

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

2326169 ONTARIO INC., O/A FAROUZ)
SHEESHA CAFÉ, 7923406 CANADA) *Ryan Zigler, for the Applicants*
INC., CLUB LAYALY EL SHARKE INC.,)
OUM KULTHOUM and NILE PALACE)
CAFE)

Applicants)

– and –

THE CITY OF TORONTO) *Kristen Franz, Leslie Mendelson and Sara*
) *Amini, for the Respondent*

Respondent)

) **HEARD:** June 24 and August 22, 2016

R. F. GOLDSTEIN J.

[1] Does the City of Toronto have the power to pass a by-law prohibiting hookah? The City passed such a bylaw in 2015. The by-law has not yet gone into effect.

[2] A hookah lounge is a business where the patrons go to socialize and smoke. The patrons can smoke various types of products (legal and illegal) using a hookah. A hookah is a type of pipe. A hookah is sometimes also called a water-pipe. In Toronto, hookah lounges supply “shisha”. Shisha is an herbal product that does not contain tobacco. The pipe heats up the shisha, which generates smoke. The smoke is inhaled through a hose. The smoke passes through water in order to cool the smoke. Hookah lounges supply a hookah, and shisha to smoke, for a fee.

[3] Smoking shisha in a hookah lounge is a form of entertainment common in the Middle East and parts of Asia. The Applicants are a group of business people who own hookah lounges

in the City of Toronto. These hookah lounges are a place of community. People come to congregate, talk, play board games, and have a snack or small meal and a non-alcoholic drink. The Applicants, who have all immigrated to this country and started operating businesses, have sought to create the atmosphere of traditional hookah lounges.

[4] On December 10, 2015 the Toronto City Council passed By-law No. 1331-2015 (which I will refer to in these reasons as “the by-law”). The by-law amended the Municipal Code. The by-law defined “hookah”. The by-law then prohibited hookah smoking in all establishments licensed by the City to carry on business.

[5] The by-law defined “hookah” as:

HOOKAH:

A. A device, whether called a hookah or any other name, designed to heat or burn a substance and produce smoke intended to be inhaled by a user or users of the device.

B. "Use", with respect to a hookah, includes any of the following: (1) Inhaling smoke from a hookah, (2) Exhaling smoke from a hookah, and (3) Holding an activated hookah.

[6] The by-law then prohibited the use of a hookah:

No person licensed or required to be licensed under this chapter shall permit any person to use a hookah in or upon any premises, vehicle, or thing to which the license relates, and this section shall come into effect on April 1, 2016.

[7] Although the by-law came into force on April 1, 2016, the City has agreed to defer enforcement until this application is resolved.

[8] The Applicants say that the City had no power to pass the bylaw. They ask that the Court quash the by-law.

[9] The Applicants are very sympathetic. The evidence is that they operate modest businesses that play a significant cultural role. They have invested time and money. They are law-abiding members of the community who simply want to run their businesses. Their evidence is that the by-law will have a devastating effect on them. Some, the City acknowledges, may go out of business.

[10] Nonetheless, the by-law is valid. It is within the powers of the City. For the reasons that follow, the application is dismissed.

ANALYSIS

[11] Mr. Zigler, on behalf of the Applicants, argues that they City did not have the power to pass the by-law. His argument can ultimately be boiled down to these points:

- The by-law is not valid. It has, in essence, a confiscatory effect. It will have the effect of shutting down the Applicants' businesses. Confiscatory legislation must be narrowly construed. Legislation can only take away established common law property rights by statute with plain language or by necessary implication. The *City of Toronto Act, 2006*, SO 2006, c 11, Sch A does not permit confiscatory by-laws. Thus, the question to be asked is whether the City has the power to pass the by-law.
- The by-law essentially prohibits a business from operating. The *City of Toronto Act* does not authorize the City to prohibit a business.
- The by-law conflicts with provincial legislation, specifically the *Occupational Health and Safety Act*, RSO 1990, c 0.1 (I will refer to this Act as OHSA.). Since the effect of the by-law is to shut down businesses, it will cost workers their jobs. This conflicts with the purpose of OHSA, which is to protect works.
- The City acted in bad faith in passing the by-law.

