justice Reilly in *Cambridge Bingo Centre Inc. v. Waterloo (Regional Municipality)* (Tab 4 Case Book).

3. Are Restaurants and Entertainment Facilities Public Places?

Our Opinion: Restaurants and entertainment facilities are "public places" pursuant to the By-Law definitions which are authorized pursuant to subsection 213 (3) of the *Municipal Act.*

Subsection 213 (2) of the *Municipal Act* providing the authority for the By-Laws, indicates that the regulation and prohibition deals with "public places". Some municipal non-smoking by-laws have been attacked on the basis that certain types of businesses attempted to be regulated pursuant to such by-laws may not be "public places".

For example, in the case of *The Ontario Restaurant Association et al v. The Corporation of the City of Toronto* (Tab 9 Case Book), it was argued that as there is no definition in the legislation or in the by-law, the meaning of "public places" is unclear and ambiguous and such ambiguity should be resolved in such a way that "...restaurants and entertainment places are not "public places"for the purposes of the legislation...". This argument was, however, rejected by Mr. Justice O'Brien in that case, who stated: "The object and intention of the by-law is clearly to protect members of the public from what council believes to be danger from [second hand] tobacco smoke. In that context, I am satisfied there is no ambiguity and restaurants and entertainment facilities are "public places" to which the by-law applies".

In this regard we would also refer to subsection 213 (3) which states:

"A by-law made under subsection (2) may,

(a) define "public place" for the purposes of the by-law".

The only restriction on this statutory power granted to municipalities by subsection 213 (3) is found in subsection 213 (4) which provides that no by-law made under subsection 213 (2) shall apply to "...a street, road or highway or part thereof."

By-Law No. 2001-148 (Schedule "A" to this letter) in section 1 (s) defines "public place" as "...the whole or part [of] an indoor area to which the general public is invited or permitted access and includes a school bus".

In view of both the legislative authority set out in subsection 213 (3) and the decision of Mr. Justice O'Brien in *The Ontario Restaurant Association et al v. The Corporation of the City*

of Toronto (Tab 9 Case Book) it will, in our view, be difficult to challenge the By-Laws based upon questioning whether restaurants and entertainment facilities are "public places" or upon "public places" being vague and uncertain.

In theory there could be a similar challenge with regard to what constitutes a "workplace" under By-Law No. 2001-149, (Schedule "B" to this letter). There has been, as far as we are aware, no similar challenge relating to "workplace" brought before the courts, presumably because the challenges of these type of municipal non-smoking by-laws have concentrated on a challenge to public place restrictions. If there was a challenge based upon the definition of "workplace" it is interesting to note that subsection 213 (3) does not include a specific authority for a municipality to define "workplace". Nevertheless, By-Law No. 2001-149 (Schedule "B" to this letter) does define workplace in section 1 (h) as being "...any enclosed area of a building or structure in which an employee works and includes washrooms, corridors, lounges, eating areas, reception areas, elevators, escalators, foyers, hallways, stairways, amenity areas, lobbies, laundry rooms and parking garages utilized by an employee".

Both because the courts have not dealt with a challenge based on a municipal by-law definition of "workplace" and because subsection 213 (3) of the *Municipal Act* does not authorize a municipal by-law enacted pursuant to subsection 231 (2) of the Municipal Act to define "workplace" it is difficult to determine whether any such challenge would be successful.

4. Are the By-Laws Invalid by Reason of Delegation of Enforcement to Proprietors and Employers?

Our Opinion: Pursuant to subsection 213 (3) (g) of the *Municipal Act*, the By-Laws can delegate enforcement to an employer of a workplace and to an owner or occupier of a public place and require them to ensure compliance with the By-Laws without the By-Laws being invalid in law.

There have been several court challenges of municipal non-smoking by-laws based upon an allegation that the by-law requiring a property owner to assist in enforcing the by-law makes the by-law invalid.

One of the first cases challenging a by-law on this basis is *Re: Weir et al and the Queen* (Tab 2 Case Book). In that case the by-law imposed a duty on the proprietor of a retail shop to "make reasonable efforts to prevent smoking in violation of " the by-law and imposed a penalty for a failure to perform that duty. Justices Cory, Craig and Holland of the Ontario High Court of Justice, Divisional Court, held: "The By-Law appears to impose such an uncertain duty, such a vague obligation upon the proprietor, that the By-Law ought to be declared invalid".

They also held: "Further, the By-Law delegates the duty of enforcement upon the proprietor. It is no doubt true that the municipality can delegate administrative duties to officials of the municipality. But to delegate what amounts to a policing authority to a "proprietor" would seem to be an invalid exercise of delegation of authority. It is to be noted that the penalty section provides that "any proprietor who fails or neglects to perform any of the duties imposed by sections 3 and 4" is to be deemed guilty of an offence. The policy duties are fairly strict... One can imagine the difficulties that might be encountered by a small, feminine proprietor of a convenience store attempting to carry out the duties delegated to and imposed upon her by that section of the By-Law. Sections 4 and 5 of the By-Law are therefore invalid, both for uncertainty and for improper delegation of authority.

Finally they held: "a reading of the by-law as a whole indicates that the concepts enunciated in ss.4 and 5 form such an integral part of the whole that it should not and cannot be divided... The entire by-law, therefore, will be declared invalid".

