

Citation:



File Nos:
Registry:

Date:
31430
Vancouver

& 31458
Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

CITY OF VANCOUVER

CLAIMANT

AND:

**ABDOLABBAS ABDIANNIA CARRYING ON BUSINESS AS
AHWAZ HOOKAH HOUSE AND
ABDOLHAMID MOHAMMADIAN, CARRYING ON BUSINESS AS PERSIA SMOKE
SHOP, ALSO KNOWN AS PERSIAN TEA HOUSE**

DEFENDANTS

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE W.F.W. YEE**

Counsel for the Claimant:

R. Flannigan and R. LeBlanc

Counsel for the Defendant:

D. Davison

Place of Hearing:

Vancouver, B.C.

Dates of Hearing: November 21, 22, 23, 24, 28, 29, 30, December 1, 2011, June 26, 27,
28, August 15, 16, September 28, November 6, 2012, January 10, 11, 2013, April 15,
16, 17, 2013, January 7, 8, 2014

Date of Judgment:

August 11, 2014

Introduction

[1] Pursuant to Court File # 31430 Mr. Abdolabbas Abdiannia carrying on business as Ahwaz Hookah House at 1322 West Georgia Street, Vancouver, B.C. has been charged with being a responsible person of the afore mentioned business located at the afore mentioned address, did suffer or allow a person to smoke in the said business contrary to Sections 2.3(b) and 3.3(a) of By-law 9535 in Count 1, on or about January 19th, 2009 and in Count 2, on or about February 13th, 2009. At the commencement of the hearing, Mr. Abdiannia entered a guilty plea for count 3 in having failed to display a no smoking sign at the entrance to his business contrary to Sections 2.4(a) and 3.3(b) on May 19th, 2009.

[2] Pursuant to Court File #31458 Mr. Abdolhamid Mohammadian, carrying on business as Persia's Smoke Shop, also known as Persian Tea House of 668 Davie Street, Vancouver, B.C. has been charged with being a responsible person of the afore mentioned business located at the afore mentioned address, did suffer or allow a person to smoke in the said business contrary to Section 2.3(b) and 3.3(a) of By-law 9535 on or about May 21, 2009.

The Background

[3] In terms of background, the two defendants had been operating their hookah lounges legally for a number of years at the addresses stated in the charges before the changes to the *Provincial Tobacco Control Act* were introduced. To comply with the changed provincial legislation, the defendants switched from the use of tobacco shisha to tobacco free and nicotine free herbal shisha.

[4] On October 2nd, 2007, Vancouver City Council (City Council) enacted the "Health By-law 9535" banning all indoor smoking or burning of any substance in commercial establishments. At the time, the by-law contains an exemption for hookah lounges and cigar lounges. However, on July 10th, 2008, City Council removed the exemptions.

[5] On July 17th, 2008, the Defendants were each served with a letter from Ms. Barb Windsor, the Deputy Chief License Inspector for the City of Vancouver (the City), demanding the defendants to cease their operation of the businesses as Hookah Lounges by August 31, 2008 to avoid prosecution.

Relevant Legislation

[6] The relevant legislation for this case include section 330(a) of the Vancouver Charter, under which the Council may make By-laws:

for providing for the care, promotion, and protection of the health of the inhabitants of the city and for preventing the spread of contagious, infectious, or other disease, and, for that purpose, for regulating, controlling, and restricting persons and their activities;

[7] Health By-law No. 9535 is a by-law to provide for the care, promotion, and protection of the health of inhabitants.

[8] Under 1.2 of the By-law, "smoke" or "smoking" means to inhale, exhale, burn, or carry a lighted cigarette, cigar, pipe, hookah pipe, or other lighted smoking equipment that burns tobacco or other weed or substance.

[9] Section 2.3(b) of the By-law provides:

Except as permitted by section 2.2, a responsible person must not suffer or allow a person to smoke in premises or common areas.

s. 3.3 of the By-law provides: A person who:

(a) ...suffers or allows any other person to do any act or thing which violates any provision of this By-law is guilty of an offence against this By-law, and liable to the penalties imposed under Section 3.

s. 3.4 of the By-law provides: Every person who commits an offence against this By-law is punishable on conviction by a fine of not less than \$250 and not more than \$2,000 for each offence, except that a person who commits an offence under section 2.3 or 3.3(c) of this Bylaw is liable to a fine of not less \$500 for each offence.

[10] Documents submitted into evidence include a letter dated January 30th, 2008 from the Director of the B.C. Tobacco Control Program stated that under the provincial legislation, hookah bars will still be able to operate as long as they do not use tobacco or tobacco blends within their fully or substantially enclosed spaces. However, the letter went on to say that local governments may bring in more restrictive bylaws which the operators of hookah bar should bear in mind.

[11] There is also a Certificates of Analysis dated May 18th, 2010 of the following fibrous material (commonly called as herbal shisha) were physically examined and chemically analyzed and found not to be manufactured tobacco as defined in the *Excise Act, 2001*:

Soex Herbal Hukka Lime-Lemon

Soex Herbal Hukka Lychee

Hydro Herbal Molasses Melon Dew

Hydro Herbal Molases Green Ice

[12] The position of Defence is that except for Mr. Abdiannia's guilty plea on count 3, Counsel for both defendants challenge the guilt of the defendants and the validity of the By-law on the following grounds:

(1) While By-law 9535 is known as the "Health By-law" is a By-law to provide for the care, promotion, and protection of the health of inhabitants, Defence argues that the City has failed to provide evidence of harm from smoking or second hand smoke from heating of herbal shisha which are non-tobacco products. In addition, given that the herbal shisha in the hookah pipe is never lit or actually burning, the City has not proven that the herbal shisha gets burned in the hookah pipes.

(2) The By-law violates sections 2(a), 7 and 15(1) of the Charter of Rights and Freedoms such that it cannot be saved under Section 1:

(3) The enactment is ultra vires of the legislative authority conferred upon the City of Vancouver.

(4) The By-law is unenforceable for being vague and uncertain.

[13] Crown takes the position that the evidence of both Dr. Ferrence and Dr. Khara show that there is clearly risk of harm from hookah pipe smoking of shisha as they produce toxicants which are cancer causing. In order to achieve the intention of the By-law, burn cannot mean to entirely consume or reduce to ashes, but rather covers the situation where the substance is heated in the hookah pipe such that smoke is produced which is then inhaled and exhaled.

