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February 15, 2013

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VIA E-MAIL

**Toronto City Council Members**  
City Hall  
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Dear Toronto City Councillors,

We are the lawyers who represented the four Applicants for judicial review of the City's By-Law prohibiting the possession, consumption or sale of shark fin products in Toronto. We are writing to you on their behalf. As you are aware, on November 30th, 2012, Justice Spence released his decision declaring the By-Law to be invalid as being beyond the legal jurisdiction of the City. I understand that Council is considering whether to appeal this decision.

I am confident that each member of Council will give careful consideration to this issue. However, when making your decision it is important that Council members be aware of some of the underlying facts and public policy considerations that you may not have been aware of, or perhaps may not have given due weight to when the by-law was passed.

It is understandable that Council would have environmental concerns related to the consumption of food from animals such as sharks, that have a important role in ecology. Our clients understand, and have respect for these concerns. However, they believe that there are better, fairer ways for a municipal government to address these concerns than an outright prohibition. For example, if the City wishes to discourage the consumption of an otherwise legal product such as shark fin soup, it could do so using the suggestions of the Acting Executive Director, Municipal Licensing and Standards in the October 6, 2011 document Supplementary Report: Banning the possession, sale, and consumption of shark fin products in Toronto. He recommended that the City use public information, public education and co-operation with local business and community groups to achieve the results sought.

I would respectfully suggest that rather than appealing this decision, Council refer the issue back to the City Staff (as was done with the proposed ban on plastic bags) with instructions to provide a report. With a comprehensive report from the City Staff, Council would be well equipped to find a legal and effective way of furthering its goals without enacting any new by-laws.

### ***Other Levels of Government***

The City had asked both Parliament and the Ontario Legislature to legislate a ban against shark fin soup. Both had declined to do so. The Federal Minister explained that on the basis of federal studies, such a ban would be unnecessary. The Province appears to have a similar view. Both levels of government are strongly in favour of public education on environmental issues. Why not the City?

There is now a small, but thriving shark protection “industry”. There are numerous NGOs dedicated specifically to the protection of sharks. These groups need to raise funds. To do so they use marketing strategies aimed at convincing the public that the protection of these animals from inhumane, live finning is urgent. They have successfully created a belief in the endangerment of most shark species, allegedly brought about by their excessive and cruel killing. There are, however, only three species of sharks listed in the UN Convention on International Trade in Endangered Species of Wildlife Fauna and Flora as endangered. The Canadian government, which has a team of scientists who study shark populations and fishing activities full-time, believes that these species are adequately protected. Ontario also believes that its existing legislation is adequate. If the City is going to act on the assumption that both of these levels of government are wrong, it might wish to have its staff review the facts.

### ***A Total Ban of a Legal Product***

The City's attempt to ban totally a food product that is otherwise legal and unregulated by any level of government presents a very real question as to the limits of the City's powers. If the City is empowered to ban shark fin soup, why would this statutory power be limited to banning only this food product? This unprecedented ban opens the door for any kind of ban, of any product, for virtually any reason. In court the City's lawyer argued that Toronto is part of the planet, and helping to save sharks helps save the planet. On that reasoning, anything that Council thinks is harmful to the planet could be totally banned within the City. Can the City of Toronto Act (“COTA”), a law of Ontario, really give the City that much power?

### ***The Purpose of the By-law***

If the purpose of the by-law is protection of animals that are killed cruelly, it seems arbitrary to limit it to sharks? There is no kind, painless way to transport or slaughter in large volumes most of the animals we eat. The PETA website (<http://www.peta.org/>) details horrific, nauseating cruelty in the breeding, growing, transportation and slaughter of pigs, cattle, turkeys, lambs and chickens. If you recall the Walkerton water tragedy, that was an environmental effect of pig farming. The City has not banned any of the foods from these animals. Unless the City enacts a by-law making vegetarianism mandatory – which it would never do – it seems arbitrary to single out for total prohibition only one food product from one animal. On the other hand, there is no jurisdictional barrier to the City creating public education programs to discourage the consumption and sale of any product.

The court may be sceptical of the claim to be protecting sharks when the City has no prohibition against eating shark meat. Shark steaks are sold in grocery stores in Toronto on occasion. So, it is entirely legal to eat all of a shark, as often as one likes, but not the occasional bowl of soup made from the fins, which are mostly cartilage, not meat. It appears

anomalous to try to justify the legal power to make a law that allows eating the entire fish but requires throwing away the fins.

Most of the sharks caught are not finned alive, contrary to popular misconception. Live finning is rare, and in Canada and many other countries, illegal. Most sharks are caught by commercial fishing boats in large nets, as by-catch, along with other species of fish. Why would a commercial fishing boat throw away valuable shark meat that it could sell?

If the purpose of the by-law is health protection, the risk posed by eating an occasional bowl of soup is trivial. There are so many other obvious, well-documented and serious health risks that the City has not banned as to raise scepticism about the reality of a health protection rationale for this by-law. The City not prohibited the possession, consumption and sale of any tobacco products, or considered banning fresh tuna, which Health Canada says is a greater risk because it has high levels of mercury and is consumed much more frequently than shark meat. As well, the mercury in sharks is found in the meat, not in the fins.