However, ten years later in the 1989 case of *Rigg v. Toronto (City)* (Tab 3 Case Book) Madame Justice Van Camp of the Supreme Court of Ontario - High Court of Justice determined that the enabling legislation for the municipal by-law (a private member's bill, *City of Toronto Act*, 1986, S.O. 1986, Pr 33) expressly permits the municipality to require an employer to enforce smoking policies in the workplace. Madame Justice Van Camp stated: "since the enabling legislation specifically provides for the delegation herein challenged and since no one has disputed the vires of the enabling legislation I find the by-law is not illegal or invalid for improper delegation". Madame Justice Van Camp also found that the delegation of enforcement was not so vague or uncertain as to invalidate the by-law.

This decision of Madame Justice Van Camp was supported by the Ontario Superior Court of Justice in the case of *Cambridge Bingo Centre Inc. v. Waterloo (Regional Municipality)* (Tab 4 Case Book). In *Cambridge Bingo Centre Inc. v. Waterloo (Regional Municipality)* (Tab 4 Case Book) the by-law was enacted pursuant to subsection 213 (2) as is the case with the City of Ottawa By-Laws.

The Waterloo by-law in section 4.1 stated "every proprietor shall ensure compliance with section 4 of this by-law within their public place." It was argued that such provision constitutes an improper delegation of policing or enforcement authority which does not flow from the enabling legislation, that it constitutes an improper delegation of discretion to "every proprietor" and that it is impermissibly vague in its terms.

Mr. Justice Reilly indicated that in the case of *Re: Weir et al and the Queen* (Tab 2 Case Book), the by-law was passed pursuant to general provincial enabling legislation dealing with public health and nuisance (similar to the current section 102 of the *Municipal Act*) and that there was no specific enabling legislation dealing with the right to delegate enforcement obligations. However, the Waterloo by-law with which Mr. Justice Reilly was dealing, was

specifically enabled by section 213 of the *Municipal Act* and subsection 213 (3) (g) of the *Municipal Act* specifically authorizes a by-law made pursuant to subsection 213 (2) to "require the employer of a workplace or the owner or occupier of a public place to ensure compliance with the by-law". Mr. Justice Reilly then stated: "I can conclude that such provision authorizes and the by-law requires proprietors not simply to enforce the signage and ashtray provisions, but also to ensure compliance with section 4 itself, to ensure that 'no person shall smoke in any public place' (such public place being under the control of a 'proprietor'). The fact that the enabling legislation specifically authorizes the delegation of enforcement to proprietors distinguishes the case at bar from *Re: Weir et al and the Queen*".

Mr. Justice Reilly also referred with approval to the decision of Mr. Justice Thackray in *Vancouver (City) v. Doll & Penny's Café Ltd.* (Tab 7 B Case Book) where it was held that delegation of enforcement to proprietors is acceptable.

Mr. Justice Reilly in *Cambridge Bingo Centre Inc. v. Waterloo (Regional Municipality)* (Tab 4 Case Book) concluded: "that an "ensure compliance" obligation constitutes a valid inclusion in provincial legislation. Further, and in particular, when the enabling legislation specifically permits a subordinate legislating authority (in this case, the Regional Municipality of Waterloo) to delegate the "ensure compliance" obligation to those who may be reasonably responsible for the enforcement of legislation or a by-law passed pursuant thereto, such delegation is a valid exercise of the authority granted to regional government and is, therefore, intra vires. Thus, I conclude that the by-law does not improperly delegate the enforcement of the by-law to proprietors of public places and the application cannot succeed on that ground."

Based upon subsection 213 (3) (g) of the *Municipal Act*, the decision in *Rigg v. Toronto (City)* (Tab 3 Case Book) and the decision in *Cambridge Bingo Centre Inc. v. Waterloo (Regional Municipality)* (Tab 4 Case Book), it appears clear that the City of Ottawa can delegate enforcement of the By-Laws. The City of Ottawa public places by-law (By-Law 2001-148 Schedule "A" to this letter) provides for such delegation in section 11 where it states: "No proprietor or other person in charge of a public place shall permit smoking where smoking is prohibited under this by-law". Further, section 12 creates an offence for any person who contravenes any of the provisions of the By-Law which would include the "proprietor" referred to in section 11 of the By-Law. Similarly with regard to the City of Ottawa workplaces by-law (By-Law 2001-149 Schedule "B" to this letter) section 5 delegates enforcement as it states: "When the non-smoking policy has been adopted for a workplace no employer shall permit smoking in the workplace". Further in section 8 (2) the By-Law creates an offence for an employer who permits smoking in the workplace and in section 9 creates and offence for an employer who refuses, fails or neglects to perform any of the duties imposed upon the employer under any of the provisions of the By-Law.

It is interesting to note the British Columbia case of *Doll & Penny's Café Ltd. v. Vancouver (City)* (Tab 7 A and B Case Book). In this case a Justice of the Peace held that the by-law

was void for inappropriate delegation of enforcement duties. The appeal of that decision by the City of Vancouver caused the Supreme Court (Tab 7 B Case Book) to hold that pursuant to the charter of the City of Vancouver it had the right to require proprietors to prohibit smoking in their restaurants. The decision of the Supreme Court was upheld by the British Columbia Court of Appeal (Tab 7 A Case Book).