[14] Crown argues that Defence has failed to meet the onus upon them to establish a Charter infringement with respect to any of the grounds alleged and therefore their Charter arguments should be dismissed without the necessity of turning to a section 1 analysis.

[15] Crown contends that the By-law is not ultra vires as the definition of "smoking" and the related provisions in the By-law are clearly valid as being enacted under section

330(a) of the Vancouver Charter which extends to Vancouver City Council (City Council) the power to protect people from the harmful effects of second hand smoke, regardless of what is being smoked.

[16] With respect to the argument of Defence that the definition of “smoking” in the By-law as being vague and uncertain, Crown maintains that the meaning and applicability of the provisions are ascertainable when they are taken in the context with the whole of the enactment and interpreted benevolently according to law, they are clear as to what conduct is prohibited and what is not.

[17] The City’s case included the testimonies from Dr. Roberta Ferrence, Deputy Director, Ontario Tobacco Research Unit, University of Toronto, was called by the Crown as an expert witness with respect to the health effects of water-pipe tobacco and non-tobacco smoking. She stated that all water-pipe smoking is harmful to users and to those in the immediate environment as a result of research evidence on the harmful effects of water-pipe smoking, both tobacco and non-tobacco, has grown substantially in the past decade.

[18] Dr. Ferrence went on to say that there are no significant differences between water-pipe tobacco and herbal preparations in exposure to toxicants that are products of combustion. These include a variety of carcinogens and other substances that cause smoking-related cancers and cardiovascular disease. The Surgeon General concluded that there is no safe level of second hand smoke, and the research to date shows no difference in the toxicity between hookah smoke and cigarette smoke.

[19] Her evidence is that there are strong reasons to eliminate indoor and outdoor use of water-pipe. The evidence for health effect is very strong, not only from studies of cigarette smoking, water-pipe tobacco smoking and most recently water-pipe non-tobacco smoking, but also from the large body of evidence that exposure to combustion of any type is hazardous, whether wood stoves, barbecues, high heat indoor cooking and other sources of toxins.

[20] There is also anecdotal evidence from enforcement officers that in addition to the known health effects of smoking water-pipe, hookah venues are linked to criminal activity, unsanitary conditions and other factors that impact the health and well-being of youth in particular as well as adults. Her concluding opinion is that there is major risk of harm that will only increase unless this serious health hazard is eliminated in all public venues, both indoors and out.

[21] In addition, Dr. Milan Khara, Clinical Director, Tobacco Dependence Clinic, Vancouver Coastal Health Addiction Services, and Clinical Assistant Professor, Faculty of Medicine, U.B.C. also took the stand. Dr. Khara's paper headed "The Medical Consequences of "Hookah" Smoking that water-pipe (also known as "hookah", "narghile" or "shisha") has been used for many centuries in Africa and Asia has been submitted into evidence. The paper stated that it is commonly believed that this form of smoking exposes the user to reduced risk (when compared with other forms of tobacco smoking) partly because smoke is cooled by passing through water. This belief is not supported by the available evidence and the marketing of this process as being nicotine or tar free is mainly incorrect (though the use of preparations free of tobacco may indeed exclude nicotine from the process).

[22] It may therefore also be assumed that those exposed to “second-hand” smoke from water-pipe smoking are at no risk. Dr. Khara pointed out that this is not consistent with the evidence and what we know about exposure to smoke, whether it be from burning tobacco or other sources, “The scientific evidence indicates that there is no risk free level of exposure to second hand smoke.” This 2006 statement by the US Surgeon General, Richard H. Camona, is considered to have been pivotal to the smoke-free policies that many jurisdictions have subsequently enacted and which apply to “hookah houses” in the same way that they limit the places that cigarettes can be smoked.

[23] Dr. Khara stated in his paper that “It is my considered professional opinion that water-pipe smoking is harmful and potentially addictive to the consumer and, furthermore, second hand smoke produced from the process is not without risk to those exposed. Sweetening or flavouring the tobacco used does not alter this risk and even if the combusted (or heated) product is NOT tobacco, the risks associated with smoke exposure remain.”

[24] Smoke free legislation is designed to protect the public and employees from the health risks associated with “second hand” exposure and there is nothing to suggest that “hookah houses” should be exempted. In fact, the WHO report explicitly recommends “water-pipes should be prohibited in public places consistent with bans on cigarette and other form of tobacco smoking.” Dr. Khara went on to say that he categorically support this statement as an appropriate directive, reflective of the existing evidence base as it pertains to the health risks associated with exposure to second hand smoke.

Testimony of Domenic Losito

[25] Mr. Losito testified that before his retirement in April of 2010, he was the Regional Director of Health Protection for Vancouver Coastal Health and that he had worked over 20 years as a health officer for the City of Vancouver. He deposed that he was the one who recommended to City Council on January 17th, 2008 to remove the exemption for cigar parlours and hookah lounges from the October 2nd, 2007 By-law. He recalled that the defendants also made presentations to the council before council voted to adopt his recommendation.

[26] Mr. Losito stated that he and Ms. Barbara Winsor, who was the chief licence inspector at the time of the report, co-authored the report which went before Council on July 10th 2008. He recalled the report made reference to the report of World Health Organization (WHO) regarding water-pipe smoking from which he quoted the following passages.

Since hookah pipes require an ignition source, usually a small piece of charcoal to burn the product in the bowl, tobacco, herb or dried fruit, there are products of combustion including carbon monoxide metals and other cancer causing chemicals. Therefore, simply from an indoor air quality perspective, the use of hookah pipes should not be permitted indoor public spaces and work places.

Commonly used heat sources that are applied to burn the tobacco such as wood cinders or charcoal, are likely to increase the health risk because ... (where) such fuels are combusted they produce their own toxicants including high levels of carbon monoxide, metals and cancer-causing chemicals.

Second-hand smoke from water-pipes is a mixture of tobacco smoke in addition to smoke from the fuel and therefore poses a serious risk for non-smokers.

The WHO has also warned about the increased risks of spreading communicable diseases from the re-use of mouthpieces and unclean tubing on the hookah pipe.

They also cited the negative impacts of the proliferation of hookah bar as having on youth prevention efforts.

It's an indication under social implications that the continued prohibition of hookah smoking in indoor public places and work places may generate complaints that certain cultural practices are being restricted. However, many other jurisdictions have enacted similar prohibitions and the cultural practices still take place in the community without impacting on the public's health.

