

WILDAID

To: Members of Hamilton City Council – General Issues Committee

From: Phil Gillies on behalf of WildAid Canada

Re: Shark Fin Resolution

Date: December 12, 2011

Dear Members of the Committee –

WildAid Canada, part of a worldwide conservation society, is asking your support for a motion being brought before Hamilton City Council by Councillors McHattie and Farr. By adopting this motion, Hamilton will be joining a growing number of North American jurisdictions calling for a ban on the trade and possession of shark fin. The trade in this food product and its derivatives is driving shark populations towards extinction, with dire consequences for ocean ecosystems and for mankind.

Hamilton is hundreds of kilometers from the nearest ocean. But by calling on a federal ban on shark fin, your city will be heralded by conservation groups worldwide as the most ecologically conscious of communities. You will be joining the City of Toronto, the City of Brantford, the Town of Oakville, the City of Mississauga and the City of Pickering in calling for this vital, progressive step.

- Sharks worldwide are being slaughtered at a rate of 75 to 80 million a year to satisfy the market for shark fin soup and other shark fin products, largely in China and other Asian markets. The trade is burgeoning because of the growth of a moneyed middle class in China.
- If this slaughter continues at this rate, many species of shark could be extinct within 10 to 15 years, throwing the oceans' ecosystems into turmoil and posing real problems for humanity.

- The practice of “shark finning” is a wasteful and brutal type of fishing, which consists of fishermen removing fins from the shark (which can be alive or dead at this point) and throwing the animal’s carcass back in the ocean. The prized, and very profitable fin is then brought back to port. This practice has been illegal in Canadian waters since 1994, European Community waters since 2003 and US waters since 2009. This illegal practice does continue, however, worldwide. It is almost certain, therefore, that some of the shark fin sold in your community was obtained criminally.
- Shark fin, and indeed shark flesh generally, is unhealthy for human consumption. Because sharks live a long time relative to other species of fish, and because they are a top predator that consumes other species of fauna, they accumulate very high levels of mercury and other toxins.
- The possession, sale and consumption of shark fin has been banned in the California, Oregon, the State of Washington, Hawaii, the Northern Mariana Islands, the Marshall Islands and Guam. Bans have also be passed in the Canadian municipalities as detailed above.
- WildAid is working with other Canadian jurisdictions to initiate legislation across Canada.
- Public opinion is pretty solidly in support of such bans, increasingly even in North American Asian communities.

While we laud the step that we hope Hamilton is taking today, we have to state our disagreement with the contention in the motion being considered today that Ontario municipalities do not have the jurisdiction to make law on this issue. I attach for your information a legal opinion signed by Nick Wright and 11 other lawyers that supports our contention that you do have jurisdiction under the Municipal Act to regulate a foodstuff, just as municipalities have regulated smoking and pesticides. In testimony before the City of Toronto Licensing and Standards Committee, distinguished municipal lawyer George Rust D'eye – the author of the City of Toronto Act – also stated his opinion that Ontario municipalities have the jurisdiction to regulate these products.

It is our hope at WildAid that Hamilton will revisit this issue in the new year with an eye to joining your fellow Ontario municipalities, now representing almost four million people, in banning shark fin.

Please contact me at 647-385-8474 or at phil@pgillies.ca should you have any questions or concerns.

Yours truly,

Phil Gillies
WildAid Canada

October 5, 2011

VIA EMAIL: councillor_debaeremaeker@toronto.ca, councillor_wongtam@toronto.ca

Councillor Glenn De Baeremaeker
Councillor Kristyn Wong-Tam
B31-100 Queen Street West
Toronto, Ontario
M5H 2N2

Dear Councillor De Baeremaeker and Councillor Wong-Tam:

RE: Ontario Municipalities' Jurisdiction to Prohibit Shark Fin Products

Below is the opinion that you requested regarding the authority of Ontario municipalities to ban the possession, sale and consumption of shark fin products.