In the current case labelled in the Case Law Summary (Tab 1 Case Book) as "City of Guelph 2000", which is probably going to be formally named *Ample Annie's Itty Bitty Roadhouse Inc. et al v. The Corporation of City of Guelph,* the plaintiffs argued in a motion to quash the by-law on June 21, 2001 that proprietors are being unfairly designated as smoking police and that this problem has been aggravated by the refusal of the local health unit to lay charges against individuals breaching the non-smoking by-law. The lawyer for the plaintiffs in making this argument stated: "Since the coming into force of this by-law not one patron has been charged" and as a result, the responsibility for enforcement "...has fallen squarely onto the backs of the proprietors". He argued that the by-law requires business owners to ensure compliance with the By-Law without offering any guidance as to how this should be done. The Justice of the Peace hearing the motion is expected to issue her ruling on July 9, 2001.

5 Do the By-Laws Economically Injure Certain Businesses and Thereby Entitle Those Businesses to Damages?

Our Opinion: In the absence of any evidence of malice or bad faith on the part of the Council of the City of Ottawa in enacting the By-Laws, the City of Ottawa is not exposed to liability for any claims for economic damages, special damages or punitive damages.

In the case of *Thirsty's Bar and Grill v. Waterloo (Regional Municipality)* (Tab 5 Case Book) the plaintiffs claimed general damages for negligence and/or breach of statutory duty; damages for unlawful interference with economic relations and discrimination; special damages; and punitive, aggravated and exemplary damages. As far as we are aware this is the only challenge to a municipal non-smoking by-law that has relied upon interference with economic relations as a ground for not only an injunction prohibiting the municipality from enforcing the by-law, but also in support of a claim for financial damages.

Mr. Justice Reilly in this case, after extensively reviewing judicial precedents stated: "the conclusion I draw from the clear jurisprudence is that the plaintiffs cannot succeed in any claim for damages in tort with respect to the enactment, implementation or enforcement of the by-law unless they are able to show bad faith on the part of the defendant."

Mr. Justice Reilly then canvassed what was necessary to demonstrate bad faith. He referred to the case of in *Re: Canada et al and City of Winnipeg* (1984) 9 D.L.R. (4th) 234 (MAN.

Q.B.), Affd. (1985) 15 D.L.R. (4th) 632 (CA) leave to appeal to Supreme Court of Canada refused (1986) 58 N.R. 160 (n) and the decision of the trial judge, Mr. Justice Morse who stated: "the type of improper motive necessary to amount to bad faith should, in my view, amount to 'corrupt or personal interest or motives' ".

Mr. Justice Reilly found that there was no evidence that the Council of the Regional Municipality of Waterloo acted in bad faith in enacting the by-law.

It was also argued by the plaintiffs that the Regional Municipality of Waterloo failed to conduct itself with "procedural fairness" and that, in itself, may be seen as evidence of bad faith. Mr. Justice Reilly however stated: "It is, I believe, trite law to observe that a municipal council, in making a decision of a legislative nature as opposed to an administrative decision, is under no duty to act with procedural fairness in any event".

He also stated: "By section 213 of the *Municipal Act*, the enabling legislation, council was specifically authorized to pass the by-law in question. Though there was arguably no legal obligation to do so, council involved itself in a lengthy process of consultation and I am satisfied invited and considered submissions of all interested parties, together with "expert evidence" with respect to the relevant issues, the danger of secondhand smoke as well as the impact of a "no smoking" by-law... Proper notice was given and representation from interested parties was heard and considered by council... No further consultation was necessary. This was truly democracy in action on the front lines."

Finally Mr. Justice Reilly stated: "It is ludicrous to suggest that these elected councillors would have any motive to alienate a significant proportion of the business community which they represent and the smoking patrons of those businesses unless such motives were in the public interest. If I draw any inference from the evidence presented before me on this motion, I would conclude that those councillors who supported the smoking by-law demonstrated considerable courage and a willingness to stand by their moral convictions, knowing the risk they might run at the next municipal election. There is not the slightest evidence of any other motive for their conduct".

See also section 5 of this letter below for a further discussion of procedural fairness.

Accordingly, for an economic claim to succeed it will be necessary for those challenging the By-Laws to produce evidence of malice or bad faith, together with an intention to cause harm by unauthorized conduct on the part of the City of Ottawa. A claim for damages for unlawful interference with economic relations requires evidence of an intention to injure the plaintiff; interference with another's method of gaining his or her living or business by a legal means; and economic loss caused thereby. As in the case of *Thirsty's Bar and Grill v. Waterloo (Regional Municipality)* (Tab 5 Case Book) we are unaware of any evidence that would constitute malice or bad faith or that would entitle someone challenging the By-Law to damages

for unlawful interference with economic relations. With regard to the issue of the good faith of the City of Ottawa in enacting the By-Laws we would refer you to section 7 of this letter below.

6. Do the By-Laws Infringe the *Canadian Charter of Rights and Freedoms*?

Our Opinion: The By-Laws are not invalid as infringing the *Canadian Charter of Rights and Freedoms.* The *Canadian Charter of Rights and Freedoms* does not provide protection for smokers as a class and the discrimination against smokers in the By-Laws is not based on an irrelevant personal characteristic so as to be the type of discrimination proscribed by the *Canadian Charter of Rights and Freedoms*. Nicotine addiction is not a physical disability pursuant to the *Canadian Charter of Rights and Freedoms.* The By-Laws while regulating, do not prevent a citizen from pursuing the gaining of livelihood contrary to the *Canadian Charter of Rights and Freedoms.* The By-Laws controlling the locating at which smoking can take place does not deprive a citizen of the liberty guaranteed by the *Canadian Charter of Rights and Freedoms.*

There are currently two cases pending before the courts which raise the issue of whether or not the regulation of smoking is an infringement of the *Canadian Charter of Rights and Freedoms*: *City of Hamilton 2000* (Case Law Summary Tab 1 Case Book) and *City of Guelph 2000* (probably to become known as *Ample Annie's Itty Bitty Roadhouse et al v. The Corporation of the City of Guelph*) (Case Law Summary Tab 1 Case Book). These cases are the seminal cases on this point as there are currently no other Canadian cases which challenge a non-smoking by-law as an infringement of the *Canadian Charter of Rights and Freedoms.* Since there has been no decisions in these cases, and therefore, no precedent cases on point, it is difficult to conclude the direction that the courts will take on this issue, or on the validity of this ground of attack.

