

CITATION: 2386240 Ontario Inc. v. The City of Mississauga, 2018 ONSC 3162
COURT FILE NO.: CV-16-4669-00
DATE: 20180605

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 2386240 ONTARIO INC., O/A AL-OMDA LOUNGE, HABIBI LOUNGE, FUSION LOUNGE, SAIMA ROGINA INC., O/A EL FISHAWY, 84921231 CANADA INC., O/A MAZAJ LOUNGE and SHISALICIOUS CAFÉ

Applicants

V.

THE CITY OF MISSISSAUGA and THE REGIONAL MUNICIPALITY OF PEEL

Respondents

BEFORE: Regional Senior Justice Peter A. Daley

COUNSEL: R.P. Zigler, for the Applicants

B.H. Kussner and S.R. Rouleau, for the Respondents

HEARD: January 17 and 23, 2018

REASONS FOR JUDGMENT

Introduction:

[1] The applicants sought a declaration that sections 2 (a), (b), (c) and 5 of By-Law 1331-2016 (“the By-Law”) enacted by the respondent The Regional Municipality of Peel (the “Region”) are illegal or invalid and as such the

applicants seek to quash those provisions of the By-Law. The remaining provisions of the By-Law are not challenged.

[2] The applicants are the owners of several waterpipe lounges which are located in the Region.

[3] As will be discussed below, the By-Law prohibits waterpipe smoking in enclosed public places such as the applicants' business establishments. The By-Law was enacted by Council for the Region and was subsequently confirmed through the consent of the Councils of all three lower-tier municipalities which comprise the Region — namely, the City of Brampton, the City of Mississauga and the Town of Caledon.

[4] The application initially sought relief from both the Region and the City of Mississauga, however the application was withdrawn against the latter party as enforcement of the By-Law was to be solely carried out by the Region.

[5] For the reasons that follow the application is dismissed.

Evidence as to the Events Leading to the Enactment of the By-Law:

[6] A substantial evidentiary record was submitted by both parties. Generally, there is little dispute as to the evidence submitted. Determination of the application turns largely on whether the Region was lawfully entitled to enact the By-Law and whether it lawfully carried out that process.

[7] In 2012 the Public Health Division of the Region's Health Services Department ("Peel Public Health") released a report entitled "Burden of Tobacco: the Use and Consequences of Tobacco in Peel" (the "*Burden of Tobacco Report*"). The report included an examination of concerns related to the use of waterpipes.

[8] In the affidavit of Eileen de Villa, Medical Officer of Health ("MOH"), submitted on behalf of the Region in response to the application, there is uncontradicted evidence as to the negative health outcomes associated with waterpipe smoking as contained in the *Burden of Tobacco Report*, including higher rates of respiratory illness, lung cancer, lower birth weights and periodontal disease.

[9] The *Burden of Tobacco Report* also identified multiple concerns with respect to smoking generally throughout the Region, including adverse results from smoking on an annual basis involving 3300 hospitalizations for diseases attributed to smoking, almost 700 deaths related to smoking, almost 5000 years of life lost as a result of premature death. Further, as a result of exposure to environmental i.e. second-hand tobacco smoke, it was estimated that:

- (I) approximately 156 people were hospitalized annually for lung cancer or ischemic heart disease as a result of exposure to second-hand smoke;

- (II) approximately 40 people died annually from lung cancer or ischemic heart disease as a result of inhaling someone else's smoke; and
- (III) one out of ten non-smokers across the Region continue to be exposed to second-hand smoke.

[10] The *Burden of Tobacco Report* also identified the economic costs of hospital treatment of smoking-attributable diseases across the Region as in excess of \$49 million annually.

[11] As deposed by witness de Villa in her affidavit, since 2009 there has been an increase in the number of waterpipe establishments carrying on business in the Region and this increase was running counter to the Region's policies focused on protecting public health from harmful effects of smoking and second-hand smoke.

