

Court of Appeal Strikes City's Ban of Plastic Checkout Bags

In recent years, the accumulation of plastic waste in marine environments has come to the public's attention. All levels of government have shown an awareness and desire to address this issue in some way.

Commencing in 2015, Surfrider Foundation (an organization dedicated to the protection of the global marine environment) engaged in lobbying efforts and delivered to the City of Victoria (the "City") a petition requesting that the City adopt a bylaw to ban the use of plastic bags to protect the future health of oceans around the world. The City then engaged in extensive consultations in relation to the reduction or elimination of single-use plastic retail bags. Through the consultations, the City received a variety of information, including: that many plastics are resistant to degradation by natural processes and at risk of being ingested by aquatic species, wildlife, and people; the view of proponents that plastic retail bags are a powerful symbol of a wasteful culture and unsustainable behavior; and the view of critics that bag regulations hinder customer convenience and risk creating more negative environmental impacts than benefits. City staff also identified municipal concerns related to waste collection systems, sewers, drainage and litter control.

In 2018, the Council of the City adopted a bylaw that prohibited businesses from providing or selling plastics bags to customers and required that businesses charge a minimum fee of 15 cents for a paper bag and \$1 for a reusable bag (the "Bylaw"). The City chose to enact the Bylaw pursuant to its authority to regulate "business", and expressly identified that the purpose of the Bylaw was to "regulate the business use of single use checkout bags to reduce the creation of waste and associated municipal costs, to better steward municipal property, including sewers, streets and parks, and to promote responsible and sustainable business practices that are consistent with the values of the

community". The City did not take steps to obtain the provincial ministerial approval that is required to enact a bylaw for the purpose of protecting the natural environment.

The Bylaw was challenged by the Canadian Plastic Bag Association (the "CPBA") and heard in the Supreme Court of British Columbia in May 2018. The CPBA argued that the City lacked the jurisdiction to enact the Bylaw because the purpose was related to the protection of the environment, and therefore required the approval of the Minister of Environment. The City argued that it enacted the Bylaw under its power to regulate "business", and thus did not require ministerial approval. The Supreme Court agreed with the City's position and upheld the Bylaw. The CPBA successfully appealed.

When considering a municipality's authority to enact a bylaw, the courts will look beyond the purpose that is expressly identified within the bylaw and will seek to ascertain the "true nature and character" of the bylaw. As stated by the Court of Appeal, "substance is to prevail over form in the characterization of bylaws". The Court found that, objectively, the ultimate goal of the Bylaw was not to interfere with or improve business transactions, but to reduce harm caused by plastics in local and global waterways. Consequently, the Court of Appeal held that the Bylaw regulated in relation to the protection of the environment, which is a subject matter falling under concurrent jurisdiction. As such, the City was required by the legislation to obtain provincial ministerial approval prior to enacting the Bylaw, which it failed to do. As a result, the Bylaw was quashed.

When considering actions related to environmental protection, local governments should be cognizant that protection of the environment is an area of overlapping juris-

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diction, and that the Province has taken an active role in environmental regulation. Municipalities are creatures of statute and their powers are limited to those delegated by the Province in the enabling legislation. Courts look objectively at the purpose and practical effect of the local government's exercise of power, and require that local governments act within their legislative constraints. The Court of Appeal was clear that the City's regulation of the use of plastic bags would be reasonable, so long as it followed the processes required by the legislation, which included obtaining provincial ministerial approval of the Bylaw.

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This article is intended for the general information of organizations in British Columbia. If your organization has specific issues or concerns relating to the matters discussed in this article, please consult a legal advisor.

Adrienne Atherton

Adrienne brings over 24 years of legal experience in litigation and dispute resolution representing local governments and other public entities, insurers and corporations, including in-house as Senior Staff Lawyer at Municipal Insurance Association of BC. Adrienne has represented and provided strategic and practical advice in relation to a variety of complex matters, including procurement, construction (including builders' lien, delay and defect claims), environmental, regulatory, expropriation, bylaw and FOIPPA disputes and processes, municipal jurisdiction, procedure, constitutional challenges, judicial reviews, remedial action orders, administrative hearing processes, contract claims, and privacy, insurance and risk management issues. Adrienne has extensive experience at all levels of Court in British Columbia, administrative tribunals, mediations and arbitrations. Adrienne regularly writes and presents on a variety of matters of interest to public entities and the construction industry.

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Nicholas joined Civic Legal LLP after completing his J.D. from the Peter A. Allard School of Law at the University of British Columbia. During law school, he served as the Director of Operations for the Law Students' Legal Advice Program, where he provided legal services to low-income individuals. Nicholas also volunteered with Pro Bono Students Canada and Legal Education Outreach, and has completed the Business Law Concentration.

Prior to enrolling in law school, Nicholas worked as a Recruitment Coordinator for a local start-up and completed a B.Com. specialized in finance from the Sauder School of Business at the University of British Columbia.

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