Following is an overview of the issues which the courts will face in coming to decisions on these cases:

(A) Discrimination and Section 15 of the *Canadian Charter of Rights and Freedoms*

The specific arguments put forth in the case of *City of Hamilton 2000* by those opposed to the regulation of smoking in public places and workplaces cite the following as potential areas of discrimination:

I) it does not apply to private clubs without employees;

II) it is more restrictive than other municipalities; and

III) nicotine addiction is a disability.

Section 15 of the *Canadian Charter of Rights and Freedoms* guarantees freedom from discrimination. It provides:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

With respect to the first two issues raised in the *City of Hamilton 2000*, it is clear that the *Canadian Charter of Rights and Freedoms* does not provide for protection on the basis of "public versus private clubs", nor does the *Canadian Charter of Rights and Freedoms* provide protection on the basis of differing regulations prescribed by a municipality. The issue which may be subject to a challenge through the *Canadian Charter of Rights and Freedoms* is the suggestion of discrimination on the basis that nicotine addiction is a physical disability. As discussed by the Supreme Court of Canada in *Eldridge v. British Columbia (Attorney General)* [1997], 3 S.C.R. 624:

> In the case of s. 15(1), this Court has stressed that it serves two distinct but related purposes. First, it expresses a commitment - deeply ingrained in our social, political and legal culture - to the equal worth and human dignity of all persons. As McIntyre J. remarked in *Andrews*, at p. 171, s. 15(1) "entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration". Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups "suffering social, political and legal disadvantage in our society"; see *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1333
> (per Wilson J.); see also Beverley McLachlin, "The Evolution of Equality" (1996), 54 *Advocate* 559, at p. 564.

With respect to specific discriminatory treatment, the Supreme Court of Canada in *Eldridge v. British Columbia (Attorney General)* provided the following guidance:

> Before concluding that a distinction is discriminatory, some members of this Court have held that it must be shown to be based on an irrelevant personal characteristic; see *Miron* (per Gonthier J.) and *Egan* (per La Forest J.). Under this view, s. 15(1) will not be infringed unless the distinguished personal characteristic is irrelevant to the functional values underlying the law, provided that those values are not themselves discriminatory. Others have suggested that

> relevance is only one factor to be considered in determining whether a distinction based on an enumerated or analogous ground is discriminatory;

In the case of *Eldrige v. British Columbia (Attorney General)*, the discriminatory conduct was aimed at an individual suffering from a hearing impairment. The court commented as follows:

> There is no question that the distinction here is based on a personal characteristic that is irrelevant to the functional values underlying the health care system. Those values consist of the promotion of health and the prevention and treatment of illness and disease, and the realization of those values through the vehicle of a publicly funded health care system.

A direct application of the principles set out in *Eldridge v. British Columbia (Attorney General)* to the argument that nicotine addiction is a physical disability was presented in the case of *McNeill v. Ontario (Ministry of the Solicitor General & Correctional Services)*, (1998) 126 C.C.C. (3d) 466 *(McNeill)*. The court cited the test as set out in *Eldridge v. British Columbia (Attorney General)* which provides that in order for the claimants to be successful, they must establish that the distinction which has been drawn between them and others has the result of denying them the equal protection or equal benefit of the law, and that the discrimination is based on one of the enumerated grounds in section 15, or a ground which is analogous thereto. In concluding that nicotine addiction was not a physical disability pursuant to section 15 of the *Canadian Charter of Rights and Freedoms*, the Court in *McNeill v. Ontario (Ministry of the Solicitor General & Correctional Services)* stated as follows:

> The "mental or physical disability" enumerated as a ground for protection in the Charter should not be trivialized or minimized. Addiction to nicotine is a temporary condition which many people voluntarily overcome, albeit with varying degrees of difficulty related to the strength of their will to discontinue smoking. It can hardly be compared with the disability of deafness under review in *Eldridge*. Smokers are not part of a group "suffering social, political and legal disadvantage in our society," a criteria for a s. 15 claim as described by Wilson J. at page 1333 of *R. v. Turpin*, [1989] 1 S.C.R. 1296. A person claiming a violation of s. 15 (1) must first establish that, because of distinction drawn between the claimant and others, the claimant has been denied "equal protection" or "equal benefit" of the law. Secondly, the claimant must show that the denial constitutes discrimination on the basis of one of the enumerated grounds listed in s. 15 (1) or one analogous thereto.