[12] As a result of concerns with the ever-increasing number of waterpipe establishments in the Region and the recognized harmful effects of both tobacco and non-tobacco smoking generally and with the use of a waterpipe, the MOH concluded that as a matter of public health and safety and occupational health and safety, legislative intervention by the Region was warranted.

[13] In her affidavit, the MOH deposed that in view of the health concerns recognized on February 5, 2015, Peel Public Health issued a report entitled

“Health Effects from the Uses of, and Exposure to, Tobacco and Non-tobacco Waterpipes” (the “*Waterpipes Report*”).

[14] This Report was in part prepared to respond to complaints made to Peel Public Health in respect of poor indoor air quality and with respect to the consumption of tobacco within waterpipe establishments in the Region. The *Waterpipes Report* was based on a review of studies and reports in regard to waterpipe use and certain recommendations were made by the authors of the report to Peel Public Health some of which included:

- (I) the development of policy options regarding the use of waterpipes and the potential option of the development of a by-law prohibiting waterpipe smoking in enclosed public places and workplaces, including restaurant and bar patios;
- (II) partner with key stakeholders to conduct high-quality research on the health effects of the use of, and exposure to, tobacco and non-tobacco waterpipes;
- (III) advocate to the Minister of Health and Long-Term Care in favour of providing an accurate, timely, cost-effective and efficient process for health units to submit waterpipe products for laboratory analysis of tobacco content;
- (IV) advocate to the Minister of Health and Long-Term Care in favour of amending the *Smoke-Free Ontario Act*, S.O. 1994, c. 10 to

also prohibit the smoking of tobacco-like products such as non-tobacco waterpipes, in all areas where the smoking of tobacco products is prohibited; and

- (I) advocate to the federal Minister of Health in favour of including tobacco waterpipe products under the federal *Tobacco Act* in order to set minimum requirements for packaging and labelling.

[15] The MOH and its Commissioner of Health Services tendered a report in November 2015 to the Regional Council where it recommended undertaking stakeholder consultations with waterpipe establishment owners, patrons of waterpipe establishments, and staff from the Region's three lower-tier municipalities with a view to determining how the Region could best address the public health risks related to waterpipe smoking in public places. The recommendations made to the Regional Council were passed in November 2015. Consultations were then carried out with the stakeholders.

[16] The stakeholder consultations included the following:

- (I) Representatives from 20 of approximately 32 businesses known to offer waterpipe smoking were interviewed;
- (II) 105 patrons of different waterpipe establishments were interviewed;

- (III) Peel Public Health representatives met with representatives of the local three lower-tier municipalities during the summer of 2015; and
- (IV) Peel Public Health representatives contacted several public health agencies in Middle Eastern countries in which waterpipe smoking is common, including Lebanon, Turkey, Egypt and Kuwait.

[17] Following the completion of the stakeholder consultation process, a jointly prepared report from the MOH and Commissioner of Health Services was issued in April 2016 and presented to Regional Council. The report identified several findings collected during the stakeholder consultation process including:

- (I) 70% of the patrons attending waterpipe establishments cited “socialization” as their main reason for doing so;
- (II) waterpipe smoking, particularly among young adults, was increasing in the Region;
- (III) existing and emerging research confirmed that waterpipe smoking posed health risks to users and those exposed to second-hand smoke;
- (IV) most individuals were unaware of the risks posed by waterpipe smoking or believed that the risks were minimal; and

- (V) in addition to several Canadian jurisdictions, a number of countries in the Middle East had already prohibited waterpipe smoking in public spaces.

[18] In its conclusion, the authors of the April 2016 report recommended the enactment of a by-law prohibiting waterpipe smoking in respect of both tobacco and non-tobacco in enclosed public places, enclosed workplaces and specific outdoor public places within the Region.

[19] On April 28, 2016 Regional Council received the April 2016 report and during this public Council meeting submissions and delegations were received from members with respect to the recommendations contained in the report. Following consideration of the submissions and delegations, Regional Council enacted the By-Law in accordance with the recommendations in the April 2016 report.

[20] The vote at Regional Council was twenty-one members in favour of enacting the By-Law while two opposed it.