We, the undersigned, conclude that Ontario municipalities have clear authority to ban the sale, possession and consumption of shark fins through their powers to legislate with respect to (a) animals, including their welfare; (b) public health and safety; and (c) consumer protection. Banning shark fins accomplishes animal welfare objectives, and it may protect the public from health risks associated with contaminants that are present in shark fin products. The courts accord a high degree of deference to municipalities and are unlikely to strike down validly enacted by-laws.

Please don't hesitate to contact us by any of the means listed at the end of this letter should you require clarification or additional information.

I. Summary

Brantford, Ontario became the first municipality in Canada to ban the possession, sale, and consumption of shark fin products on May 24, 2011,¹ with a number of US

¹ Officially, Brantford directed city staff to prepare such a by-law. See City of Toronto Council Meeting Minutes, Report 8, May 24, 2011.

jurisdictions also passing similar bans.² The Brantford ban has sparked more municipalities in Ontario to propose by-laws banning shark fin products.

Toronto City Councillors Glenn De Baeremaeker and Kristyn Wong-Tam put forth a June 14, 2011 motion seeking the introduction of a by-law banning the possession, sale, and consumption of all shark fin products in Toronto.³ The motion was referred to the Licensing and Standards Committee, which has asked the Executive Director of Municipal Licensing and Standards to report back on such a by-law.⁴ Oakville became the third city in Ontario to propose such a ban on July 5, 2011,⁵ followed by Mississauga, which directed its staff to report on the viability of a ban on July 6, 2011 and Pickering, which did the same on September 19, 2011.

It is our position that Ontario municipalities are legally empowered to ban shark fin products. Such a ban relates to animal welfare, public safety, and consumer protection – all areas over which Ontario municipalities have jurisdiction.

II. Municipal Authority to Make By-Laws Respecting Animal Welfare

The province of Ontario delegates power and duties to its municipalities through the *Ontario Municipal Act*.⁶ Section 11(3)(9) of the *Ontario Municipal Act*, R.S.O. 2001 c.25 (the “**2001 OMA**”) provides that municipalities may “...pass by-laws respecting... animals.” This provision gives municipalities clear authority to make by-laws respecting any animal welfare related activity.

Notably, under a previous version of the *Ontario Municipal Act*, R.S.O. 1990 c.M45 (the “**1990 OMA**”), the authority granted to municipalities in relation to animals was more limited. The courts interpreted that power narrowly, holding that municipal authority over

² Hawaii banned shark fin products in May 2011; California did so in September 2011.

³ A By-law to Ban the possession, sale and consumption of Shark Fin and Derivative Products in Toronto, Toronto City Council Member Motion 9.3, June 14, 2011.

⁴ A By-law to Ban the possession, sale and consumption of Shark Fin and Derivative Products in Toronto, City of Toronto Licensing and Standards Committee item LS7.2, September 7, 2011.

⁵ Oakville directed city staff to draft a by-law banning the possession, sale, distribution and consumption of shark fin, cartilage and derivative products. See Town of Oakville Council Meeting Minutes, Item 3, July 4, 2011.

⁶ Note that Toronto is governed by the *City of Toronto Act*, 2007, S.O. 2006, c. 11, Sched. A. The provisions relevant to authority to ban shark fin products are identical in the *City of Toronto Act* and the *Ontario Municipal Act*, therefore this document will refer simply to the *Ontario Municipal Act*.

animals was limited to controlling nuisances, and that *provinces* had exclusive jurisdiction to regulate with respect to animal welfare.⁷ On January 1, 2003, the 2001 OMA replaced the 1990 OMA. As a result, municipal powers to regulate animals were dramatically enhanced through the creation of a brand new area of municipal authority over animals.

This background information is important because there is a prevailing conception that animal welfare by-laws—passed by cities—are vulnerable to being struck down by the courts. While this was the case under the former municipal legislation, it is our position that by delineating clearer areas over which municipalities have authority, the 2001 OMA protects animal related by-laws from legal challenge on the basis of jurisdiction.