(B) Sections 6 and 7 of the Charter of Rights and Freedoms

In the case of *City of Hamilton 2000,* the court is also faced with the issue of whether or not the regulation of smoking in public places and workplaces contravenes sections 6 and 7 of the *Canadian Charter of Rights and Freedoms.*

Sections 6 of the *Canadian Charter of Rights and Freedoms* provides as follows:

(1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right,

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who were socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Section 7 states:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

With respect to section 6 of the *Canadian Charter of Rights and Freedoms*, it is our understanding that this issue has been raised; however, it is difficult for us to opine as to how this section truly applies to a non-smoking by-law challenge. The only subsection which would appear to present a reasonable basis of challenge would be subsection 6(2)(b) confirming a citizen's right to pursue the gaining of a livelihood. However, it is our opinion that this challenge is easily countered on pure logical reasoning. There is nothing in the By-Laws to prevent a business proprietor from earning a livelihood, there may simply exist regulatory requirements which must be followed. An excellent example can be made by analogy to the restrictions on the method of food handling that are imposed upon restaurant proprietors. The requirement to follow certain procedures in handling food in order to protect public health, does not prevent a restaurant owner from earning a livelihood, but merely imposes regulatory restrictions on the method of doing so. In addition, the courts appear to hold consistently that the right to earn a livelihood as set out in section 6 (2) (b) of the *Canadian Charter of Rights and Freedoms* must be read in conjunction with s.6 as a whole. As such, this does not guarantee a right to earn a livelihood

except in the context of mobility rights. Estey J., writing for the Supreme Court of Canada in *Law Society of Upper Canada v. Skapinker* (1984), 9 D.L.R. (4th) 161 commented as follows:

> I conclude for these reasons, that para. (b) of s.6 does not establish a separate and distinct right to work divorced from the mobility provisions in which it is found. The two rights (in paras. (a) and (b)) both relate to movement into another province, either for taking up of residence, or to work without establishing residence.

With respect to section 7 of the *Canadian Charter of Rights and Freedoms*, the only viable ground upon which a challenge to the By-Laws can rest is on the basis of an infringement against one's freedom of liberty. However, the recent Supreme Court of Canada decision of *Blencoe v. British Columbia (Human Rights Commission)* [2000], 2 S.C.R. 307 is highly instructive on this point. The court stated as follows:

> The liberty interest protected by s.7 of the Charter is no longer restricted to mere freedom from physical restraint. Members of this court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices... ... In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 80, LaForest J., with whom L' Heureux-Dubé Gonthier and McLachlin agreed ... liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental importance. ... Although an individual has the right to make fundamental personal choices free from state interference, such personal autonomy is not synonymous with unconstrained freedom. In the circumstances of this case, the state has not prevented the respondent from making any "fundamental personal choices".

An analogous argument can be made with respect to the By-Laws. The City of Ottawa is not proposing a blanket prohibition to take away the freedom of the individual smoker to pursue an interest, it is simply regulating where the interest is allowed to be pursued.

Another useful case which provides an analogous argument is *Buhlers v. British Columbia (Superintendent of Motor Vehicles)* [1998], B.C.J. No. 495. Referring to American authorities, in the context of a challenge with respect to the right to drive, the Court noted as follows: ""Liberty" under the Charter cannot be taken to create an absolute right to drive. Age, infirmity and other impediments may restrict the granting of drivers' licences".

Similarly, simply because one is allowed the freedom to choose whether or not to smoke, this does not create an absolute right to smoke. There already exists a vast amount of tobacco regulation with respect to age requirements to purchase tobacco products, and permissible areas designated as smoking or non-smoking. Additional regulations, as awareness of the necessity for such regulations increases, are unlikely to be treated by the courts as an infringement of a liberty protected by the *Canadian Charter of Rights and Freedoms*.

7. Did the City of Ottawa Act in Good Faith in Enacting the By-Laws?

Our Opinion: The City of Ottawa acted in good faith in enacting the By-Laws.

Some attacks upon the validity of municipal by-laws are based upon the municipality enacting such by-laws in bad faith, thereby either invalidating the by-law or entitling a challenger to a permanent injunction prohibiting the municipality from enforcing the by-law.

The nature of a claim against the City of Ottawa alleging bad faith in the enactment of the By-Laws would likely be framed in the context that there was no constitutional authority to pass the By-Laws, that the City of Ottawa does not possess the necessary authority to enforce the By-Laws or that the City of Ottawa has not followed proper procedure in enacting the By-Laws. The remedy which would likely be sought in such a case would be a permanent injunction preventing the enforcement of the By-Laws or a declaration that the By-Laws are invalid.

In the decision of *Thirsty's Bar and Grill v. Waterloo (Regional Municipality)*, (Tab 5 Case Book), the claim against the municipality alleged bad faith on the part of the municipality in the enactment and enforcement of a by-law to regulate smoking in public places. The judge inferred from the materials before him that it was alleged that the municipality had failed to conduct itself with "procedural fairness", and that this constituted evidence of bad faith. In reaching its conclusion the court found that there was no evidence of bad faith on the part of the municipality. Of specific import to the current situation in the City of Ottawa, the Court commented as follows:

> It is, I believe, trite law to observe that a municipal council in making a decision of a legislative nature as opposed to an administrative decision, is under no duty to act with procedural fairness in any event. Brown and Evans, in their *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998), state at page 7-21 to 7-23
>
> > "It is clearly established that in the absence of a statutory provision to the contrary, the duty of fairness does not apply to the exercise of powers of a legislative nature. Moreover, even where legislation expressly requires a hearing to be held before a particular power is exercised, the courts will not likely augment those procedures where the power in question is of a legislative nature."
>
> ...
>
> Clearly, the by-law in this case is of general application. It impacts upon all public places as designated by the by-law, on the proprietors of those public places and on all patrons, smokers and non-smokers alike. That its effect might prove to be negative with respect to some establishments and some proprietors will only be known with the passage of time. However, it

> has long been recognized that the passage of any restrictive by-law will have a negative effect upon some businesses or individuals. This reality is not determinative of the issue of whether the conduct of the municipality in enacting the by-law is legislative in nature or determinative of the degree the municipality must act with "procedural fairness". Clearly in cases where a by-law has a direct impact upon a specific individual or business or a very small number of individuals or businesses, the obligation to act with procedural fairness increases.

