



## Shark Fin Ban Case: Does Biodiversity Have Anything to Do With Social and Civic “Well-Being”?

By Laura Bowman\*

In November 2012 the Ontario Superior Court of Justice held that Toronto’s shark fin by-law was *ultra vires*.

*Eng v. Toronto (City)*<sup>1</sup> was an application seeking a declaration that By-law No. 12347-2011 of the City of Toronto (Shark fin by-law) was *ultra vires* and of no force and effect. The by-law provides, in section 3, that “no person shall possess, sell or consume shark fin or shark fin food products within the city of Toronto”. The by-law was passed by a vote of 38-4 at council.

The applicants argued that the shark fin by-law’s purpose was directed against the extinction of sharks and lacked a proper municipal purpose. The court agreed that this environmental threat was a purpose of the ban on shark fin food products as it was “a theme that persists in the public record of the proposed ban” and “environmental well-being of the City” was mentioned the preamble.

The applicants submitted that the City was the “wrong level of government” for the by-law and that there was no identifiable environmental benefit to the city. The court rejected the first argument and accepted the second.

Justice Spence cited with approval the majority of the Supreme Court in *Shell Canada*,<sup>2</sup> which held that a by-law must have a purpose to “benefit to the the citizens of the City”,<sup>3</sup> and cited s. 6 of the *City of Toronto Act, 2006*,<sup>4</sup> which provides:

6. (1) The powers of the City under this or any other Act shall be interpreted broadly so as to confer broad authority on the City to enable the City to govern its affairs as it considers appropriate and to enhance the City’s ability to respond to municipal issues.

In this case, much weight was put on the environmental purpose of the by-law and the true purpose of the by-law was found to be to prevent the extinction of sharks. The court seemed

<sup>1</sup> 2012 ONSC 6818.

<sup>2</sup> *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 SCR 231.

<sup>3</sup> *Shell Canada, ibid.*, at paras. 31-33 cited in *Eng, supra* note 1 at para. 53.

<sup>4</sup> S.O. 2006, c. 11, Sched. A.

unconvinced that the by-law would prevent the extinction of sharks or achieve any of the other purposes cited by the City such as health (dangers of consumption) or preventing animal cruelty.

The court held that “On the basis of the material and the submissions, the ban will not by itself have any identifiable benefit for Toronto with respect to the environmental well-being of the City.”<sup>5</sup> Further the court noted in discussing the various permissible municipal purposes that shark finning does not occur in the city and dismissed the expression of Torontonians’ “social and environmental values” as a proper municipal purpose. Justice Spence noted that the phrase in the Act “social well being of the City” was not defined but held that “The phrase must refer to the ability of the inhabitants of the City to live together in the City as an urban society.”<sup>6</sup>

The court also held that that “there is no air of reality to the potential adverse impact on health from shark fin consumption referred to in the first recital in the Preamble of the By-law.”<sup>7</sup>

Arguably, the case has adverse implications for biodiversity caselaw more broadly for three reasons. First, the decision suggests that biodiversity of exotic species, and even more broadly the expression of environmental values is not a municipal issue, because it is not salient to the well-being of an urban society. It would seem fair to ask if this was properly an issue for the court to determine in order to resolve this case.

Second, the court’s approach to reviewing the purpose and effect of the by-law was not precautionary in nature and did not discuss the precautionary principle as it was addressed in the Supreme Court of Canada case of *Spraytech*.<sup>8</sup>

Third, from a biodiversity perspective, the court accepted the argument that prohibition elsewhere would have better benefits for shark protection and considered the purpose of the by-law suspect as a result. This form of analysis has potential negative implications for a wide-range of multilateral biodiversity protections.

Justice McLachlin’s dissent in *Shell* supported the view that municipal purposes include expressive purposes related to issues outside the geographic boundaries of a municipality and provided:

Can the desire of the citizens’ elected representatives to express their views on such matters and to withdraw support for the conduct to which they object by refusing to do business with its perpetrators be said to be totally unrelated to the welfare and interests of the citizens of the city? To all these questions I would answer no.

The court did not seriously entertain this approach in *Eng*. Justice Spence rather noted that this particular paragraph hadn’t been adopted by the majority of the Supreme Court or otherwise expressly in other cases. The court instead relies crucially upon the majority decision in *Shell*.<sup>9</sup>

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<sup>5</sup> *Eng*, supra note 1, at para. 65.

<sup>6</sup> *Ibid.* at para 74.

<sup>7</sup> *Ibid.* at para. 85.

<sup>8</sup> *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241.

<sup>9</sup> *Eng*, supra note 1, at paras. 70-73.

This is surprising since the Supreme Court of Canada adopted key portions of the dissent in *Shell in Nanaimo (City) v. Rascal Trucking Ltd.*<sup>10</sup> It is thus not crystal clear that the key passages in the majority decision in *Shell* limiting the geographic scope of municipal by-laws are still good law. Although some support can be found for this in authorities such as *Spraytech*, the relevant passages were not discussed in *Eng*.

The City of Toronto served a Notice to Appeal in the matter on December 31, 2012. There are interesting potential appeal issues arising from Justice Spence's decision, both on the approach of the court in addressing the purpose of the by-law and in restricting the by-law to the territorial extent of the municipality.

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<sup>10</sup> *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 SCR 342.