[12] Although, as I have said, I sympathize with the plight of the Applicants, I must respectfully disagree. Much of the argument hinges on a finding that the effect of the by-law is confiscatory. I do not agree that it is. But even if it were, the City has the legal authority to pass the by-law and the specific power to shut down a business.

(a) Does the City have the legal authority to pass the by-law?

[13] Mr. Zigler argues that the City of Toronto did not have the authority to pass the by-law because it acts as confiscatory legislation. The *City of Toronto Act* does not have the authority to pass a confiscatory by-law. In essence, he says that a municipality can only take away a person's business by a plainly worded statute or by necessary implication.

[14] I must respectfully disagree. The *City of Toronto Act* authorizes the by-law. A court interpreting the *City of Toronto Act* must take a "broad and purposive" approach. Moreover, the line of cases relied on by the Applicants is either distinguishable or has been overtaken by statute in the case law. Finally, while I agree that the by-law will have an unfortunate effect on the Applicants, I cannot agree that it is confiscatory. The purpose of the by-law is to deal with health and safety, which I turn to next.

Hookah Smoke Is A Health And Safety Problem

[15] That the by-law is aimed at the health and safety of the City's residents is beyond doubt. The by-law must be seen in the context of the broader anti-smoking campaign. Dr. David McKeown is the City's Medical Officer of Health. He is very experienced. He was Medical Officer of Health from 1996-1998. He has been Medical Officer of Health (for the second time) since 2004. He is in charge of Toronto Public Health. His mandate is to prevent the spread of disease and to promote and protect the health of the City's residents. He also advises City Council on issues of public health.

[16] In a report to City Council dated March 10, 2014, Dr. McKeown stated that hookah smoke was a health hazard, no matter what was smoked. He outlined some of the hazards associated with non-tobacco hookah smoking. The smoke includes some of the same cancer-causing chemicals associated with tobacco. As well, hookah use in enclosed spaces (such as a hookah lounge) exposes staff and patrons to hazardous levels of air pollution. Certain types of shisha had even higher levels of some cancer-causing chemicals than tobacco. Survey evidence noted that many people incorrectly perceived hookah smoking as less harmful than tobacco. Dr. McKeown recommended

... that the Board of Health direct him to consider measures, including prohibition, to address the health risks of indoor waterpipe smoking at Toronto commercial establishments.

[17] From October 2014 to January 2015 Toronto Public Health conducted public consultations with stakeholders (including owners and patrons of hookah lounges, cultural organizations, and public health units) regarding a possible hookah by-law.

[18] I note that smoking of tobacco (or other illegal substances) would be illegal even if the by-law did not exist. The *Smoke Free Ontario Act*, SO 1994, c 10:

9.(1) No person shall smoke tobacco or hold lighted tobacco in any enclosed public place or enclosed workplace.

[19] The *Smoke Free Ontario Act* does not apply non-tobacco products, such as shisha. The *Controlled Drugs and Substances Act*, SC 1996, c 19 obviously prohibits the general use of illegal substances.

[20] In May 2015 Dr. McKeown provided a very lengthy and detailed report to the Board of Health. The report surveyed other hookah-related legislation from across Canada (including four municipalities in Ontario) and other parts of the world. Prohibition, as the report noted, has been the common response in most jurisdictions. The report also noted the health hazards of hookah smoke. Dr. McKeown recommended that council take steps to ban hookah use in business establishments licensed by the City. The Board of Health adopted the recommendation at a public meeting on June 1, 2015. City Council passed the by-law in December, 2015 to take effect in April, 2016.

The By-Law Is Authorized By the City of Toronto Act

[21] The parties have filed voluminous records designed to buttress their positions, but a complete answer to the Application is found in the *City of Toronto Act*:

8.(2) The City may pass by-laws respecting the following matters:

6. Health, safety, and well-being of persons.

[22] It is clear that the Legislature intended to provide the City with broad powers:

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.

[23] Moreover, courts have a very limited power to quash a City of Toronto by-law. No court may quash a by-law for unreasonableness. The only basis upon which a by-law may be quashed is for illegality: *City of Toronto Act*, ss. 213, 214. As Lang J.A. stated in *Friends of Landsdowne Inc. v. City of Ottawa*, 2012 ONCA 273, 110 OR (3d) 1 at para 12: "Absent illegality, municipal by-laws are well insulated from judicial review."