The evidence led in *Thirsty's Bar and Grill* v. *Waterloo (Regional Municipality)* (Tab 5 Case Book) demonstrated that the municipality was specifically authorized to pass the by-law pursuant to the *Municipal Act*; while not legally obligated to, the municipal council involved itself in lengthy public consultation and considered submissions from all interested parties; and finally, the municipal council considered "expert evidence" with respect to the relevant issues.

Furthermore, while "good faith" was not directly at issue in the case of *The Ontario Restaurant Association et al. v. The Corporation of the City of Toronto*, (Tab 9 Case Book) the court , in upholding the enactment of the by-law stated as follows:

> In this case, there is no suggestion of bad faith. It is clear Council passed the by-law after considerable debate and public discussion. The obvious intention of the by-law was to deal with matters of public health.

It is our understanding that the process of enactment of the By-Laws by the Council of the City of Ottawa included the following:

(a) an express recommendation of the Medical Officer of Health for the City of Ottawa that the By-Laws be enacted based upon public health issues relating to illness caused by secondhand smoke;

(b) public input provided to the Medical Officer of Health in a series of public meetings held throughout the City of Ottawa with regard to his recommendation;

(c) the public presentation of the Medical Officer of Health's recommendation to the Health, Recreation and Social Services Committee of the City of Ottawa, followed by a public hearing held by the Committee at which in excess of one hundred public presentations were made, including some by "expert" witnesses on the health affect of secondhand smoke;

(d) the unanimous vote of the members of the Health, Recreation and Social Services Committee to recommend to City Council that the By-Laws be enacted;

(e) a meeting of the Council of the City of Ottawa at which the recommendation of the Health, Recreation and Social Services Committee was received and discussed and the draft By-Laws debated; and

(f) the unanimous vote of the members of the Council of the City of Ottawa enacting the By-Laws.

Such an extensive public consultation by the Medical Officer of Health and by the Health, Recreation and Social Services Committee of the City of Ottawa followed by a public debate by the Council of the City of Ottawa and unanimous votes by the Committee and by City Council will make it very difficult to attack the By-Laws on the basis that they were enacted in bad faith.

8. Are the by-laws in violation of the Ontario *Human Rights Code?*

Our Opinion: The By-Laws are not in violation of the Ontario *Human Rights Code.*

In the decision of *The Ontario Restaurant Association et al. v. The Corporation of the City of Toronto,* (Tab 9 Case Book), the plaintiff raised the issue of whether the regulation of smoking in restaurants and entertainment facilities was an infringement of the Ontario *Human Rights Code*. The Court quickly concluded that there was no merit to this argument. The Court specifically stated as follows:

> The Courts have clearly indicated that a complainant under that Act must first exhaust all procedures and remedies under that Act before turning to the courts... In this application, it is conceded no procedures have been taken under the Ontario *Human Rights Code*. Applicants' counsel argued the matter might eventually go to that tribunal and it would expedite matters to deal with it now. I reject that argument.

Based on the conclusion above, it would appear that any court action started against the City of Ottawa on the basis that the By-Laws are in violation of the Ontario *Human Rights Code* could be quickly quashed by indicating that the appropriate level at which to make this claim is the Ontario Human Rights Tribunal as opposed to the Courts.

Should the matter be pursued at the Ontario Human Rights Tribunal, it is likely that the challenge would be based on freedom from discrimination as set out in sections 1 and 5 of the Ontario *Human Rights Code* which provide as follows:

Section 1 1 provides:

Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or handicap.

Section 5 (1) provides:

Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or handicap.

It is clear, similar to the *Canadian Charter of Rights and Freedoms*, that the Ontario *Human Rights Code* does not explicitly protect smokers as a class.

We believe that a challenge at the Ontario Human Rights Tribunal would face similar pitfalls to those outlined above in respect of a challenge pursuant to the *Canadian Charter of Rights and Freedoms.* It is well accepted in the case law (*Quebec (Commission des droits de la personne & des droits de la jeunesse) c. Montreal (Ville)*, [2000] 1 R.C.S. 665; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *Entrop v. Imperial Oil Ltd.* (2000), 2 C.C.E.L. (3d) 19 (Ont. C.A.) that the interpretation of section 15 of the *Canadian Charter of Rights and Freedoms* should inform the interpretation of human rights codes all across Canada. As such, the Ontario *Human Rights Code* must be interpreted in a manner consistent with the *Canadian Charter of Rights and Freedoms.*
We do note, however, that a British Columbia arbitrator recently ruled that nicotine addiction is a disability which must be accommodated in the work force. In the decision of *Cominco Ltd. v. United Steelworkers of America, Local 9705* [2000] B.C.C.A.A.A. No. 62, the arbitrator ruled that nicotine addiction is a disability under the British Columbia *Human Rights Code* (which prohibits discrimination in employment on the basis of physical or mental disability). At issue was whether or not an employer could implement a completely smoke-free work area (including outdoors), thereby eliminating the possibility that heavily addicted smokers would be able to smoke at all during an eight to twelve hour shift. The employer argued that nicotine addiction was a temporary addiction which could be voluntarily overcome and does not interfere with effective physical or psychological functioning. The arbitrator disagreed.

