COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Canadian Plastic Bag Association v. Victoria (City),* 2019 BCCA 254

Date: 20190711
Docket: CA45452

Between:

Canadian Plastic Bag Association

Appellant
(Petitioner)

And

The Corporation of the City of Victoria

Respondent
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Garson
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated June 19, 2018 (*Canadian Plastic Bag Association v. Victoria (City)*, 2018 BCSC 1007, Vancouver Docket S180740).

Counsel for the Appellant:	R.W. Parsons N. Baker
Counsel for the Respondent:	T.M. Zworski C. Moffatt
Place and Date of Hearing:	Vancouver, British Columbia May 15, 2019
Place and Date of Judgment:	Vancouver, British Columbia July 11, 2019

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Garson
The Honourable Madam Justice Fisher

Summary:

City of Victoria was approached by a worldwide environmental foundation to consider outlawing plastic 'checkout' bags being given to customers by stores. After a process of study and consultation, City enacted a bylaw that prohibited businesses from providing or selling plastic bags to customers and required fees to be charged for paper or other re-useable bags. Section 9 of Community Charter provided that for bylaws relating to protection of the natural environment, the approval of the Minister of Environment was required. The City did not seek such approval, and characterized the bylaw as one relating to "business" under s. 9 of the Charter. The bylaw was challenged on a petition for judicial review. Chambers judge below agreed with City's position and upheld bylaw.

Held: appeal allowed. Counsel agreed that the issue was whether the "pith and substance" of the bylaw was environmental protection. As in constitutional law, pith and substance refers to the "dominant character" of the law, and is usually determined by a consideration of the purpose and effects of the law. CA found this bylaw was in substance a law intended to protect the environment rather than one concerned with "business", and that its effects were mainly environmental. In absence of the required approval, bylaw was invalid.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] Over the last few years, the accumulation of plastic waste in marine environments has come to public attention in British Columbia. It is now apparent that many plastics are resistant to degradation by natural processes and at risk of being ingested by aquatic species, wildlife and people. This appeal is about an attempt by the City of Victoria to cut the number of plastic 'checkout' bags being discarded and entering waterways, both locally and globally. Under the governing statute, the *Community Charter*, S.B.C. 2003, c. 26, municipal laws that regulate "in relation to" the protection of the natural environment require the approval of the provincial Minister of Environment. The City contended, and the court below found, that a bylaw enacted by Victoria that prohibited merchants from providing plastic bags to customers was *not* an environmental law, but one "in relation to" business — and that it therefore did not require the Minister's approval. For the reasons that follow, I find the bylaw *was* one relating to the protection of the environment, that the Province's approval was required, and that the appeal must therefore be allowed.

Factual Background

[2] The initiative for the bylaw in question came from the Surfrider Foundation ("Surfrider"). According to its promotional materials, Surfrider is a non-profit organization dedicated to the "protection and enjoyment of the world's ocean, waves and beaches through a powerful activist network." The Vancouver Island chapter of the Foundation has among its aims the reduction and eventual elimination of single-use plastic check-out bags and the education of the community on alternatives to such plastics. In 2015 it adopted a "strategic plan" that contemplated initiatives to "eliminate single-use plastic bags, which pollute and obstruct local waterways (one of the biggest threats to our marine environment)", consistent with the enhancement and stewardship of "public spaces, green spaces and food systems".

[3] In June 2015, Surfrider wrote to the mayor of the City of Victoria, Ms. Helps, and members of the Council, to advise that its Vancouver Island chapter had been working on a draft bylaw banning the provision of single-use plastic bags in Victoria. In an unsigned "legal memo" attached to its letter, Surfrider anticipated the primary issue raised by this appeal — whether the City would require the Province's approval to pass a bylaw of the kind proposed. The letter stated its "brief conclusion":

> There is overlapping authority between municipalities in British Columbia and the Province in respect of the protection of the natural environment. However, the Province has specifically provided that municipalities may regulate, prohibit, and impose requirements in relation to polluting or obstructing, or impeding the flow of, a stream, creek, waterway, watercourse, waterworks, ditch, drain or sewer, whether or not it is located on private property. Pursuant to this power specifically designated by the Province, a bylaw banning plastic bags <u>is within the jurisdiction of the City of Victoria to enact to prevent single-use plastic bags from pollution and obstructing local waterways</u>. [Emphasis added.]