[21] In May 2016, each of the three lower-tier municipalities within the Region consented to the enactment of the By-Law and resolutions were passed for that purpose by each municipality.

[22] As to investigations carried out with respect to waterpipe lounges operated by the applicants, the respondent filed affidavit evidence from Jakub Graczyk, a

Public Health Inspector and Tobacco Enforcement Officer (“TEO”) employed by the Public Health Division of Peel Public Health for the Region.

[23] As outlined by witness Graczyk, three rounds of sampling were carried out whereby samples were collected from waterpipe establishments and tested for tobacco content. During the first round of testing, samples were collected from 11 waterpipe establishments. Of those 11 premises, 7 were found to have at least one sample containing tobacco.

[24] During the second round of testing, samples were collected from one premises and of the samples collected at least one contained tobacco.

[25] During the third round of testing, samples were collected from 11 premises. Eight of those premises were found to have at least one sample containing tobacco.

[26] Five of the applicants in this proceeding were found to have samples containing tobacco on the premises during at least one of the three rounds of testing and the particulars with respect to that are set out in Graczyk’s affidavit.

Nature of the Applicants’ Businesses:

[27] Affidavit evidence from the principles of each applicant was submitted outlining the nature of their respective waterpipe lounges.

[28] The applicants supply waterpipes and smoking products to their customers to be consumed on site, while the customers socialize in their premises.

[29] The applicants depose in their affidavits that their waterpipe lounges offer herbal shisha to customers, which is heated in the waterpipe by burning charcoal. Smoke is generated by this and the smoke is cooled by water and inhaled by the customer through a hose or mouthpiece. Herbal shisha is not a substance prohibited under the *Smoke-Free Ontario Act*.

[30] The applicants' evidence is that the bulk of their business revenues are derived from the supply of waterpipes and the shisha sold to their customers. The percentage revenue of their total revenue from the rental of waterpipes and sale of herbal product ranges from approximately 60% to as high as 90%.

[31] A survey of waterpipe lounge clientele, as commissioned by the respondent, indicated that 75% of those interviewed would be unlikely to visit a waterpipe lounge if waterpipe smoking was prohibited.

[32] The applicants explain that their business operations are small and that they have invested substantial sums of money ranging from \$60,000-\$500,000 to refurbish their business premises for the operation of a waterpipe lounge.

[33] The applicants disputed the evidence with respect to the sampling and testing that resulted in the detection of tobacco at certain waterpipe lounges in the Region, which was relied upon by the Region in considering the proposed By-Law.

[34] It is further the applicants' evidence that they will face significant personal liability with respect to their business premises leases as a result of the adverse effects from the enforcement of the subject By-Law.

[35] In submissions on behalf of the applicants, counsel urged that enforcing the subject By-Law would ultimately result in the closure of the applicants' waterpipe lounges and substantial economic losses flowing from that.

Analysis:

[36] Most of the issues at stake on this application have already been thoroughly considered by this court in *232169 Ontario Inc. (Farouz Sheesha Café) v. Toronto (City)*, 2016 ONSC 6221, 59 M.P.L.R. (5th) 279 (Goldstein J.), and by the Ontario Court of Appeal in *232169 Ontario Inc. (Farouz Sheesha Café) v. Toronto (City)*, 2017 ONCA 484, 67 M.P.L.R. (5th) 183 (C.A.). These two cases, collectively, are hereinafter referred to as the "*City of Toronto Case*".

[37] The application before the court in that case was virtually identical to the application before this court.

[38] The applicants take the position that the determinations made by both the application judge and the Court of Appeal in the *City of Toronto Case* are distinguishable from the issues in this application and as such, the findings and conclusions reached by both courts have limited application to this matter. For the reasons outlined below I disagree with this submission.

[39] Counsel for the applicants did not address the applicable standard of review on an application to quash a municipal by-law pursuant to section 273 of the *Municipal Act, 2001*, S.O. 2001, c.25. This section provides that one may bring an application to this court to quash a by-law in whole or in part for “illegality” within one year after the passing of the by-law.