Nevertheless, and regardless of the direction that a sole British Columbia arbitrator has taken, it is our opinion that the Human Rights Tribunal in Ontario will likely follow the direction that the Ontario courts have taken and will adopt an interpretation in accordance with the *Canadian Charter of Rights and Freedoms.*

We thought that it might be of assistance for us to expand upon the opinion you have requested to deal with two additional topics. We would expect that if the By-Laws are challenged, the challenge will include an application to stay the enforcement of the By-Laws while the court deals with the issue of the validity of the By-Laws. Accordingly, we thought our views on a possible application to stay enforcement of the By-Laws might be of assistance to you. In addition, we thought that you might like to have our opinion on the powers and authority of the Medical Officer of Health to deal with smoking in public places and workplaces as a health hazard outside of the By-Laws. Accordingly, we have set out our views on these topics as well.

A. Application for a Stay of Enforcement:

Our opinion: The City of Ottawa will be able to successfully oppose an application for a stay pending the outcome of a hearing on the merits of the By-Laws.

It is well established in the case law that an application to the courts for an interim injunction, in effect a stay, to restrain the City of Ottawa from taking steps to enforce the By-Laws pending the Court's disposition of an application to quash the By-Laws must satisfy a three part test as set out by the Supreme Court of Canada in *RJR-McDonald Inc. v. Canada (Attorney General),* (1994) 111 D.L.R. (4th) 385 (*RJR McDonald*). In this case, the applicants were requesting that the court delay the legal effect of regulations (concerning the advertisement of tobacco products and health warnings which must be placed on tobacco products) which had already been enacted, and to prevent public authorities from enforcing them. Briefly stated, the test is as follows:

(i) there must be a triable issue;

(ii) if the injunction is not granted, irreparable harm must result to the applicants; and

(iii) the balance of inconvenience must favour the applicants.

All of the three above-noted criteria must be present in order that an interim injunction be granted.

It is likely a court would hold that the determination of a serious issue, such as the validity of the By-Laws means there is a triable issue.

However, in the majority of cases, where "irreparable harm" amounts to simply a monetary amount which can be settled by way of damages, the courts are reluctant to grant a stay.

As the court stated in *RJR - McDonald Inc. v. Canada (Attorney General):*

> "Irreparable refers to the nature of the harm suffered rather than its magnitude. It is ~~not~~ harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. 228); where one party will suffer a permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

The application in *R.L. Crain Inc. v. Hendry* referred to by the court in *RJR - McDonald Inc. v. Canada (Attorney General)* was by R.L. Crain Inc. for an interlocutory injunction to restrain Hendry from breaching a non-competition clause. The court held that the applicant failed to meet each of the elements as set out in *RJR - McDonald Inc. v. Canada (Attorney General)*. Specifically, the court noted as follows:

> I am of the opinion that the loss suffered by the defendant in the event the injunction is granted is far greater than the loss which will befall Crain, if the injunction is not granted. If the injunction asked for was granted, the defendant would be deprived of her principal means of earning a living as the area in which Crain seeks to restrict the defendant's activities is where the defendant principally makes her living.
>
> There is a further reason for not granting the injunction as Crain has not established that it would suffer irreparable damage. The parties have by agreement fixed the damages for violation of the clause at $300.00 per occurrence. If one construes the facts as revealing one breach (The Saskatchewan Motor Club Contract) or five, there being no evidence of any possible breach beyond that number, Crain has agreed that its damages would be somewhere between ($300.00) and ($1,500.00). Furthermore, the damages are easily calculable. In other words, the loss Crain may suffer is readily compensable through an award of damages.

It is well accepted that the where the full recovery of harm can be undertaken by way of financial damages, "irreparable harm" has not been established. If the arguments presented against the City of Ottawa are restricted to an economic disadvantage which can later be overcome, it is likely that a finding of irreparable harm will not result.

We are aware that historically both in the State of California in the United States and in the Regional Municipality of Waterloo following the enactment of similar tobacco control measures there was, on average, a temporary reduction in volume of sales of businesses affected lasting a matter of a few months which reduction was then overcome with the long term result of there being an increase of sales for such businesses. Accordingly, we believe that the evidence as to these experiences can

demonstrate that there would be no "irreparable harm" to those challenging the By-Laws that could not be compensated by damages. We believe that those challenging the By-Laws will have great difficulty in introducing evidence that they will be "put out of business" by the court not granting a stay.

It should be noted that there is a connection between such an application for an interim injunction and the *Canadian Charter of Rights and Freedoms*. The court in *RJR - McDonald Inc. v. Canada (Attorney General)* held that where there is a breach of the *Canadian Charter of Rights and Freedoms* or human rights violations, regardless of whether or not such breach can be assessed a quantifiable sum in damages, it is appropriate to assume that there is "irreparable harm" and to grant a stay. Because our opinion, as indicated in section 6 of this letter above is that the By-Laws do not infringe the *Canadian Charter of Rights and Freedoms*, it is unlikely this constitutional matter will be successfully able to support an application for an interim injunction.

With respect to the third component of the test, the balance of convenience, the Supreme Court of Canada in *RJR - McDonald Inc. v. Canada (Attorney General)* commented as follows:

> The factors which must be considered in assessing the "balance of convenience" are numerous and will vary in each individual case... The decision in *Metropolitan Stores*, supra at p. 349, made clear that in all constitutional cases the public interest is a "special factor" which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry". This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1993), 106 D.L.R. (4th) 507 at p. 530:
>
> > Interlocutory injunctions involving a challenge to the constitutional validity of legislation or the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of private litigants.