[27] Mr. Lasito deposed that his message to council was that there may be ways of satisfying the cultural practices, but they did not need to put other people's health in jeopardy. He stated that the recommendations in the report were adopted by council unanimously

[28] The evidence relating to Mr. Abdiannia's operation came from the following police officers:

[29] Constable Yee's evidence was that she attended to Awaz Hookah House on January 19th, 2009 with Constable Risebrough in plainclothes at about 5:40 p.m. She was outside the shop for almost an hour and observed two males smoking hookah pipes in the store from a distance of about 30 feet. Her evidence was that she saw inhaling and exhaling of smoke by the two males inside the store. Constable Risebrough's evidence was that she saw people smoking inside the store and that the person behind the counter inside the store did not make any efforts to stop them.

[30] Constable Silzer testified that he had smoked a hookah pipe before and that on February 13th, 2009 attended Awaz Hookah House at about 5:15 with Officers Southworth and Donnelly. His evidence was that they dealt with Mr. Abdiannia. He recalled having noted the wording at the bottom of the menu to say "All tobacco,

contains 0 percent tar or chemicals and are a hundred percent natural,” and that all flavours are available in 50 grams boxes for \$15 each. The evidence of the officers were that they were inhaling, exhaling and sharing the straws for about hour-and-a-half.

[31] Constable Silzer's evidence was that when Mr. Abdiannia was asked how the hookah pipe is to be smoked, it was explained that the tobacco is placed inside the top of the hookah underneath the tinfoil in which the flavoured coal sits upon it. He recalled the tobacco was wet and mixed with molasses and therefore no tar was inhaled when a person smoked it. He said what they inhaled was flavoured smoke which resulted after the coal which sits on top of the tinfoil is lighted up. The officer also stated that the store also sells tobacco and hookah pipes.

[32] The evidence relating to Mr. Mohammadian's operation came from Constable Silzer who attended to the Persian Tea House on Davie Street at about 5:00 p.m. on May 21st, 2009 with Constables Donnelly and Southworth. The evidence by Constable Silzer was that they ordered two hookahs and smoked well over an hour there with no one trying to stop them. Constable Donnelly testified that he was familiar with the boxes of tobacco that he saw there as he remembered having dealt with those boxes before the incident. He confirmed that the charcoal on top of the tinfoil was burning as they smoked.

Evidence of Defence

[33] Defence had called Doctor Ara Norenzayan, an Associate Professor of the Department of Psychology in U.B.C., who published an article titled "The Cultural Significance of Hookah Smoking and Implications for Multicultural Civil Societies". He

opined that hookah smoking cannot be considered a religious activity, although it is not uncommon among devout Muslims to frequent hookah cafes as part of their routine. He concluded in his paper that “social hookah smoking in cafes is to a significant extent a cultural practice in Middle Eastern cultures, where hookah smoking is relatively prevalent, done communally and in public, is perceived to reflect local cultural identity, and is viewed with more social approval than is cigarette smoking”.

[34] Dr. Norenzayan stated at the end of his article that “While many do not smoke, for a significant subset of this diverse community, smoking the hookah in particular, in a publically available social atmosphere is an important cultural activity that is also part of the vibrant multicultural landscape of Vancouver.

Testimony of Mr. Abdiannia

[35] Mr. Abdiannia testified that he has been in the hookah bar business for five years and that people come to know his operation by word of mouth. He said that most of his customers are religious and that they don’t drink and that one place they socialize is in the hookah bars.

[36] He deposed that after the provincial legislation prohibiting the smoking of tobacco products in commercial businesses, he began using herbal shisha or herbal molasses which are non-tobacco products free of nicotine and tar.

[37] He said that he is a Muslim, born and grew up in southwest Iran and left in 1987. He grew up in a big family and always seen hookah around him so he always wanted to open a hookah bar decorated with Middle East design and music. He believes that one of the best things living in a multicultural society like Vancouver is to have a place where

different people can gather and speak and share their cultures. He stated that most of his clients are from Iran or from Saudi Arabia and that they speak Arabic. He said that his business gets very busy every Friday after Praise and on the weekends and that in the month of Ramadan, his business gets busy every single day at the time of Ramadan.

[38] When asked by his counsel as to his understanding of the connection with hookah and Ramadan, Mr. Abdiannia deposed that while the Koran or the holy book says smoking is not good, the books of Hadith, which translates or explains the Koran, says something different and that most of the Muslims use both books.

[39] He explained that it was possible that he might have used the word tobacco together with the word herbal in explaining what herbal molasses to people who are not familiar with the products in the store. However, he insisted that he only serve herbal molasses/shisha to everyone even before the letter from the City telling him to cease his operation.

[40] He stated that he does not currently have a business licence as the City had stopped renewing his licence for the past two years.

[41] Mr. Abdiannia swore that he smokes herbal molasses hookah at least four to five times a day which include smoking in his shop in the day time as well as at home with his wife and his 19 year old daughter after work.

[42] Mr. Abdiannia admitted under cross-examination that except for Wednesday, he runs the business six days a week in the hookah bar. When customers come into the

bar, he would greet them and provide them with the menu. After the customers have selected their flavour, he would prepare the molasses and then serve that to the customers with mouthpieces.

[43] He also admitted that if he is not allowed to have customers smoke in the shop, he could still sell hookah pipes, herbal molasses and even tobacco. If he wanted to, he could also serve tea or coffee to his customers and charge them for it.

[44] In explaining that the customers cannot possibly bring in tobacco products and be able to put that in the clay bowl inside the hookah to smoke, Mr. Abdiannia stated that once the charcoal is lit, the bowl get "very, very hot" and that it would be impossible for the customers to remove the charcoal and then the tinfoil without using a thong.

[45] He admitted that someone by the name of Mahdiyaz Biazi had prepared a website for him when he first opened the hookah bar in 2007 and when it was legal to serve tobacco. The website does say that "tobacco is available in a wide variety of flavours. He acknowledged that the blend contains only .5 per cent nicotine. He stated that he wanted to update the website for quite some time but because he had no means of getting in touch with the person he was not able to do so. When it was pointed out to him by Crown counsel he was able to receive an email back from Mr. Biazi after he emailed Mr. Biazi by putting in the link shown in the website to his name, Mr. Abdiannia then said he never pay any attention to what was in his website and that he did not even know that Mr. Biazi's name was in it. He also agreed that after the Health By-law came into effect, it was important that the content of the website should have been changed.

[46] Mr. Abdiannia admitted that the green Hydro box submitted into evidence contained the Hydro Herbal Molasses (Green Ice, Melon Do Melon), that he sells mostly in his store labelled "tobacco free, nicotine free, tar free" as well as the warning "smoking causes lung cancer, heart disease, emphysema, and may complicate pregnancy".