[4] The Foundation expressed the hope that the City Council would address the proposal at its July meeting and sought Ms. Helps' "feedback and thoughts." In due course, Surfrider provided the mayor with a draft bylaw and petition with over 2,500 signatures supporting it. In October 2015, two of the City councillors who were in contact with and supporting the Surfrider Foundation proposed a motion to the Governance and Priorities Committee of Council. They proposed that Council approve a motion directing staff to prepare a bylaw modelled on the draft provided by the Foundation, and that Ms. Helps write to officials in neighbouring municipalities encouraging them to do the same. The two councillors wrote in part:

> Jurisdictions across North America and the globe have increased stewardship of water systems through the elimination of single-use plastic bags. This includes national jurisdictions such as Rwanda, sub-national jurisdictions such as the state of Hawaii, and local government jurisdictions in the United States including the City of Seattle, City of Los Angeles, City of San Francisco, and City of Chicago, and Canadian municipalities including Wood Buffalo (Fort McMurray), Alberta; Thompson and Leaf Rapids, Manitoba; and Huntingdon and Deux-Montagnes, Quebec.
>
> Scientific research confirms that single-use plastic bags are a major source of pollution of local waterways as well as the marine ecosystem, with the concentration of micro-plastics in some areas of the Pacific Ocean exceeding the concentration of plankton. Pollution relating to single-use plastic bags also contaminates local waterways within

> the City of Victoria and Capital Region, imposing infrastructure maintenance and repair costs on local government, and harming marine species.

[5] On May 25, 2016, the City solicitor, Mr. Zworski, wrote to Council advising a different approach to the issue of jurisdiction than that taken in Surfrider's correspondence:

> Under the *Community Charter*, the City has broad power to regulate in relation to business. This power is in addition to powers to regulate in relation to protection of the natural environment or protection and enhancement of the well-being of the community. A bylaw regulating business can be adopted under this power even if it could also have been enacted under one of the other authorities, such as protection of the natural environment, provided that it deals with effects of the regulated business activity.
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> ...
>
> That is not to say that Council cannot consider broader environmental issues when enacting business regulations. To the contrary, Council has every right before enacting any regulations to consider broader, even global, consequences of its decisions on the environment or society, provided that there is a valid municipal purpose for the enactment of the bylaw. Ultimately, for a regulation to be valid as being in relation to business, it must focus on an undesirable business practice with negative local implications rather than a purely environmental concern. [Emphasis added.]

[6] The requirement for Provincial approval was brought home more clearly in a letter sent by an official of the Ministry of Environment, Mr. Harris, to Mr. Work, the head of Victoria's Department of Engineering and Public Works, in early March 2017. In part, Mr. Harris said this about the option of a ban on the sale or use of plastic bags:

> Section 8(3)(j) of the *Community Charter* allows municipalities to enact bylaws for the protection of the natural environment. Municipalities could potentially enact a bylaw to ban the use of plastic shopping bags through this authority – it would be subject to approval from the Minister of Environment as protection of the natural environment is an area of concurrent provincial and municipal jurisdiction as directed under Section 9(3)(c) of the *Community Charter*. Alternatively, a regional solid waste management plan may include strategies to encourage businesses to implement incentives (e.g., fee for plastic bags at retail outlets).
>
> Bylaws banning the sale/use of plastic bags should be considered a means of last resort, as most local government recycling programs (through MMBC depots) now include film plastics and have helped reduce the environmental impacts of plastic bag waste. This is also due to society in general becoming more aware and responsive to the negative impacts of plastic bags, and the local end-of-life management options available. [Emphasis added.]