[24] As Feldman J.A. noted in *Croplife Canada v. Toronto* (2005), 75 OR (3d) 357(CA) at para 17, the broad approach set out in the *City of Toronto Act* (and in the current *Municipal Act*) has been mirrored by a "more generous interpretation of municipal powers" and greater deference shown to municipal officials. I turn next to these developments.

The Applicants' Cases Are Distinguishable or Have Been Overtaken

[25] The case generally relied on by the Applicants, *Prince George v. Payne*, [1978] 1 SCR 458, 1977 CanLII 161, is an example of an older approach to interpreting municipal legislation. In 1978 municipalities had very specifically delegated authority. In *Prince George*, Payne had applied to the City of Prince George for a licence for an "adult boutique" that he proposed to call (perhaps rather quaintly by the standards of 2016) the Garden of Eden. The City Council, by resolution, refused the licence on moral grounds. Payne applied for mandamus and was refused by the Supreme Court of British Columbia. The Court of Appeal (with a dissent) allowed the appeal. Dickson J. (as he then was) for a unanimous Supreme Court of Canada framed the issue this way:

Let me say, at the outset, that one might well be inclined to support Council's evident distaste with sex businesses. But it is no part of a Court's task to determine the wisdom of Council's decision, assuming a power to deny the licence inhered in the Council. The Court's sole concern is whether the council acted within the four corners of its jurisdiction. The discretion contained in s. 455, wide as it is, must be exercised judicially. It is not a judicial exercise of discretion to rest decision upon an extraneous ground. The common law right of the individual freely to carry on his business and use his property can be taken away only by statute in plain language or by necessary implication.

[26] Mr. Zigler points in particular to the last part of Dickson J.'s decision. He says it is still good law. Since the effect of the by-law is confiscatory, it can only be considered valid if it specifically prohibits a business – although he also argues that the current *City of Toronto Act* does not authorize the City to do so.

[27] In 1978, the key part of s. 455 of British Columbia's *Municipal Act* stated:

455. Notwithstanding anything contained in this Act or in the by-laws of the municipality, the Council may upon the affirmative vote of at least two-thirds of all the members, refuse in any particular case to grant the request of an applicant for a licence under this Division but the granting or renewal of a licence shall not be unreasonably refused.

[28] Dickson J. noted that a municipality's power to make by-laws to regulate and govern a trade did not, in the absence of an express power to prohibit something, authorize making it "unlawful to carry on a lawful trade in a lawful manner." He dismissed the City's appeal. The by-law was quashed.

[29] There is certainly a line of cases following this approach, much of it growing out of attempts to control or limit otherwise businesses that politicians found distasteful, such as in the *Prince George* case. For example, in *City of Oshawa v. 505191 Ontario Ltd.* (1986), 54 OR (2d) 632 (CA) the municipality passed a zoning by-law restricting adult entertainment parlours to certain areas within the city. A tavern owner was convicted of infringing the by-law. His tavern was outside the designated area. He argued that the municipality did not have the authority to pass the by-law because (among other things) it contravened the *Planning Act*, RSO 1990, c P.13. Goodman J.A. accepted the principle that legislation restricting common law rights of property must be narrowly construed. A municipality may not take away such rights without clear and unambiguous language. He found, however, that in this case the Legislature had specifically authorized the municipality to enact the particular by-law.

[30] The *Prince George* line of cases has, with great respect, been overtaken by subsequent developments in the case law and legislative changes.

[31] Those developments began with the dissent of McLachlin J. (as she then was) in *Shell Canada v. Vancouver*, [1994] 1 SCR 231, 1994 CanLII 115. McLachlin J.'s dissent now embodies the approach taken to the interpretation of municipal legislation.

[32] In *Shell Canada* the City of Vancouver had passed a by-law prohibiting the City from doing business with Shell as long as affiliated companies did business in South Africa. The majority struck down the by-law as not falling within Vancouver's legislative competence – Vancouver would not be permitted to have its own foreign policy. McLachlin J., however, advocated a broader approach to the construction of municipal legislation. This was in keeping with what she described as an "emerging consensus" that courts must respect the decisions of elected municipal bodies. Rules of construction should not be used to usurp the legitimate role of municipal councils as democratic institutions. McLachlin J.'s dissent became the majority view in *Nanaimo v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 SCR 342 and *114957 Canada Ltd. (Spraytech, Societe d'arrosage) v. Hudson*, 2001 SCC 40, [2001] 2 SCR 241.