[47] He also admitted that his hookah shop is open to any people or tourist of any race, gender and religion and that he would charge them for smoking the hookah. Despite vigorous cross-examination by Crown Counsel, Mr. Abdiannia insisted that since the Health By-law, only herbal molasses are being sold in his hookah bar.

[48] He explained that the preparation of the hookah pipes involve poking holes on the tinfoil before putting on the charcoal and that the charcoal never touch the molasses in the bowl.

Testimony of Abdolhamid Mohammadian

[49] Mr. Mohammadian testified that he was born in Machet, Iran, which he left at the age of 40. While he smokes cigarettes four to five times a day, he also smokes hookah which has been part of his culture when people would get together in weddings, funerals and special occasions. He said he is a Muslim by religion.

[50] He deposed that he is the owner of hookah shop known as the Persian Tea House serving herbal shisha, tea and Iranian sandwiches as well as selling hookah pipes located at 668 Davie Street in Vancouver for about 14 years. He said that he was serving tobacco molasses prior to switching to herbal shisha when the City removed the

exemption for hookah bar's from the Health By-law. He said that brands of herbal shisha he serves to his customers include Hydro and Bombay.

[51] He explained that the reason for the use of tinfoil is to keep the charcoal from getting wet by the herbal which would cause the charcoal to go off. Furthermore, the tinfoil between the shisha and the charcoal would make the heat go more evenly to the shisha and to create steam as opposed to burning. He also stated that it would be impossible for the customers to put or switch shisha with tobacco once the charcoal has been torched.

[52] He deposed that his daughter, son and son-in-law sometimes go to the shop to help him out. Because he serves tea and has washroom facilities, two sinks and a dishwasher in his shop, he has a food licence issued by the Vancouver Coastal Health for 2011.

[53] He recalled that he had the opportunity to address the City Council with his lawyer before the resolution to remove the exemption for hookah and cigar bars was passed in 2008. He recalled having brought each councillor a sample of the herbal hookah indicating that the material contains "no tobacco, no tar and no nicotine". He deposed that unlike the case with cigarettes which turns into ashes after being burned, the herbal shisha does not show any signs of burning but maintain the same colour and simply shrink.

[54] Under cross-examination, Mr. Mohammadian stated that prior to the Health By-law which came into effect in 2008, he was only using hookah tobacco. Once the new by-law passed, he used only non-tobacco products. He deposed that the smell from

smoking tobacco fruit hookah has exactly the same smell as the non-tobacco fruit hookah and that he would not know if someone added nicotine to the fruit or herbal shisha. He swore that after the law changed, he never offered to mix tobacco with other substances in the hookah for his customers.

[55] On re-direct, Mr. Mahammadian said that he was surprised to learn that the box of herbal shisha which he took to City Hall to give the councillors may contain tobacco before the resolution to remove the exemption of hookah bars and cigar bars. He stated that he never tested the herbal shisha for tobacco as the box was clearly marked as having no tobacco and no nicotine but he had smoked the product himself and never felt the product to have tobacco in it.

[56] Counsel for Defence has also called a number of customers of the defendants who had smoked in their hookah shops to testify with respect to their personal experiences. Like the defendants, these witnesses came from the Middle East, in Iran, Egypt, Saudi Arabia and Lebanon. They stated that hookah smokings are common for family gatherings at home, weddings, funerals and that hookah cafes are gathering places for social interactions. Moreover, some of them say that hookah smoking also plays a part in their spiritual life when after Friday evening prayers and after the breaking of the daily fast during Ramadan Muslim men would gather at the hookah cafes to smoke. They also say that is what they also do at the Defendant's businesses.

[57] In essence, Counsel for the Defence has raised the following 6 issues:

Issue # 1: Is there harm in herbal shisha smoking?

[58] While the certificates of analysis of the herbal Soex and Hydro indicating that they are not manufactured tobacco as defined by the *Tobacco Excise Act*, defence has presented no evidence to show that those products are safe to use in the manner they have testified to.

[59] The expert testimonies of Dr. Ferrence and Dr. Khara clearly show that there are real health concerns for the consumers and from second hand smoking from hookah pipe, irrespective of whether it is tobacco or another substance which is being smoked in the hookah. These health risks include respiratory problems and acute cardiovascular events such as heart attacks, as well as cancer. Both Dr. Ferrence and Dr. Khara deposed that hookah smoking produce a lot of smoke. Dr. Khara actually described the amount of smoke produced from hookah smoking as “a toxicant soup”. It is also significant to note that Dr. Khara stated that in all the peer reviewed articles on hookah smoking, the product coming from the hookah has always been referred to as smoke and not steam. While there is no study to determine exactly how much of the toxicants come from the charcoal and how much come from the product, Dr. Khara stated that what matters is that the toxicants are in the smoke that is produced. Both experts have also said that there is also growing concern that the use of hookah pipes is growing among younger people.

[60] It is important to note that the testimonies and opinions of both experts are consistent with what was essentially pointed out to City Council at the time when the recommendation to removal exemption of cigar bars and hookah parlours from the Health By-law. I am, therefore, satisfied that given the expert evidence, there is

certainly risk of harm in herbal shisha smoking for both the consumers and the people who are exposed to the second hand smoke. I conclude that the Health Bylaw is enacted for the care, promotion, and protection of the health of the inhabitants of the city and for preventing the spread of contagious, infectious or other disease. I am satisfied as well that City Council had reasonable grounds to extend the smoking prohibition to the smoking of any substances.

Issue # 2: Is the definition of smoking under the By-law too vague or too broad?

[61] Defence takes the position that the definition in the By-law not only bans tobacco smoke, or smoke that has been shown to be dangerous or beyond a reasonable limit, but it bans all smoke, and in fact, all burning that may occur in a limitless array of commonplace activities such as cooking food, lighting candles and incense and fireplaces or wood burning ovens.

[62] In addition, it is argued that as it stands, without having shown to be harmful, the By-law bans all burnings in enclosed public places, regardless of what is being burned or for how long or who is present. It has been suggested that the By-law is so broad and so vague that one could be in violation of the By-law for cooking a meal or lighting a candle.