The various motions being introduced in Ontario municipalities to ban shark fin products are clear in their purpose: to ban a product that is the result of the “wasteful, inhumane practice”⁸ of finning sharks. Municipal leaders recognize that tens of millions of sharks are slaughtered per year, putting these animals at risk of extinction at the current rate of slaughter. Brantford’s shark fin motion noted that “shark finning is a cruel practice that is contrary to the good morals” of its citizens.

Proposed shark fin bans are clearly motivated by a concern over shark welfare, or more broadly, animal welfare. Municipalities may pass by-laws respecting animal welfare.⁹ Municipalities may enact by-laws to regulate, license, or completely prohibit activities over which they have jurisdiction.¹⁰ Therefore, Ontario municipalities may prohibit the sale, possession or consumption of shark fin products because these activities are inherently linked to shark (or animal) welfare—an area over which they have jurisdiction. A citywide ban on the presence (or possession) of shark fin products may be likened to the banning of certain exotic animals, which many Ontario municipalities have successfully implemented.¹¹

⁷ See *Stadium Corp. of Ontario Ltd. v Toronto (City)* [1992] OJ No 3541.

⁸ A By-law to Ban the possession, sale and consumption of Shark Fin and Derivative Products in Toronto, Toronto City Council Member Motion 9.3, June 14, 2011.

⁹ Section 11.1 of the *Ontario Municipal Act* defines an animal as any non-human member of the animal kingdom—this includes sharks.

¹⁰ *Ontario Municipal Act*, Section 8(3)(a).

¹¹ For example, Toronto prohibits the keeping of many species of mammals, bird, and reptiles. See *Toronto Municipal Code*, Chapter 349 – Animals, Schedule A.

III. Ensuring Animal Protection By-Laws Will Withstand Judicial Scrutiny

Although Ontario municipalities have clear authority to pass by-laws respecting animals, this does not mean that animal protection by-laws are always immune to challenge on other grounds. The *Xentel v Windsor*¹² decision, in particular, showed that by-laws may be vulnerable to challenge on the basis of how a council decision was made. In *Xentel*, Windsor's City Council passed a by-law banning animal acts in circuses. The by-law was struck down because the court found that: (a) the 1990 OMA did not give municipalities authority to legislate with respect to animal welfare; and (b) the Windsor City Council did not act in good faith when passing the by-law, which was deemed discriminatory and vague.

Although municipal authority to enact animal-related by-laws is no longer an issue under the 2001 OMA, the *Xentel* decision indicates that animal protection by-laws must be enacted: (a) in good faith; (b) only after council has conducted due diligence regarding the relationship between the by-law and the problem it proposes to address, and (c) in a procedurally fair manner, meaning that affected parties must be provided with an opportunity to make representations to council.

IV. Municipal Authority to Enact By-Laws Respecting Health and Public Safety

Ontario municipalities are also vested with clear authority to make by-laws concerning the "health, safety and well-being of persons"¹³ as well as the "protection of persons and property, including consumer protection."¹⁴

In addition to animal welfare concerns, proposed shark fin bans also appear to be motivated by a concern over health and public safety. Shark fin food products may pose a health risk, as shark fin contains high levels of mercury and other toxins.¹⁵

¹² *Xentel DM Inc. v Windsor (City)* [2004] OJ 3656.

¹³ *Ontario Municipal Act*, Section 10(2)(6).

¹⁴ *Ontario Municipal Act*, Section 10(2)(8).

¹⁵ Multiple studies indicate that mercury and other contaminants are present in shark fin products, and that these contaminants are a public health concern. See: *Mercury, A Major Public Health Concern*. World Health Organization, www.who.int/phe/news/Mercury-flyer.pdf; *Final Report: Contaminants and health risk assessment of shark fins available in markets in five cities in China*. Croucher Institute for Environmental Sciences & Hong Kong Baptist University, 2007, submitted to WildAid.

Because municipalities may enact by-laws to protect public health and safety, as well as consumer protection, a ban on the sale, possession and consumption of shark fin products is also valid under this sphere of power.