[40] As established in *Friends of Lansdowne Inc. v. Ottawa (City)*, 2012 ONCA 273, 110 O.R. (3d) 1 (C.A.), at paras. 13–14 on an application to quash a municipal by-law, the court must determine if the municipality acted within the scope of its express or implied statutory powers and for the purposes consistent with those statutory powers. In the absence of a clear demonstration of illegality, municipal by-laws are “well insulated from judicial review.”

[41] The question as to what constitutes “illegality” within the meaning of section 273 of the *Municipal Act, 2001* encompasses a variety of municipal law grounds, such as *ultra vires*, procedural irregularities or vagueness. When construing a municipal by-law on the assertion that it is *ultra vires*, the applicable standard is one of correctness. However, as stated by the Court of Appeal in *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502, 86 O.R. (3d) 401, at paras. 20–24, “in determining the question, courts are to take a broad and purposive approach to the construction and interpretation of municipal powers.”

[42] Both the legislative and jurisprudential framework, which guides the determination of a municipal by-law’s validity, must be examined by taking a

broad and purposive approach to the construction and interpretation of municipal powers.

[43] Municipalities are creatures of statute and the *Municipal Act, 2001* provides broad powers to municipal councils to make policy choices and legislative decisions. Sections 8 and 11 of the *Municipal Act, 2001* set out the range of authority and powers conferred upon municipal governments in the following subsections:

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

...

(3) Without limiting the generality of subsections (1) and (2), a by-law under sections 10 and 11 respecting a matter may,

- (a) regulate or prohibit respecting the matter;
- (b) require persons to do things respecting the matter;
- (c) provide for a system of licences respecting the matter.

(4) Without limiting the generality of subsections (1), (2) and (3) and except as otherwise provided, a by-law under this Act may be general or specific in its application and may differentiate in any way and on any basis a municipality considers appropriate.

11(1) A lower-tier municipality and an upper-tier municipality may provide any service or thing that the municipality considers necessary or desirable for the public; subject to the rules set out in subsection (4). 2006, c. 32, Sched. A, s. 8.

(2) A lower-tier municipality and an upper-tier municipality may pass by-laws, subject to the rules set out in subsection (4), respecting the following matters:

...

6. Health safety and well-being of persons.

...

(5) The power to pass a by-law respecting a matter set out in a paragraph of subsection (2) or (3) is not limited or restricted by the power to pass a by-law respecting a matter set out in another paragraph of subsection (2) or (3).

[44] As to the jurisprudence applicable to the review of municipal by-laws, the Supreme Court of Canada and the Ontario Court of Appeal have emphasized the need for a generous, deferential standard of review of the decisions of elected municipal councils made pursuant to valid enabling legislation: *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342, at paras. 35-36; *Grosvenor v. East Luther Grand Valley (Township)*, 2007 ONCA 55, 84 O.R. (3d) 346, at para. 31.

[45] Several principles that emerge from these cases are engaged here. Counsel for the respondent provided a thorough review of the applicable jurisprudence in both his factum and oral submissions.

[46] The deferential approach to the construction of municipal by-laws calls for a reviewing court to “respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens of those municipal councils.” See: *Toronto Livery Association v. Toronto (City)*, 2009 ONCA 535, 83 M.V.R. (5th) 1, at para. 44; *Nanaimo (City)* (supra).

[47] A party challenging the validity of municipal action on the basis that it is invalid or unenforceable bears a heavy onus. All *intra virus* municipal actions are presumptively valid. Courts should be reluctant to find bad faith on the part of democratically elected municipal councils unless the evidence leads to “no other rational conclusion”: *Canada Mortgage and Housing Corp. v. North Vancouver (District)*, 2000 BCCA 142, 77 B.C.L.R. (3d) 14, at paras. 41-43.

[48] By-laws must be presumed to have been enacted in good faith unless the contrary can be proven. If there are lawful grounds upon which the municipal council can be found to have acted, the court should not presume that the council acted beyond its authority or that it intended to do so: *McKay v. The Queen*, [1965] S.C.R. 798, at 803-804.