[33] The development of the case-law, and the parallel development of broader municipal legislation, was described in detail by Feldman J.A. in *Croplife*. In that case, the City of Toronto enacted a by-law limiting pesticide use. The by-law was passed under the *Municipal Act*, RSO 1990, c M.45 [*Municipal Act*] (the current *City of Toronto Act* came into force in 2006). The *Municipal Act* contained a residual provision authorizing municipalities to regulate matters not specifically provided in the legislation related to health, safety, and well-being. Croplife argued that, since the legislation did not give municipalities the specific authority to regulate pesticide use, even the broad and purposive approach could not sustain the pesticide by-law since it did not fall within the residual clause. Feldman J.A., for the Court of Appeal, rejected that approach at paras. 33-34:

In light of the development of the jurisprudence in this area over the last twelve years and the clear adoption by the Supreme Court of a generous approach that accords deference to municipal governments, it would take clear legislative language to return to Dillon's Rule when interpreting those parts of the new Act not contained in Part II...

Furthermore, it would be a retrograde step to apply the former, restrictive approach to interpret the balance of the Municipal Act, 2001 outside Part II, when the goal of modernizing the Act, as stated by the Minister of Municipal Affairs at the time, was to give municipalities in Ontario the "the tools they need to tackle the challenges of governing in the 21st century. [citations omitted]"

[34] Given the clear language of the *City of Toronto Act*, and using the broad and purposive approach, it is clear that the by-law is valid.

The By-Law Is Not Confiscatory

[35] Mr. Zigler argues that the evidence shows that the effect of the by-law is confiscatory.

[36] He points to *Pacific National Investments Ltd. v. Victoria*, 2000 SCC 64, [2000] 2 SCR 919 [*Pacific National*] as authority for the proposition that the principles that confiscatory legislation must be strictly construed is alive and well. He specifically points to this passage:

In embarking on my analysis of British Columbia's municipal government legislation, I am mindful of the recent words of Major J. in *Rascal Trucking* at para 18, "[t]here is ample authority, on the interpretation of statutes generally and of municipal statutes specifically, to support a broad and purposive approach." At paragraph 19, Major J. also cited this comment from Iacobucci J.'s reasons in *R. v. Greenbaum*, "a court should look to the purpose and wording of the provincial enabling legislation when deciding whether or not a municipality has been empowered to pass a certain by-law." These words do not mean that municipal jurisdiction is to be read in an unlimited way. Indeed, the judgment of this Court in *Greenbaum* suggests that the purposive aspects of the interpretation apply only to the scope of expressly conferred powers. Municipalities have only those powers

expressly conferred on them, powers necessarily following from these, or powers essential to municipal purposes... [citations omitted].

[37] Again, I must respectfully disagree. The by-law does not expropriate any property, impose extra property or municipal taxes, or in any way prevent the Applicants from running their businesses.

[38] In *Pacific National* the Court was dealing with a municipal by-law that would have effectively re-zoned an area. The area had been the subject of a development agreement between the City and the developer. The re-zoning significantly affected value of the land held by the developer. *Pacific National* and similar cases relied on by the Applicants are distinguishable from the situation here. Those are cases where, broadly, development had been stymied by changes to zoning by-laws or changes to official plans.

[39] In this case there have been no changes to the business licenses of the Applicants. They are all businesses or business operators that are licensed by the City as “eating establishments”. They offer food and non-alcoholic drinks. None have a liquor license. Hookah pipes and shisha are offered for rent and sale. No Applicant has a hookah lounge license because the City does not issue such a thing. There is nothing in the by-law to prevent the Applicants from renting hookah pipes and selling shisha for home use, although I appreciate that it is the experience of the hookah lounge that they have built their businesses around.