[63] The City submits that the purpose of the By-law is the protection of the public from second-hand smoke in premises open to the public. When one interprets the meaning of smoke or smoking in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the By-law, and the intention of City Council which is that smoking means the act of smoking, involving

inhale and exhale the smoke of any substance by means of a lit cigarette, pipe, hookah, or other lighted smoking equipment designed for that purpose. Furthermore, within the context of the By-law burn cannot mean to entirely consume or reduce to ashes, but rather covers the situation where the substance is heated in the hookah, such that smoke is produced, which is inhaled and exhaled by means of a smoking equipment.

[64] The Supreme Court of Canada, in the case of *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)* (2004) 1 SCR has rejected a narrow approach to the interpretation of municipal enabling statutes in favour of a more liberal approach, which generally calls for greater deference to municipal authorities carrying out their mandate.

The Court stated in paragraph 8 that

“A broad and purposive approach to the interpretation of municipal legislation is also consistent with this Court’s approach to statutory interpretation generally. The contextual approach requires “the words of an Act ... to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.”

[65] It is noted that section 8 of the *Interpretation Act* (RSBC 1996) Chapter 238 which provides:

Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[66] Following the legal framework for the examination of a municipal by-law when validity is being challenged on the grounds of uncertainty or vagueness enunciated by the B. C. Court of Appeal (2012) B.C.J. No. 1651, in the decision in *Okanagan Land Development Corp. v. Vernon (City)* where the Court stated:

... the vagueness must be so pronounced that a reasonable intelligent person would be unable to determine the meaning of the by-law and govern his actions accordingly. A mere difficulty in interpretation will not be sufficient.

[67] On the evidence, I find that a reasonably intelligent person would be able to ascertain what is being prohibited by the By-law. I also find that the definition of “smoking”, when benevolently read, clearly applies to the act of smoking any substance. The language is not so broad that enforcement agencies would conduct unfettered and enforcement of burning objects in the City such as stoves used for cooking, fireplaces used for the burning of wood, or civets used for the burning of incense. Bearing in mind that the object of this By-law is for the protection of the public from second-hand smoke in enclosed premises open to the public, harmless and everyday activities are not captured by the definition as those activities do not do not involve the act of smoking with lighted equipment which are designed for the purpose of inhaling and exhaling smoke.

[68] Consequently, I find that the definition of smoking under the By-law is neither too vague nor too broad.

Issue # 3: Does the herbal shisha in hookah smoking get burned?

[69] Defence pointed out that while “smoking” is defined in the By-law, but the word “burn” is not. Defence contends that in order to find the Defendant in contravention of the By-law, it must be shown that their hookah pipes were burning a substance. It is argued that since the evidence is that there is no direct contact between the herbal shisha and the charcoal and therefore, the herbal shisha does not get burned. Mr. Mohammadian’s evidence was that the herbal shisha produced steam after having been

heated up by the charcoal and that the herbal shisha only shrinks in size after having been smoked. It is argued that on the evidence the City has not proven that the shisha was being burned or reduced to ash.

[70] The City takes the position that in order to achieves the intention of the By-law, burn cannot mean to entirely consume or reduce to ashes, but rather covers the situation where the substance is heated in the hookah, such that smoke is produced, which is inhaled and exhaled by means of a hookah pipe. Moreover, such an interpretation of the word burn is consistent with the dictionary definitions of the word in the Concise Oxford English Dictionary, the Canadian Oxford Dictionary and the Webster's Third New International Dictionary which include "use as a source of heat or energy", "use or be used as a source of heat, light or other energy"; "to heat for a purpose" and "to become hot as if on fire", and "to become altered by the action of fire or heat"; "to produce by the action of fire or heat".

[71] As I see it, the position of Defence is based on the fact that there is a tinfoil separating the herbal shisha in the bowl and the charcoal that sits on top of the bowl. However, I have trouble with the assertions that the herbal shisha produces steam after having been heated up by the charcoal and that the shisha only shrinks in size after having been smoked when the following are considered.

- (1) The testimonies of the officers and even the witnesses called by Defence all say that they inhaled flavoured smoke and not steam from smoking the hookah which is also consistent with the testimonies of the expert witnesses.
- (2) While there is a tinfoil separating the herbal shisha from the charcoal, I am convinced that the reason for holes to be punched to the tinfoil is to allow the heat or flame from the burning charcoal to be drawn

through the holes to come into contact with the herbal shisha as the smoker inhales. If the sole purpose of the charcoal is just for heating up the shisha, there would be no need to have the tinfoil punched.

(3) The discolouration of the bowl and the residues in the bowl of the hookah pipes submitted into evidence show that the substance in the bowl had been in contact with some direct heat source rather than just been heated up. The residues found in the bowl is indicative the substance in the bowl gets dried up and burned after coming in contact with the heat or flame from the lighted charcoal.

[72] I, therefore, conclude that the shisha in hookah smoking gets burned in the ordinary meaning of the word. Even if the herbal shisha only gets heated, I am persuaded by the City's argument that the dictionary meaning of the word burn is sufficiently clear given the object of the By-law as it relates to the act of smoking.

Issue # 4: Does the By-law violate Section 2(a) of the Charter?

[73] Section 2(a) of the Charter provides: Everyone has the following fundamental freedoms: freedom of conscience and religion.

[74] Both Defendants and three of their patrons gave testimony that the smoking of the hookah is an important cultural and religious activity and tradition in their religious and cultural communities. They stated that for hundreds of years, smoking hookahs has been a central way in which Muslims come together to discuss and reflect on many subjects, including their religion. This practice is particularly prevalent after Friday prayers and after the evening meal that follows the day of fasting during the holy month of Ramadan. Counsel for the Defendants maintains that the Defendants and their customers have a subjective, honest, or sincere belief the hookah smoking has a reasonable connection to Islam. Dr. Norenzayan testified that hookah smoking is a

significant cultural practice which has a nexus with religion for person of Muslim faith or Middle Eastern backgrounds.

[75] Counsel for Defence argues that that the Health By-law in banning the operation of hookah cafes and the smoking of hookahs in public and in a community, is a limit on their religious and cultural rights under section 2(a) and one which is not trivial. The By-law also infringes upon the rights of the Defendants and on the religious rights of the many Muslim or Middle Eastern men and women who come to the Defendants' shops to share in this religious and cultural tradition.