[49] Statutory provisions dealing with municipal powers should be given a “benevolent construction” using a “broad and purposive” approach consistent with underlying objectives and “showing deference to and respect for the decisions of local elected officials”.

[50] It has been held that the “overhaul of the *Municipal Act*, R.S.O. 1990, c. M.45 in 2001 was intended to “give municipalities the tools they need to tackle the challenges of governing in the 21st century... including more authority, accountability and flexibility so that municipal government would be able to deliver services as they saw fit.”: *Croplife Canada v. Toronto (City)* (2005), 75

O.R. (3d) 357 (C.A.), at para. 37; *Fourth Generation Realty Corp. v. Ottawa (City)* (2005), 197 O.A.C. 389 (C.A.) at paras. 29–37.

[51] In terms of the evidentiary record to be considered on an application such as this, the Court of Appeal has confirmed the principle that statements made by individual members of a municipal council are not to be taken as determinative of the intent of council as a whole when enacting a particular resolution or by-law. Council's decision on its face represents the exercise of its authority within its jurisdiction and the decision underlying the enactment of a by-law is not open to attack on the basis of an allegation that one or more individual members of council were motivated by improper purposes. The motives of a legislative body such as the Regional Council in this case, is made up of a number of members. As such, the motives are "unknowable" except by what the council enacts: *Consortium Developments (Clearwater) Limited v. Sarnia (City)* (1996), 30 O.R. (3d) 1 (C.A.), at paras. 29–31; [1998] 3 S.C.R. at paras. 43-45 (S.C.C.).

[52] I will address the positions as argued under five separate issues.

(i) Issue 1 – Does the By-Law Conflict with Provincial Legislation:

[53] It was urged on behalf of the applicants that the impugned provisions of the By-Law are not authorized by the *Municipal Act, 2001* or alternatively, the provisions conflict or are inconsistent with superior legislation.

[54] Section 14 of the *Municipal Act, 2001* establishes the test for determining whether a municipal by-law conflicts with provincial or federal legislation:

14 (1) A by-law is without effect to the extent of any conflict with,

- (a) a provincial or federal Act or a regulation made under such an Act; or
- (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation.

(2) Without restricting the generality of subsection (1), there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument.

[55] The applicants submit that the By-Law conflicts with the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (the “OHSA”).

[56] It has been held that the two-pronged test established by the Supreme Court of Canada in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188, at para. 15 calls for the reviewing court to consider two questions namely:

- (1) is it impossible to comply with both the by-law and the provincial legislation?
- (2) does the by-law frustrate the purpose of the legislation enacting that law?

If the answer to both questions is “no” then the by-law is not in conflict with the provincial or federal legislation: *Croplife*, at paras. 60, 63.

[57] The Court of Appeal at para. 23 of the *City of Toronto Case*, when considering essentially the same by-law, concluded that there was “no merit to

the appellant's' submission that the by-law conflicts with and frustrates the purpose of the *OHSA*." The court further noted at para. 24 that "[t]he by-law protects the health and safety of patrons as well as employees of businesses. It does not render compliance with the *OHSA* impossible, or even more difficult. On the contrary, the by-law is complementary to both the purpose and the provisions of the *OHSA*. Contrary to the appellant's' submission, the *OHSA* does not require the City to adopt measures short of a prohibition on waterpipe smoking in order to protect employment in waterpipe lounges."

[58] The application judge in the *City of Toronto Case*, whose decision was subsequently upheld by the Court of Appeal, noted that it is the current public policy in Ontario to discourage smoking and to protect people, including employees, from the effects of tobacco smoke. He further concluded that a by-law that protects workers, in a facility such as a waterpipe lounge, does not frustrate the objectives of the *OHSA*.

[59] Further, I have concluded that it would not be impossible for an owner of a waterpipe establishment to comply with both the By-Law as well as any provisions of the *OHSA*.

[60] There is symmetry in the operation of the By-Law and the *OHSA*.