[40] A typical hookah lounge owner is Karim Rajah Fallah. He operates the Fari Ouz Sheesha Café on Danforth Avenue in Toronto. He immigrated to this country from Morocco in 2009. In 2013 he borrowed \$30,000.00 from friends and family to purchase the business. He has a business licence from the City. He has personally guaranteed the commercial lease. He serves non-alcoholic drinks and a limited amount of food. He tries to replicate the atmosphere of a Middle Eastern hookah lounge. His customers come to socialize, read Arabic newspapers, play board games, and enjoy smoking shisha in a hookah. His main source of revenue comes from renting a hookah pipe and selling shisha. His business judgment is that his customers will no longer come if they cannot smoke shisha. He believes the effect of the by-law will be to close his business.

[41] Another typical hookah lounge owner is Magdy Mehany. He immigrated to this country from Egypt in 1996. He operates the Nile Palace Café on Lawrence Avenue East in Toronto. He opened up his business in 2009. He spent about \$100,000.00 to renovate the premises. His lounge attempts to create the atmosphere and decor of an Egyptian hookah lounge. He offers traditional Egyptian coffees, teas, and desserts. He supplies hookah pipes and shisha to his customers. His customers come to socialize, listen to Egyptian music, play games and cards, and smoke shisha. He derives about 80% of his revenue from hookah pipes and shisha. He believes that his clients will no longer come if he cannot continue to offer shisha. He points out that other hookah lounges in the GTA will be able to continue to operate (although not in Peel, which has passed a by-law similar to Toronto’s). He believes it would not be feasible to convert his

business into a restaurant because of the location. In any event, he does not have the \$60,000.00 he believes he requires to do that.

[42] Other hookah lounge owner/operators have given similar evidence. Sam Maktabi operates the Le Beirut Shisa Café. He immigrated to this country from Lebanon. He offers a variety of Lebanese foods, but his main income is derived from providing hookahs and shisha to his customers. He also believes that the by-law will have the effect of shutting his business. Moir Mikhail operates the Oum Kulthom hookah lounge. His lounge is named for a famous Arabic singer. He provides a colourful description of the cultural importance of Egyptian hookah lounges in his affidavit.

[43] I appreciate that the Applicants have a genuine fear for the financial health and future of their businesses. The City concedes that some may go out of business. I also appreciate that the Applicants are offering a product that is otherwise lawful. That, however, does not make the by-law confiscatory. As I mentioned, the City is not taking anything away.

[44] Toronto Public Health conducted surveys of hookah lounge patrons and operators during the consultation process. Dr. McKeown's report noted:

(a) The intercept interviews indicate that nearly half of the patrons (46%) would still visit these establishments even if hookah use was not permitted;

(b) In Toronto, looking at all known businesses, approximately half of the hookah establishments are restaurants, bars or nightclubs and clearly rely on revenue from other sources such as food and alcohol. For the other half, hookah use appears to be the activity and likely is a more important source of revenue;

(c) All 14 interviewed operators stated that approximately 70%-90% of their revenue comes from hookah use. Almost all of the operators stated that a prohibition on hookah use would result in the closure of their business.

[45] "Confiscatory" is a term that appears frequently in the case-law. A definition of "confiscatory" appears less frequently – or never. The usual context is a municipal zoning by-law that has the effect of prohibiting a particular land-use – something akin to an expropriation. The typical case involves a developer characterizing the new zoning as an expropriation. For example, see *Rodriguez Holding Corp. v. City of Vaughan*, 2006 CanLII 40238, 25 MPLR (4th) 100 (Sup Ct). Nothing of that sort is happening in this case. The by-law does not prevent the Applicants from continuing to do that which they are licensed to do.

(b) Does the City have authority to prohibit a business?

[46] Mr. Zigler argues that the by-law essentially prohibits a business. He points to *Treesann Management Inc. v. Richmond Hill* (2000), 47 OR (3d) 221 (CA). In that case, the town had prohibited adult entertainment parlours – what else? – from operating in a particular location.

The Court found that since the *Municipal Act* at the time did not grant municipalities the power to prohibit specific businesses, the by-law was invalid.

[47] While that case is obviously good law, the *City of Toronto Act* provides yet another complete answer to this submission:

86.(1) Without limiting sections 7 and 8, those sections authorize the City to provide for a system of licences with respect to a business and,

(a) to prohibit the carrying on or engaging in the business without a licence.