The significant health issues involved in tobacco control are such that the interests of the public will likely be given a very heavy weight by the courts in assessing the "balance of convenience".

In any event, the balance of convenience clearly favours the City of Ottawa. The City has hired additional by-law enforcement officers, including a supervisory officer, to enforce the By-Laws. All by-law enforcement officers have received special training. The City has liaised with the police to ensure aid in enforcing compliance. The City has allowed in excess of a two month period from the May 9, 2001 enactment of the By-Laws to the effective date, August 1, 2001, to educate the population in respect of the coming controls.

It is interesting to note that, as far as we can determine, an interim injunction application with respect to the enforcement of a new municipal non-smoking by-law has not been attempted in other challenges to municipal non-smoking by-laws.

B. Medical Officer of Health Authority Under the *Health Protection and Promotion of Safety Act:*

Our Opinion: The Medical Officer of Health has the authority to issue an order which could effectively achieve the same outcome as the By-Laws.

Pursuant to section 13 of the *Health Protection and Promotion Act*, the Chief Medical Officer of Health or a public health inspector may require a person to take or to refrain from taking any action that is specified in an order in respect of a health hazard. An order to such an effect may be made where he or she is of the opinion, upon reasonable and probable grounds,

> (a) that a health hazard exists in the health unit served by him or her; and
>
> (b) that the requirements specified in the order are necessary in order to decrease the effect of or to eliminate the health hazard.

A Medical Officer of Health has reasonable and probable grounds to make an order that eliminates the health risk of secondhand smoke. A Medical Officer of Health can rely on *Protection from Second-Hand Tobacco Smoke in Ontario*: *A review of the evidence regarding best practices,* (Toronto: A report of the Ontario Tobacco Research Unit, University of Toronto, May, 2001) which states as follows:

> Regulations under the *Ontario Occupational Health and Safety Act* list unknown toxic agents for which exposure values have not been established and to which any exposure should be avoided. Seven of these toxic agents are known to be in the side stream smoke emitted from at least 33 of the leading brands of cigarettes available for sale in Canada.

Pursuant to subsection 13(4), of the *Health Protection and Promotion Act* an order may include, but is not limited to the following:

> (a) requiring the vacating of premises;
>
> (b) requiring the owner or occupier of premises to close the premises or a specific part of the premises;
>
> (c) requiring the placarding of premises to give notice of an order requiring the closing of the premises;

(d) requiring the doing of work specified in the order in, on or about premises specified in the order;

(e) requiring the removal of anything that the order states is a health hazard from the premises or the environs of the premises specified in the order;

(f) requiring the cleaning or disinfecting, or both, of the premises or the thing specified in the order;

(g) requiring the destruction of the matter or thing specified in the order;

(h) prohibiting or regulating the manufacturing, processing, preparation, storage, handling, display, transportation, sale, offering for sale or distribution of any food or thing; and

(i) prohibiting or regulating the use of any premises or thing.

Based upon the legislation, it would appear that a Medical Officer of Health has the authority, pursuant to the *Health Protection and Promotion Act*, to make and enforce an order which could effectively achieve the same effect as the By-Laws. As far as we are aware, there has been no judicial interpretation or application of the above noted provisions of the *Health Protection and Promotion Act*, and we are unaware of any Medical Officer of Health who has used the above noted sections for such a purpose. However, a Medical Officer of Health could ensure non-smoking compliance, by using subsections 13(4)(a) and (i) to order premises that allow smoking to be vacated and closed - a drastic but authorized order.

Conclusion:

The following is a summary of our opinion.

If the City of Ottawa Non-Smoking By-Laws are legally challenged, and if the City contests such a challenge in a proper manner and utilizes proper legal concepts relying on known legal authorities, the courts will reject such a challenge.

The City of Ottawa has the authority pursuant to the *Municipal Act* to enact the By-Laws. The By-Laws are not so vague, uncertain or ambiguous that a court would hold that they are invalid and unenforceable. The definition of "public places" in By-Law 2001-148 is properly authorized pursuant to the *Municipal Act*. The *Municipal Act* allows the City of Ottawa to delegate enforcement of the By-Laws to an employer of a workplace and to an owner or occupier of a public place. There is no liability by the City of Ottawa for any economic loss to businesses caused by the By-Laws. The By-Laws do not infringe the *Canadian Charter of Rights and Freedoms*. The City of Ottawa acted in good faith in enacting the By-Laws. The By-Laws do not infringe the Ontario *Human Rights Code*.

If there is an application for an interim injunction to stay the enforcement of the By-Laws pending the outcome of a challenge to the By-Laws, the City of Ottawa, if it opposes such an application and does so using proper principles of law and judicial precedent will be successful in preventing the issuance of such an interim injunction.

In any event, even without the existence of the By-Laws, the Medical Officer of Health has, statutory authority to make orders that will achieve the same result as compliance with the By-Laws.

Should you have any questions that are not answered by this letter or questions arising out of this letter, we would be pleased to discuss them with you. As indicated in this letter, should an attack against the By-Laws be commenced we would like the opportunity to review the form of that attack in order to determine whether this opinion covers all of the grounds of challenge to the By-Laws.

Yours very truly,

David H. Hill
3:gd/Encl.