[76] It is contended that the case law interpreting section 2(a) shows that this section of the Charter does not only protect activities that are officially required by a religious text or teaching, but that it protects any practice which the practitioner subjectively believes creates a furtherance of or connecting to one's faith. The standard for finding something worthy of protection under section 2(a) is relatively low and the Courts tend to defer to the sincere believes of those seeking Charter protection even in the absence of expert evidence. Reference to paragraph 47 of the Supreme Court of Canada in the case of *Syndicate Northcrest v. Amselem* (2004) 2SCR SSI has been made which states:

(religious) freedom encompasses objective as well as person notions of religious belief, "obligation", precept, "commandment", custom or ritual. Consequently both obligatory as well as voluntary expressions of faith should be protected under the ...Charter. It is the religious or spiritual essence of any action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection. An inquiry into the mandatory nature of an alleged religious practice is not only inappropriate, it is plagued with difficulties.

[77] Counsel for the Defendants maintains that the smoking of hookahs although not a mandated practice in Islam, for hundreds of years individuals in Middle Eastern countries, most of whom are Muslims, have had the hookah pipe at the centre of their social and spiritual lives. It is argued that this practice which has been an integral part of Middle Eastern and Muslim culture deserves protection under section 2(a) of the Charter.

[78] In addition, it is further submitted that the deprivation of the Defendants' rights has been contrary to the principles of fundamental justice, as the Health By-law is both overbroad and vague in its scope and it is due to this over-breadth and vagueness that the deprivation of the Defendants rights has occurred.

[79] With respect to the allegations of charter breaches, Counsel for the City first makes reference to the decision of the Supreme Court of Canada in *Mackay v. Manitoba* (1989) 2SCR 357 where the Court emphasized that decisions regarding constitutional principles should not be made in the absence of sufficient evidence to support constitutional adjudication. This is especially true when the constitutionality of legislation is being attacked as contrary to the Charter.

[80] Counsel for the City cited the same case of *Syndicate Northerest v. Amselem*, 2004 SCC 47 where the Supreme Court of Canada stated at paragraph 39:

... While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions

or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

[81] At paragraph 46, the Court went on to state:

To summarize up to this point, our Court's past decisions and the basic principles underlying freedom of religion support the view that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.

[82] Counsel for the City maintains that the purpose of the By-law is secular in nature as it focuses on the care, promotion and protection of the health of the inhabitants of Vancouver as opposed to the legislation in *R. v. Big M Drug Mart* decision on the *Lord's Day Act*. Consequently, the question in this case is whether any section of the By-law infringes the Defendants' freedom of religion in its effect.

[83] Reference to the case of *Alberta v. Hutterian Brethern of Wilson Colony* decision of the Supreme Court of Canada (2007) is mentioned by counsel for the City where the Court enunciated that an infringement of s. 2(a) will be made out where:

- (i) The Defendants sincerely believe in a belief or practice that has a nexus with religion; and
- (ii) The impugned measure interferes with the Defendants' ability to act in accordance with their religious beliefs in a manner that is more than trivial or insubstantial.

[84] Counsel for the City argues that the Defendants have failed to pass the first test in that they have not proven that they sincerely believe that the smoking of hookahs

connects them with the divine or is a function of their spiritual faith when the following evidence are considered:

- (i) The Defendants' shops are open to anyone and are not restricted to any religion or race.
- (ii) There is nothing in the Defendants evidence which would show that they each have a sincere belief that smoking hookahs is a religious belief or practice as defined by the law.
- (iii) There is no evidence whatsoever showing that the Defendants have a sincere belief that operating a business of allowing people to smoke hookahs for profit is a religious practice or belief.

[85] Furthermore, it is contended that even if the Defendants met the first stage of the test, they have not established an infringement of the right under s. 2(a) because it is not enough for a person to say his or her rights have been infringed under the second stage. The Defendants must prove such on a balance of probabilities. Counsel for the City relies on the decision of the Supreme Court of Canada in the case of *S.L. v. Commission scolaire des Chenes*, (2012) SCC 7 where the Court stated at para 23-24:

...as with any other right or freedom protected by the Charter, proving the infringement requires an objective analysis of the rules, events, or acts that interfere with the exercise of the freedom. To decide otherwise would allow persons to conclude themselves that their rights had been infringed and thus to supplant the courts in this role.

[86] In *Regina Correctional Centre v. Saskatchewan* (1995) SJ 35 (QB((QL); affirmed by the Sask. CA without written reasons, the issue was whether the prohibition of smoking products in the Regina Correctional Centre violated the freedom of religion, as many of the inmates were aboriginal. Inmates were allowed to use tobacco on ceremonial and special occasions within the jail, but wanted a broader exemption based upon traditions of their culture and religion. The Court said that to grant such an

exemption on religious grounds it would have to be shown on each occasion that the smoking activity had that objective. Kyle J further stated at para 19 of that decision:

After careful consideration of the point, I am persuaded that smoking is probably not such a subject as to attract the attention of the Charter except perhaps in traditional religious ceremonies of demonstrable authenticity. Accordingly, the application of the inmate must fail.

[87] It is argued that there is no evidence of demonstrable authenticity in the case at bar.

[88] In *R. v Chan* 2005 ABQB615 at paragraph 164, the Court found that the prohibition against an inmate having prayer beads and burning incense in his cell was an insubstantial interference with his freedom of religion as the prayer heads could be used as projectiles, and the use of incense in his cell was a fire hazard, and thus could impact on the air quality of others. Accordingly, there was no infringement in relation to the prayer beads and incense.

[89] Counsel for the City points out that the evidence from the Defence is that hookah smoking is not just popular with some people in the Middle East but it is also popular with people from other nations, races and religions around the globe. While Counsel for Defence has argued that the practice of hookah smoking has nexus to religion, Counsel for the City maintains that the Defendants have failed to prove that the smoking of hookahs connect them with the divine or is a function of their spiritual faith. Moreover, the Health By-law does not prevent people from buying hookahs, buying hookah tobacco or non-tobacco products, or smoking them in their homes, or at another person's homes, either in an individual or group setting. What the By-law prevents is

the Defendants from operating a business where people come to their stores to smoke hookahs for a price.

[90] Mr. Abdiannia's evidence is that while the Koran or the holy book says smoking is not good, the books of Hadith, which translates or explains the Koran, says something different and that most of the Muslims use both books. According to Dr. Norenzayan, while "social hookah smoking in cafes is to a significant extent a cultural practice in Middle Eastern cultures" he also stated in his paper that "hookah smoking cannot be considered a religious activity". On the evidence, while I am prepared to accept that social hookah smoking in cafes maybe a cultural or traditional practice in Middle Eastern Cultures, I am not convinced that hookah smoking has an objective nexus with all Muslims since there is no evidence to suggest that hookah smoking is part of any religious ceremony. Furthermore, even if one is to accept that the Defendants and some of their customers may have a subjective, honest or sincere belief the hookah smoking has a reasonable connection to Islam, the officers who paid the Defendants to smoke the hookah pipes on the offence dates in question obviously did not.