[61] For these reasons, and given the determination made by the Court of Appeal on this issue, I have concluded that there is no merit in the applicants' submission on this issue.

(ii) Issue 2 – Did the Respondent Region Act in Bad Faith?

[62] The central submission made by counsel for the applicants in respect of this issue was that where an economic interest is at stake, affected parties are entitled to be consulted and provided notice of a council meeting prior to the passing of a by-law, and failure to do so constitutes bad faith. In this regard, counsel's submissions primarily related to employees of the waterpipe lounges.

[63] It is notable that no evidence whatsoever was offered by any employees associated with the applicants' businesses. As such, there is no evidence at all as to what adverse economic outcomes would arise from the enforcement of the subject By-Law so far as employees are concerned.

[64] There is a very heavy burden on the party seeking to establish bad faith on the part of a municipal council in the enactment of a by-law. There is no evidence in this record to support the assertion of bad faith on the part of the respondent Region's Council, let alone evidence that would even come close to discharging the heavy burden imposed.

[65] The record more than amply discloses very diligent and thorough levels of inquiry, research and consultation by the Region prior to the enactment of the subject By-Law.

[66] A public meeting was held which provided members of the public and stakeholders to make their concerns and submissions known to the Regional Council. There is no evidence of any mistakes or errors in that process that could

possibly demonstrate any bad faith on the part of the respondent. In order to establish bad faith, there would have to be evidence of some malicious or purposeful intention of council to exclude the employees in the consultation/decision making process. Here, there is no such evidence. Mere inadvertence of council to invite employees does not make out bad faith, especially if it was open to such employees to come to the public meeting.

[67] As such, the applicants have failed to meet the heavy burden to establish the presence of bad faith in the enactment of the By-Law.

(iii) Issue 3 – Did the Region Contravene the Health Protection and Promotion Act?

[68] It is asserted on behalf of the applicants that the Region breached section 11 of the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7, which provides as follows:

Complaint re health hazard related to occupational or environmental health

11 (1) Where a complaint is made to a board of health or a medical officer of health that a health hazard related to occupational or environmental health exists in the health unit served by the board of health or the medical officer of health, the medical officer of health shall notify the ministry of the Government of Ontario that has primary responsibility in the matter and, in consultation with the ministry, the medical officer of health shall investigate the complaint to determine whether the health hazard exists or does not exist.

Report

(2) The medical officer of health shall report the results of the investigation to the complainant, but shall not include in the report personal health information within the meaning of the *Personal Health Information Protection Act, 2004* in respect of a person other than the complainant, unless consent to the disclosure is obtained in accordance with that Act.

Conflict

(3) The obligation imposed on the medical officer of health under subsection (2) prevails despite anything to the contrary in the *Personal Health Information Protection Act*, 2004.

[69] Although counsel for the applicants indicated in his reply submissions that the applicants were no longer pursuing this issue, for the completeness of these reasons, I have decided to briefly address the matters raised.

[70] It was acknowledged by the MOH on cross-examination on her affidavit that neither she nor anyone on her behalf gave consideration to contacting the Ministry of Labour with respect to complaints received from members of the public in regard to poor air quality in the waterpipe establishments that were investigated prior to the enactment of the subject By-Law.

[71] I disagree with counsel for the applicants so far as this submission is concerned. Section 11 of the *Health Protection and Promotion Act* does not obligate the MOH to report to a particular ministry on matters that are being considered by Regional Council, such as the case was here. Rather, the legislation requires the MOH to make such a report following a complaint in respect of a specific health hazard related to occupational or environmental health connected with specific events on specific premises.

[72] Thus, I have concluded that there is no evidence that the respondent contravened the *Health Protection and Promotion Act*.

(iv) Issues 4 & 5 – Does The Region Have The Legal Authority To Pass The By-Law – And Does The By-Law Prohibit Business, And Even If It Does, Does The Region Have Statutory Authority To Do So?

[73] I disagree with counsel for the applicants' assertion that the *City of Toronto Case* has little application here or can be easily distinguished given new arguments that are being presented by him in this case.