[7] The preparation of a bylaw did not proceed quickly, but at some point, the City Council in its capacity as the Committee of the Whole requested a report from the Engineering and Public Works Department concerning a ban on plastic bags. On March 14, 2017, Council received a report from Mr. Work concerning meetings held by the Department with various groups, who were said to agree that bag-reduction programs should be supported and that reusable retail bags were the "preferred sustainable alternative". The report set out four options, but recommended the first, namely a "stakeholder led engagement and awareness campaign" that would involve stakeholder workshops and public education, from which various viewpoints could be obtained.

[8] This report came before the Council on March 23, 2017. After discussion, Council voted unanimously to begin the process of community engagement on the "detriments of plastic bag waste and the benefits of reusable bags". The approved activities were to be carried out between April and September 2017 and a further report provided in October.

[9] On May 19, 2017, Mr. Work reported to the Council concerning the "Single-Use Plastics Retail Bags-Waste Management Review". (This report was mistakenly dated May 19, *2016*.) The executive summary of the report stated in part:

> Reducing the waste accumulated from single-use shopping bags will prevent litter and its associated downstream environmental, economic and social costs. In certain parts of the world, much of the consumer plastic 'leaks' from poorly controlled waste management systems, and can enter the ocean environment, where it never completely degrades, but only breaks into smaller portions and can potentially harm the food chain. Science is only just beginning to understand the scope of harm imposed by what is known to be a dramatic increase in ocean plastic pollution. Ocean health concerns are fuelling bag-ban campaigns by ocean advocacy groups. While it is accurate to suggest that the problems of waste 'leakage' is most prevalent in coastal nations in the developing world, the environmental leadership from more advanced nations can send strong socio-economic signals to local and

> international consumers, as to the need for dramatic reductions in wasteful habits and more conscientious consumer decisions.
>
> Proponents view plastic retail bags as a powerful symbol of a wasteful culture and unsustainable behaviour, while industry and critics suggest that bag regulations hinder customer convenience and risk creating more negative environmental impacts, than benefits.
>
> Careful consideration of the total life-cycle impacts of plastic bags and their alternatives is necessary to ensure that bans or levies do not create unintended environmental consequences. Numerous scientific studies state that conventional, high-density polyethylene (HDPE) shopping bags are more environmentally friendly than other single use bags, and can be less harmful than reusable, shopping bags, unless they are used a "sufficient" number of times. Re-usable bags made from recycled materials are the most environmentally friendly alternative, but only if they are used numerous times and are responsibly managed at the end of life. Policy alternatives should attempt to minimize any adoption of less environmentally friendly bag alternatives.

[10] The report recommended that the City hold discussions with key "business and waste management stakeholders" to "better understand perspectives and issues related to a voluntary retail bag fee, … to incentivize the adoption of sustainable reusable bags", and to reinvest funds received from the sale of such bags "to improve business packaging and sustainability programs and future packaging reduction initiatives". The Department would then provide a preliminary work-plan and resource assessment by July 2017. (Again the year was mis-stated as *2016*.) The body of the report reviewed various alternatives to plastic bag use and reduction schemes in various other parts of the world. A schedule entitled "Environmental Life Cycle Considerations of Bag Alternatives" was attached, which set out the environmental features of different types of bags. It referred to new research concerning the amount of plastic waste in oceans worldwide and its impact on ocean ecosystems, food chains and global health. As noted by the chambers judge below, it was estimated that Victoria businesses "distribute" more than 17 million single-use plastic bags per year, of which as many as 798,000 are littered and not collected, although it was acknowledged there were no reliable statistics on that point.

[11] Mr. Work duly reported again in October 2017 to "provide Council with a proposed regulatory framework and implementation plan for single-use checkout bags, which includes a ban on the City's single-use plastic checkout bags." Attached to the report was a draft by-law that would prohibit any Business from providing a Checkout Bag to a customer unless the customer was first asked whether he or she needed a bag; the bag provided was a Paper Bag or Reusable Bag; and the customer was charged a fee of not less than $0.12 per Paper Bag or $2 per Reusable Bag. (Capitalized terms were defined in the draft bylaw.) Unlike Mr. Work's previous report, this document spoke in terms of local waste management as well as global environmental concerns and "cultural norms":