[48] Thus, although the by-law does not actually prohibit the Applicants from carrying on business, it is clear that the City has the power to do so.

(c) Does the by-law conflict with the Occupational Health and Safety Act?

[49] Mr. Zigler argues that there is an operational conflict between the by-law and the OHSA. The by-law purports to protect the health of workers from second-hand smoke. In fact, the by-law eliminates workers, he argues – which hardly protects them.

[50] Section 11(1) of the *City of Toronto Act* makes it clear that where a by-law conflicts with a federal or provincial statute, it is without effect. Operational conflicts may be dealt with by asking whether it is impossible to comply with both the by-law and provincial legislation at the same time; and whether the by-law frustrates the purpose of the federal or provincial legislation: *Croplife* at para 60.

[51] It is difficult to see how the by-law operationally conflicts with the OHSA. The OHSA is designed to protect workers. It regulates workplaces in the interests of worker safety. It is difficult to see how compliance with the by-law makes it impossible to comply with the OHSA. Moreover, it is very clear that it is public policy in Ontario to discourage smoking and protect people (including workers) from the effects of tobacco smoke: *Smoke Free Ontario Act*. While that Act only applies to tobacco, the objective (healthier citizens) is broader. A by-law that protects workers does not frustrate the objectives of the OHSA.

(d) Did the City act in bad faith?

[52] Mr. Zigler contends that the city failed to act with the degree of fairness, openness, and impartiality required of a municipal government. In particular, Mr. Zigler argues that City staff acted with unacceptable partiality in presenting relevant information to the City Council.

[53] Mr. Zigler points to mistakes he says were made by the city during the consultation process. There are material errors. For example, he says that the “growing trend” of hookah use described by Dr. McKeown’s report is unsupported by the survey data in the consultations (such as the figure of 46% of users who say they will continue to patronize hookah lounges). He also

argues that the question asked of stakeholders was unacceptably partisan. That question was: “Is the growing trend of hookah smoking and its health risks brought up as an issue in your organization and clientele?” A further example of partisanship was the manner that some of the medical surveys were presented, and some of the survey data of hookah lounge patrons.

[54] I must respectfully disagree. As Mr. Zigler fairly noted, there is a very heavy burden on a party seeking to establish bad faith by members of City Council. A party must show that a municipality acted with “a lack of candour, frankness, and impartiality. It includes arbitrary or unfair conduct and the exercise of power to serve private purposes at the expense of the public interest.” See: *Equity Waste Management of Canada v. Town of Halton Hills* (1997), 35 OR (3d) 321 (CA) per Laskin J.A. at para 61. Moreover, it must be bad faith on the part of the Council itself, which was the decision-maker. As Aston J. of this Court pointed out in *Municipal Parking Corp v. City of Toronto* (2009), 2009 CanLII 65385, 314 DLR (4th) 642 (ONSC), even if staff did provide information that was misleading or incorrect there must still be evidence of bad faith. The evidence must be of the sort described by Laskin J.A.

[55] In my view, there is no such evidence here. Taken at its highest, the evidence shows that some staff members might have made some mistakes at some point. The central message of the report, that hookah smoke is harmful, was clearly the basis upon which Council passed the by-law. Council therefore made a policy choice. The by-law was passed by an overwhelming majority of city councillors. It was an exercise of democratic decision-making. It is no part of this Court’s function to overturn the will of elected officials by, in effect, second-guessing their policy decisions.

DISPOSITION

[56] As I noted at the beginning of these reasons, I have a great deal of sympathy for the Applicants. They run modest businesses that are otherwise lawful and compliant with pertinent regulations and by-laws. They make an important contribution to the diversity that makes life in our city so culturally rich and vibrant. It is unfortunate for them that Council chose to prohibit rather than regulate hookah use in establishments licenced by the City to carry on business. That was a policy decision by elected officials. It is my duty to determine whether the by-law is legally valid, not whether it is good policy or bad policy.

[57] Accordingly, the Application must be dismissed. The by-law is valid. Under the circumstances, there will be no order as to costs.

R.F. Goldstein J.

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DATE: 20161007

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PALACE CAFÉ

Applicants

and

THE CITY OF TORONTO

Respondent

REASONS FOR JUDGMENT

R.F. Goldstein J.