[91] I find it necessary to point out that the By-law, in effect, does not prevent the Defendants or any Muslim or Middle Eastern men or women from smoking their hookahs with their family members or friends at home regardless whether they believe that the practice enable them to connect with their spiritual faith or not. Nor does the By-law prevent the Defendants from using their shops for serving tea, or selling tobacco or herbal shisha, hookah pipes for profit. However, what the By-law does prohibit the

Defendants from is the operating of their hookah shops where their patrons, who may or may not be Muslims, from smoking hookah.

[92] Based on the above analysis, I come to the following conclusions:

(a) The evidence of the Defendants and the patrons fall short of establishing that they sincerely believe that hookah smoking is a practice which has a nexus with their religion as the term has been defined by the Supreme Court of Canada in the case *Syndicate Northerest v. Amselem*.

(b) Even if the Defendants are found to have a subjective belief that the smoking of hookah has a nexus with their Islam faith, the By-law does not interfere with their ability to smoke their hookahs in their own homes.

(c) There is no evidence whatsoever to support their implied claim that the Defendants' ability to operate their hookah cafes permitting people to smoke hookahs for profit is a function of their spiritual faith.

Issue # (5): Is there a violation of the Defendants' liberty rights protected under section 7 of the Charter?

[93] Section 7 of the Charter provides: 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.

[94] Counsel for the Defence submits that the enforcement of the By-law infringes on the Defendants' right to liberty under section 7 of the Charter. It is argued that enforcement of the By-law in question will deprive the Defendants to engage in the culturally and religiously significant practice of hookah smoking. This practice is a means of cultural and religious fulfilment and expression of the Defendants and their clients. Counsel for the Defendants made reference to paragraph 66 of the case of *Godbout v. Longueuil (City)* (1997) 3 SCR where the court held that:

...the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.

[95] Counsel for the Defendants claims that the By-law deprive the Defendants of their rights to gather to smoke hookahs are infringements against their liberty that relate to their experience of individual dignity and independence. Furthermore, Defence contends that the deprivation has been contrary to the principles of fundamental justice as the By-law is both overbroad and vague in its scope.

[96] Counsel for the City submits that pursuant to the decisions of the Supreme Court of Canada in the cases of *Blencoe v. B.C. Human Rights Commission* (2000) SCC 44 at para 47 and *Charkaoui v. Canada Citizenship and Immigration* (1997) SCC 9 at paragraph 12, breach allegations under s. 7 of the Charter involves a two-stage process: firstly, there must be a finding that there has been a deprivation of the right to life, liberty or security of the person and, secondly that the deprivation is contrary to the principles of fundamental justice. The onus of proof is on the Defendants on a balance of probabilities. If the Court does not find that has been a deprivation, then the inquiry stops there.

[97] It is argued that the Defence has failed to prove a deprivation of the Defendants liberty interest in the circumstances of this case as there is no threat of punishment in this case if the Defendants are convicted. With respect to the case cited by Defence of *Godout v. Lougueil* (supra), Counsel for the City stated that section 7 right to liberty encompassed only those matters that can properly be characterized as fundamentally

or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. Such inherently personal matters comprised a narrow class. But that does not mean that there is unconstrained freedom, or that this encompass all decisions that individuals may make in conducting their affairs.

[98] Counsel for the City argues that the decision to engage in a particular commercial activity is not akin to the kinds of decisions that have been characterized as so fundamentally and inherently person and private as to fall under the right to liberty. In addition it is further stated that to accept the Defendants submission would be to read into s. 7 a constitutional protection from what are economic or commercial decision. That reading would be inconsistent with the deliberate decision to exclude property-related rights from the ambit of s. 7 as stated by Major J. in *Sienmens v. Manitoba (Attorney General)* 2003 SCC3 at para.46:

The ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the Charter.

[99] It is my view that the enforcement of the By-law only prevents the Defendants from continuing their operation of their shops by permitting people to smoke. The By-law does not curtail them from selling hookah pipes, tobacco or non-tobacco products, serving tea and or sandwiches. The By-law does not prevent the Defendants and anyone else to smoke hookah pipes, cigars or cigarettes in their own homes. While enforcement of the By-law will mean that the Defendants are no longer able to charge the customers to their shops to smoke and thus adversely impact their ability to generate business revenue, this is not a right protected under s. 7 of the Charter as

stated by Major J. The effect of this By-law on the Defendants' ability to generate business revenue certainly does not go to the core of what it means to enjoy individual dignity and independence as stated in the above cited cases of *Blencoe*.

[100] On the basis of the above analysis I find the Defendants to have failed to prove that their rights to liberty has been infringed by the provisions of the By-law, and as such there is no need to consider whether it is in accordance with the principles of fundamental justice.

Issue # (6): Is there a violation of Defendants' section 15(1) rights?

[101] Section 15(1) of the Charter provides: 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.

[102] Counsel for the Defendant argue that the Section 15(1) rights to equal protection and benefit of the law without discrimination has been violated in that the definition of "smoking" in the By-law discriminates against the Defendants and against Muslims and person of Middle Easter descent by specifically mentioning "hookah pipes" while failing to mention other cultural and religious equipment used for smoking or burning, including bongos, thuribles, and calumets. While the addition of hookah pipes to the By-law did not make its prohibitions stricter, the singling out of "hookah pipes" does focus the enforcement of the By-law on the Defendants when establishments like the Amsterdam Café allows marijuana smoking and Buddhist temples that permit incense burning.

[103] It is further suggested that the reason for the different treatment of the Defendants under the By-law is due to their ethnicity or religion and was born out of a lack of understanding or outright prejudice against Middle Eastern or Muslim groups. In demanding that the charges against the Defendants be abandoned, Counsel for the Defendants maintains the Defendants' section 15 rights have been violated as they were targeted in the By-law by its drafters and enforcers as a result of their race or religion.

[104] Counsel for the City contends that the Defendants have misinterpreted the definition of "smoking" in the By-law and by narrow construction in order to make their argument compatible with the claim for infringement under s. 15(1). The City argues that what the Defendants have done is to allege discrimination on the basis of race and religion by the inclusion of the term "hookah pipe" in the definition of smoking when the term "hookah pipe" along with cigarette, cigar and pipe, is used to illustrate and define the term "smoking equipment". Counsel for the City stated that it is not a complete list of such "smoking equipment" as evidenced by the use of the words "or other" preceding it, but serves to expand upon and provide examples of those devices that share the same characteristics: they all are capable of producing smoke by the burning of tobacco, weed, or other substance, they all facilitate the inhalation of said smoke by the placing of the items to the lips, and they are all designed and used for that purpose.