[74] The findings and legal conclusions reached by the judge at first instance and as upheld by the Court of Appeal in the *City of Toronto Case*, are all apt and instructive in the circumstances of the present application.

[75] Not only is the subject matter and the type of by-law in question strikingly similar in the *City of Toronto Case*, that case dealt with the legislative authority of municipalities to enact by-laws of the type in question. The public policy considerations underlying the enactment of the by-laws is similar, as well as the procedural steps involved prior to each by-law's enactment.

[76] In the *City of Toronto Case*, the court concluded that the *City of Toronto Act*, 2006, S.O. 2006, c. 11, Sched. A, conferred the necessary powers upon the City of Toronto to enact its by-law. Subsection 11(2) of the *Municipal Act, 2001* confers similar powers on the Region, and as noted by the Court of Appeal, there

was “ample support in the record for the application judge’s conclusion that the purpose of the by-law was the protection of public health and safety a purpose specifically authorized by section 8(2) of the *City of Toronto Act*”.

[77] I have concluded that similarly there is ample evidence in this record to support the conclusion that the purpose of the By-Law was protection of public health and safety, which is a purpose specifically authorized by section 11(2) subparagraph 6 of the *Municipal Act, 2001*.

[78] The MOHs in Toronto and in the Region both recommended a prohibition against waterpipe smoking in public places in their respective jurisdictions. In the case of the City of Toronto, the recommendation was in the form of a prohibition against waterpipe smoking in establishments which were required to be licenced by the city, whereas in the case of the respondent Region it took the form of a prohibition against waterpipe smoking of both tobacco and non-tobacco in enclosed public places, enclosed workplaces and specific outdoor public places within the Region. The resulting effects of the by-law in the *City of Toronto Case* and the By-Law in this case are virtually the same, namely the prohibition of waterpipe smoking in certain establishments.

[79] The courts in the *City of Toronto Case* also considered whether or not the net result of the enforcement of the subject By-law would result in the prohibition of a certain type of business, which was an issue raised in this case.

[80] It was urged by counsel on behalf of the applicants that the true purpose of the subject By-Law is to prohibit the particular type of business – namely, waterpipe lounges and as such, in the absence of expressly stated authority in the *Municipal Act, 2001*, the by-law would be *ultra vires*.

[81] In support of this submission, counsel relied upon the decision in *Canada Post Corp. v. Hamilton (City)*, 2016 ONCA 767, 134 O.R. (3d) 502. In my view this case, which involved questions of constitutional law and specifically a determination as to whether or not there was conflict between a provincial by-law and federal legislation and the application of the doctrine of paramountcy, has no application here. The case involved an appeal by the City of Hamilton from Canada Post’s challenge of a municipal by-law giving the City control over the installation of equipment, including community mailboxes on municipal roads. At first instance, the court concluded that the by-law was inoperative for several reasons including as a result of the application of the doctrine of paramountcy.

[82] In considering the issues on the appeal, the court stated at para. 30 that “[t]he focus of these reasons is on the question of the *vires* and paramountcy, which are decisive of the appeal. The other issues raised by the City – vagueness, Crown immunity, and interjurisdictional immunity – will be disposed of summarily.”

[83] Counsel for the applicants referred to this decision as an authority that not only was it necessary to examine the “purpose” of the by-law to determine

whether or not it was *intra vires* the municipality, but additionally that the “effect” of the by-law must be examined as well. That was the type of examination undertaken by the court in the *Canada Post* decision.

[84] I have concluded that the ultimate effect of the By-Law on the economic interest of the applicants, need not be considered when determining whether the By-Law was lawfully enacted having regard to its purpose.

[85] The Court of Appeal in the *City of Toronto Case* addressed the applicants’ argument on this point and rejected it at paras. 12–15, which for completeness I will fully quote here:

12. The appellants submit that the purpose of the by-law must be determined having regard not only to its apparent purpose, but also its effect. They characterize health and safety concerns as the *motive* for the by-law, but submit that the effect of the by-law is the closure of many, if not most of the appellants’ businesses, and that this is determinative of the by-law’s purpose.