> ... The draft bylaw establishes controls necessary to reduce the risk of any corresponding and significant increase in single-use paper bag use, or an excessive use of reusable bags – both of which could have more damaging environmental and local waste management impacts when compared to the corresponding reduction of plastic bags. Although paper bags perform better if littered (i.e. they break down more easily), they require more energy and create more waste and pollution, as compared to a common single use plastic bag. ...
>
> ... The free provision of single-use materials represents a systemic business/consumer transaction that privileges short-term convenience over long term sustainability. The current overuse of plastic checkout bags in our community is unsustainable over the long term and has been identified by many in the public to be inconsistent with the values of Victorians. The single-use plastic bag is powerful, ubiquitous example in our community of "throw-away consumerism" and is not merely unsustainable due to the upstream and downstream environmental impacts of plastic waste, but due to the wasteful and prevalent cultural norms that are consuming scarce resources in a manner that is not economically or socially sustainable. [At para. 15; emphasis added.]

[12] Mr. Work recounted that the City's waste management costs were increasing but that it was difficult to estimate how much could be saved by the proposed ban. In the words of the report:

> More accurate and comprehensive detail across our operational and logistics chains would be required in order to quantify such savings or impacts. That being said, any reduction in waste material can help promote reduced garbage volume and pickup frequency, reduced contamination, litter reduction, GHG savings, human resources implications etc. Reducing the transport of low density material is a benefit. Drastically reducing any mobile plastic film also helps reduce the risk of fouling underground storm water systems, which will be increasingly impacted in seasons with heavy rainfall, that are becoming more frequent/severe in our changing climate. [At para. 17; emphasis added.]

[13] In subsequent months, the City received further feedback from the public and affected persons, resulting in some changes to the draft bylaw. On December 14, 2017, an amended version received three readings. It was adopted on January 11, 2018 as Bylaw No. 18-008, the “Checkout Bag Regulation Bylaw”.

[14] I have attached a copy of the Bylaw as Schedule I to these reasons. It differs somewhat from the draft provided by Surfrider in late 2015, which would have prohibited *any person* from selling or providing single-use bags free of charge, and retail businesses from selling them or providing them free of charge. (Interestingly, this draft contemplated that it would be enacted under s. 8(3)(j) and 9(1)(b) of the *Community Charter*.) The Bylaw proposed by the City focussed on ‘Businesses.’ Section 3 prohibited any Business (as defined) from providing a Checkout Bag to a customer unless:

> (a) the customer is first asked whether he or she needs a bag;
>
> (b) the bag provided is a Paper Bag or a Reusable Bag; and
>
> (c) the customer is charged a fee not less than
>
> (i) 15 cents per Paper Bag; and
>
> (ii) $1 per Reusable Bag.

Businesses were also prohibited from selling or providing Plastic Bags to customers or providing Checkout Bags to customers free of charge. (Section 3(3).) The Bylaw defined “Checkout Bag” in s. 2 to mean:

> (a) any bag intended to be used by a customer for the purpose of transporting items purchased or received by the customer from the business providing the bag; or
>
> (b) bags used to package take-out or delivery of food
>
> (c) and includes Paper Bags, Plastic Bags, or Reusable Bags;

Section 4 created certain exemptions, including bags used to package loose bulk items; to contain or wrap frozen foods, meat, poultry or fish; to “protect” large items that cannot easily fit into a reusable bag; and to protect clothes after professional laundering or dry-cleaning. Under s. 5, a contravention of the Bylaw constituted an offence for which penalties could be imposed under the *Offence Act*, R.S.B.C. 1996, c. 338, and under the City’s Ticket Bylaw.

[15] Most provisions of the Bylaw came into effect on July 1, 2018. The City’s website — presumably around this time — stated under the heading “Why the City is restricting single-use checkout bags”:

> - Victoria residents use approximately 200 bags each every year, which would equate to 17 million plastic bags from city residents, alone.
> - Plastic bags are made from a limited supply of non-renewable petroleum sources, which contribute to greenhouse gases, air quality issues, natural resource depletion, and chemical, waste and litter accumulation.
> - People may use them only once, yet they remain in the environment for more than a human lifetime.
> - Plastic bags are on the Top 10 list of garbage littering the world’s beaches.
> - Stopping waste before it enters our management systems will help City staff reduce operating costs and increase service levels to enhance the quality of life and experience for all Victoria residents and visitors.