[105] Counsel for the City pointed to the evidence of Mr. Losito who testified that under the old Health By-law it was always implicit that hookah lounges and cigar lounges were prohibited from allowing smoking inside their establishments. The objective in adding the term "hookah pipe" was to make it explicit in the By-law as to what was prohibited.

[106] The City also takes the position that the statement of Defence that the definition of “smoking” in the Health By-law discriminates against them to be misleading and unfair as there is no evidence before the Court that hookah pipes have their origins in the Muslim faith. Conversely there is no evidence that pipes, or cigars, or cigarettes do not have their origins in other cultures and religions. City maintains that the definition achieves exactly what the Defendants claim it does not: it defines “smoking equipment” regardless of a user’s race, culture or religion. The definition is an inclusive one, and not exclusive of any individual on the basis of any enumerated or analogous ground.

[107] With respect to the Defendants’ claim that the enforcement of the By-law against them amounts to discrimination as they have been unfairly targeted because of their culture and religion, Counsel for the City takes the position that the Defendants’ contention is really an issue of “selective prosecution”. By reference to the testimony of Ms. Windor with respect to the enforcement efforts of the City against restaurants and Amsterdam Café, Counsel for the City submits that there is no evidentiary basis to conclude a differential treatment under the law, or that any such differential treatment was on the basis of an enumerated or analogous ground as required.

[108] Counsel for the City maintains that the Defendants have not met the onus on them to establish a breach of section 15(1) of the Charter.

[109] The Supreme Court of Canada has since the case of *Law v. Canada* (1999) 1 SCR 497 and in the cases of *R. v. Kapp* (2008) SCC 41 and *Withler v. Canada* (2011) SCC 12 have set out a two-part test for infringement of s. 15(1) applications as follows:

- A. Does the law create a distinction or result in differential treatment on the basis of an enumerated or analogous ground?
- B. Does the differential treatment amount to discrimination?

[110] To establish a violation of s. 15(1), an applicant has to satisfy the court on a balance of probabilities that “he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory”.

[111] As I see it, a large part of the Defendants' allegation of breach of s. 15(1) rights is premised on the use of “hookah pipes” in the definition of smoking under the By-law which they argue to mean that persons of Middle Eastern descent and the Defendants having been singled-out and led to “focused enforcement” on the Defendants.

[112] Objectively, a plain reading of the By-law would convey to a reasonable person that smoking is prohibited in any enclosed space where the public is accessible. The prohibition is against any form of smoking, regardless whether it involves tobacco, cigarettes, cigars, weeds, herbal shisha or any other substance with or without smoking equipment such as pipes or hookah pipes which involve the act of smoking. In other words, the prohibition is so general that it includes the smoking of any substance, with or without the use of different smoking equipment, anyone who is smoking or anyone who permit the smoking to take place.

[113] It is clear to me that in reading 1.2 of the By-law that the words “hookah pipes” is used to describe as a type of smoking equipment like ordinary pipes. The fact that the words “or other lighted smoking equipment” following “hookah pipes” makes it

abundantly clear that "hookah pipe" is included as an example of smoking equipment. It would be fair to say that bongos, thuribles and calumets are also included under the By-law as they are all equipment capable of being used for smoking. The fact that the By-law was first enacted on October of 2007 with an exemption for cigar parlours and hookah cafes and that it was in July of 2008 that the exemption was removed would mean that no one were allowed to smoke in enclosed premises accessible by the public since July of 2007 while cigar parlours and hookah cafes were allowed to continue their operation until July of 2008.

[114] It is important to note that By-law 9535 was enacted on October 2nd, 2007 banning all indoor smoking or burning of any substance by way of smoking equipment in commercial establishments except for hookah lounges and cigar lounges. The evidence is that City Council wanted a report back from the staff before they decide whether the exemption should be allowed to continue. It was on July 10th, 2008 when City Council decided to strike down the exemptions at the recommendation of the staff. From that perspective, it is difficult to understand the claim of discrimination by the Defendants when hookah cafes and cigar lounges had been allowed to continue their operations when all restaurants and other commercial businesses were prohibited to allow anyone to smoke in their premises since October 2nd of 2007. While it can be said that cigar parlours and hookah cafes have been treated differently under the Bylaw by way of the exemption, but they were certainly not being discriminated against. In fact, along with cigar parlours hookah cafes received preferential treatment for the period when the exemption was in effect.

[115] While the decision of City Council to remove the exemption for cigar parlours and hookah cafes can be described as differential treatment were being applied against both types of operations but the Defendants cannot say that “they have been unfairly targeted because of their culture and religion” because the treatment they receive were certainly not unfair. Furthermore, I find that there is no factual basis for the position that the Defendants of having been singled-out for enforcement. In essence, the removal of the exemption means that hookah cafes along with cigar parlours are now subject to the same prohibition just like all other commercial establishments in the City from allowing smoking inside their premises.

[116] I agree with the submission of Counsel for the City that, in the circumstances of this case, there is no evidentiary basis to conclude a differential treatment under the law, or that any such differential treatment was on the basis of an enumerated or analogous ground as required.

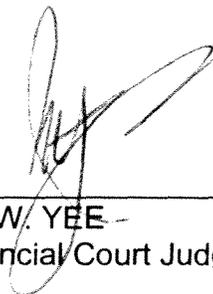
[117] The foregoing analysis leads me to conclude that the Defendants have also failed to meet the onus on them to establish a breach of s. 15(1) of the Charter. Since no Charter breach is established, there is no need to do a section 1 analysis.

Decision

[118] In view of my above findings on the various issues raised by the Defence and based on the evidence of the police officers who attended to the businesses in questions and on the dates of the offences, it is clear that both defendants were responsible persons for the respective businesses as defined in the bylaw.

Furthermore, both of the defendants testified that they are the sole proprietors of the

respective businesses. The evidence from the officers and the defendants are also clear that both defendants suffered and allowed their customers to smoke hookah pipes in their businesses for a fee on the offence dates mentioned in their respective information. Consequently, I find both Defendants guilty as charged.



W.F.W. YEE -
Provincial Court Judge