Municipalities license businesses selling foodstuffs, and a municipality may impose conditions as a requirement of obtaining, continuing to hold or renewing a license.¹⁶ Therefore, a municipality could prohibit a restaurant or grocery store from selling, possessing, and permitting the consumption of shark fin products as a condition of its license.

An August 17th report authored by the Mississauga Commissioner for Transportation and Works—received by Mississauga City Council on September 7th—suggests in one sentence that Health Canada has sole jurisdiction over food safety, with the Canadian Food Inspection Agency responsible for enforcing Health Canada’s food safety policies and standards. Health Canada does indeed regulate foodstuffs sold in Canada, *but such regulation does not bar a municipality from placing its own restrictions on the sale of food items*. Legislation enacted by one level of government does not preclude other levels of government from passing *complementary* legislation. For example, cigarettes have been approved federally and are subject to federal regulation, but have nonetheless been restricted provincially and municipally.¹⁷ The validity of tri-level regulation has been unambiguously endorsed by the Supreme Court of Canada as the accepted model in our federal system.¹⁸

Municipal by-laws are deemed invalid only if they *conflict* with federal or provincial legislation.¹⁹ The Ontario Court of Appeal considered this issue in *Croplife Canada v The City of Toronto*,²⁰ where a by-law banning pesticides was challenged by the pesticide industry. Because it was possible to simultaneously comply with the pesticide by-law and federal and provincial legislation, and because the by-law did not frustrate the purpose of the provincial and federal legislation, it was permitted to stand.

¹⁶ *Ontario Municipal Act*, Section 151(1)(c).

¹⁷ Many Ontario municipalities banned smoking in public places like restaurants and workplaces. These restrictions remained in place until 2006, when provincial restrictions in the *Smoke-free Ontario Act*, SO 1994 c.10 came into force.

¹⁸ *Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)* [2001] 2 SCR 241, at para 39.

¹⁹ *Ontario Municipal Act*, Section 14.

²⁰ *Croplife Canada v Toronto (City)* [2005] OJ 1896.

With respect to shark fins, there are no provincial or federal laws that regulate the product. *Therefore, a municipal by-law banning shark fin products will not conflict with any existing laws enacted by other levels of government.*

V. Interpreting Municipal Authority

Finally, it should be noted that courts are taking an increasingly expansive view of municipal jurisdiction.

Section 9(1) of the 2001 OMA provides that "Sections 8 and 11 are to be interpreted broadly so as to confer broad authority on municipalities, (a) to enable them to govern their affairs as they consider appropriate; and (b) to enhance their ability to respond to municipal issues".

As Justice Feldman of the Ontario Court of Appeal noted in *Croplife*, "the jurisprudence from the Supreme Court is clear that municipal powers, including general welfare powers, are to be interpreted broadly and generously within their context and statutory limits, to achieve the legitimate interests of the municipality and its inhabitants." The Supreme Court has adopted a generous approach, according deference to municipal governments.

The Supreme Court of Canada has also recognized that the "precautionary principle"²¹ is a recognized principle in international law and may inform the powers of municipalities to act for the general welfare of their citizens.²² In the case of shark finning, the precautionary principle most certainly applies. Ontarians have expressed concern that the wasteful practice of finning sharks is contributing to environmental degradation through the steep decline of shark populations. Further, there are legitimate concerns that mercury and other toxins contained in shark fin products are risky to human health. Thus, pursuant to the precautionary principle, municipal lawmakers are justified in taking precautions to prevent sharks from becoming endangered.

²¹ As per the precautionary principle, where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

²² *Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)* [2001 2 SCR 241].

VI. Conclusion

Municipalities in Ontario may ban the sale, possession and consumption of shark fins through their power to legislate surrounding issues of: (a) animal welfare; (b) public health and safety; and (c) consumer protection. Banning shark fins accomplishes animal welfare objectives, and it may protect the public (or “consumers”) from the health risks associated with consuming toxic chemicals.

Yours sincerely,

Nicholas dePencier Wright

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