13. The appellants do not submit that the City’s stated purpose – the protection of health and safety – is somehow colourable, but say that the primary effect of the law will be the closing of hookah lounges, and that this overwhelms the City’s health and safety motive when characterizing the purpose of the by-law.

14. This argument must be rejected.

15. As the application judge noted, the appellants are licensed by the City to sell food and may continue to do so. Indeed, they may continue to sell shisha. What they cannot do is to permit the smoking of hookah pipes on their business premises. There is no doubt that many hookah lounges will suffer economic harm as a result of the by-law and may no longer be economically viable, but it does not follow that this is the by-law’s purpose. The protection of public health and safety necessarily has economic impact on the operation of the appellants’ businesses, but that impact is incidental to, rather than determinative of, the purpose of the by-law.

[86] In my view, there is no evidence to support the submission that the purpose of the subject By-Law was to prohibit business. Its true purpose was to prohibit a specific activity, namely smoking with waterpipes on the grounds that it posed a risk to public health and safety.

[87] Section 8(3) of the *Municipal Act, 2001* expressly confers statutory authority upon municipalities to “regulate or prohibit” specific activities with respect to any matter falling within their general by-law enacting authority.

[88] Subsection 11(2) subparagraph 6 of the *Municipal Act, 2001*, which is complementary with the scope of by-law making power set out in section 8(3), allows by-laws to be enacted with respect to “[h]ealth, safety and well-being of persons.”

[89] The Court of Appeal’s decision in *Galganov v. Russell (Township)*, 2012 ONCA 409, 293 O.A.C. 340, is most instructive in terms of explaining the authority to enact by-laws established in both subsection 8(3) and section 11 of the *Municipal Act, 2001*.

[90] At para. 24 of that decision, the court held that subsection 8(3) “makes clear that specific by-laws may be enacted pursuant to the general municipal powers and spheres of jurisdiction” in section 11. Further, the court restated the principle established in the Supreme Court of Canada decision of 114957 *Canada Ltee (Spraytech Societe d’arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241. at paras. 18–19 that “where no specific power is granted, a

general provision in the Act may be the source of power for the enactment of a specific by-law.”

[91] Thus, I have concluded that the Region does have statutory authority to enact the subject By-Law. Further, I have concluded that the purpose of the By-Law is not to close waterpipe lounges, but rather to protect public health and safety. As noted by the Court of Appeal in the *City of Toronto Case*, the enactment and enforcement of the subject By-Law may have an economic impact on the operation of the applicants’ businesses, but that is only an unfortunate incidental result of the By-Law and not determinative of its purpose.

Conclusion:

[92] For these reasons, I have concluded that the application must be dismissed.

[93] In the event counsel cannot agree on the disposition of costs, counsel on behalf of the respondent shall file costs submissions of no longer than 3 pages, along with a Bill of Costs within 20 days from the release of these reasons. Counsel for the applicants shall file similar submissions within 20 days thereafter. No reply submissions shall be filed without leave.

Daley RSJ.

Date: June 5, 2018

CITATION: 2386240 Ontario Inc. v. The City of Mississauga, 2018 ONSC 3162
COURT FILE NO.: CV-16-4669-00
DATE: 20180605

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 2386240 ONTARIO INC., O/A AL-
OMDA LOUNGE, HABIBI
LOUNGE, FUSION LOUNGE,
SAIMA ROGINA INC., O/A EL
FISHAWY, 84921231 CANADA
INC., O/A MAZAJ LOUNGE and
SHISALICIOUS CAFÉ

Applicants

V.

THE CITY OF MISSISSAUGA and
THE REGIONAL MUNICIPALITY
OF PEEL

Respondents

BEFORE: RSJ Peter A. Daley

COUNSEL: R.P. Zigler, for the Applicants

B.H. Kussner and S.R. Rouleau,
for the Respondents

REASONS FOR JUDGMENT

Daley RSJ.

DATE: June 5, 2018