To date, the City has not banned the possession, consumption or sale of any other product. In comparison, the possession, consumption and sale of cigarettes is entirely legal. If the City has the jurisdiction to ban shark fin products for health reasons, it must surely also have the jurisdiction to ban other products that it considers to pose health risks. And if so, why single out shark fin soup? Health Canada, after extensive research, recommends eating fish, including shark meat, for its health benefits (as long as the amount consumed weekly does not exceed a certain weight). There is no medical evidence of health risks to the Chinese community in Toronto from the occasional consumption of shark fin soup.

### ***Legal Opinions***

Council was warned by its staff that there is no evidentiary basis for the by-law on municipal grounds, and warned by the City Solicitor that there was no jurisdictional foundation for it. Some councillors have recently been quoted in the media as having said that the City had two legal opinions indicating that the by-law was within the City's legal powers. I would respectfully suggest that Council look at these again.

I have the highest respect for George Rust-D'Eye and am confident that at no time would he knowingly give wrong advice. That may be why his written legal opinion does not say anywhere that the by-law the City was proposing to enact would be within its jurisdiction. To the contrary, his opinion assumes that the by-law would cover restaurants only, not private possession or consumption of shark fin products. Even in that narrow situation, he does not state that the by-law would be valid. For Council to believe that it has a legal opinion from him "blessing" this by-law, as enacted, would be incorrect.

The City also received a so-called legal opinion from a group of 10 people with law degrees, some of whom were or had been law students, others, lawyers. This was not a normal legal opinion. It was largely a recitation of the City's powers as found in the Act, with no detailed analysis from a municipal law perspective. It read more like a petition signed by a group of people, than a legal opinion. The group only claimed expertise in "animal law", which is not municipal law. When this group sought intervener status in the court case the court refused, ruling that the City knew more about the COTA than this group of animal rights activists. Thus,

no lawyer with expertise in municipal law has stated publicly that what the City enacted is within its jurisdiction.

### ***The Unprecedented Nature of This By-Law***

This is not the place to debate again the merits of our respective legal positions before Justice Spence. However, Council should be aware that a total prohibition of this nature is unprecedented in law in Canada. To the best of my knowledge, no such total prohibition has been approved by any appellate court in any Province in Canada.

A few examples will illustrate this point.

- The so-called “ban” on smoking tobacco products is not really a total prohibition, just a regulation in public places. City residents can consume tobacco products in private places like their homes, and can possess these products anywhere. The reason the courts have upheld restricting smoking is that the smoke can harm the health of non-smokers in the vicinity of the smoker (well supported by evidence). Thus, smoking can be a nuisance occurring within the municipal boundary. On the other hand, if someone at the next table in a restaurant, or next hotel room, or next house eats a bowl of shark fin soup, that creates no adverse impact on a nearby person within the municipal boundary.
- The so-called “ban” against spraying pesticides, adopted by some municipalities and upheld by the courts, was also only regulation of unnecessary spraying. Like smoking, unnecessary spraying of chemicals on someone’s lawn can blow onto neighbouring property, creating a potential nuisance for them, again, within the municipal boundary.
- In the case brought by Shell against the City of Vancouver to strike down a resolution not to do business with that company (because it carried on business in South Africa, which then had an apartheid regime), the majority of the judges in the Supreme Court of Canada held that this by-law served no valid purpose within the municipality, and struck it down. The dissenting judgment of now Chief Justice McLachlin has since been cited in other cases as growing support for her view that just because the reason for the resolution was in part moral should not automatically render it invalid. However, the context of that case was merely a resolution, not a by-law, and it was about how the City would spend its own money. Unlike Toronto, Vancouver made no by-law prohibiting any person in Vancouver from possessing Shell gasoline, or consuming it in their vehicles, or prohibiting Shell from selling it. The analogous resolution in Toronto would be that no City function or City-owned restaurant would serve shark fin soup. That is not the by-law in issue.
- Our courts have distinguished between exotic animals passing through the City and those living in the City. The courts have ruled that the City can regulate the former, but not the latter. Sharks, however, are marine animals that live in the ocean. The City of Toronto is not adjacent to any ocean. Shark fin soup is not a live animal passing through or living within municipal boundaries.

- Restricting the body contact that exotic dancers may have with customers in adult entertainment parlours, upheld by the courts, is also regulation, not a total ban against lap dancing. This is a type of business over which municipalities have well-established regulatory jurisdiction. The City has no similar regulatory jurisdiction to prohibit consumption of legal food products, whether consumed at home or in restaurants.


### **Conclusion**

Justice Spence's decision is quite narrow and fact-specific. He deals only with the City's power to enact a by-law prohibiting the possession, consumption or sale of shark fin food products. He makes no broad, sweeping pronouncements of law that would narrow the scope of the City's jurisdiction in any area. His decision is unlikely to restrict the City's freedom in regulating or prohibiting anything outside of the single food product in this case.

The situation on appeal may be quite different. Council runs the risk of inviting the highest level of the Ontario judiciary to make firmer and more restrictive pronouncements on the scope of the City's municipal powers. On the other hand, there is nothing to prevent the City from conducting a public education campaign on shark fin products that might well be more effective in encouraging the Chinese community in Toronto to stop eating shark fin soup.

For all of these reasons, our clients would respectfully request City Council not to appeal Justice Spence's ruling, but to direct the staff to study and report on alternative methods of discouraging the consumption of shark fin soup.

Yours truly,



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