The Petition

[16] The Canadian Plastic Bag Association filed a petition for judicial review of the Bylaw in the Supreme Court of British Columbia on January 22, 2018. The Association is a non-profit advocacy organization that represents various manufacturers and distributors of plastic shopping bags throughout Canada. The petition states that its members are committed to conforming to “sound environmental practice and the principles of product stewardship” and that the Association works co-operatively with retailers and governments to pursue the “Three R’s (Reduce, Reuse and Recycle)” in their own operations. There was no doubt, the chambers judge found, that the Association had standing as an interested person to seek judicial review of the Bylaw.

[17] The Association's central argument was that the City lacked the jurisdiction to prohibit businesses from providing plastic bags to their customers because the purpose for which the City was purporting to legislate was to regulate "in relation to the natural environment. It is also regulating/prohibiting in relation to municipal solid waste." Under s. 9(3) of the *Community Charter*, the petitioner asserted, the City may not adopt a bylaw aimed at protecting the natural environment unless the bylaw conforms to that section. In this case, the pleading stated, the approval of the responsible provincial minister (the Minister of Environment) was required under s. 9(3)(c). The petition sought a declaration that since such approval had not been obtained, the Bylaw was *ultra vires* the City; and sought an order quashing the Bylaw.

[18] The petition was heard in the Supreme Court of British Columbia over two days in May, 2018 and the chambers judge issued reasons (indexed as 2018 BCSC 1007) on June 19, 2018.

The Chambers Judge's Reasons

Standard of Review

[19] After reciting the facts, the chambers judge began his analysis at para. 19 of his reasons, noting that where it is asserted that a municipality lacks the legal authority to enact a bylaw, a "true question of jurisdiction" arises that is reviewable on the standard of correctness. (Citing *Nanaimo (City) v. Rascal Trucking Ltd.* 2000 SCC 13 at para. 33; *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)* 2014 BCCA 271 at para. 10.) The judge found that the petition raised this type of issue, rather than one concerning the reasonableness of the Bylaw. (At para. 23.)

Legislation

[20] The chambers judge noted the most relevant provisions of the *Community Charter*, beginning with ss. 8 and 9. I have attached as Schedule II to these reasons the material portions of these sections. As well, I note the definition of "regulate", contained in a schedule to the *Charter*, headed "Definitions and Rules of Interpretation":

> "regulate" includes authorize, control, inspect, limit and restrict, including by establishing rules respecting what must or must not be done, in relation to the persons, properties, activities, things or other matters being regulated….

[21] As the chambers judge observed, there was no evidence that the City had sought to obtain the Province's approval under s. 9(3)(c) for the adoption of Bylaw 18-008, although as seen above, Mr. Work had been in communication with the Ministry of Environment. The petitioner argued that the Bylaw was enacted under s. 8(3)(j) — i.e., that it regulates, prohibits or imposes requirements "in relation to ... protection of the natural environment." In adopting the Bylaw, City Council had been responding to the issues raised by Surfrider and public support had been generated for that purpose. In the petitioner's submission, s. 9, headed "Spheres of Concurrent Authority", was also engaged and thus required the approval of the Minister of Environment. For its part, the City responded that the Bylaw fell within its power to regulate "business" under s. 8(6). In it submission, the Bylaw "simply regulate[d] a specific transaction — the provision of a bag to a customer for carrying goods that have been purchased" (at para. 30) — and it was exempted from s. 9(3) by s. 9(2). The City also relied on a provincial regulation to the *Community Charter*, to which regulation I will return below.

[22] The Attorney General received notice of the petition but did not appear. The City argued that the Court should infer from this that no provincial interest was engaged, but the chambers judge declined to draw that inference. (At para. 38.)

[23] The judge instructed himself that in determining whether municipal legislation authorizes the exercise of a certain power, a court is required to take a "broad and purposive approach" consistent with the "modern" approach to statutory interpretation enunciated in cases such as *Bell ExpressVu Limited Partnership v. Rex* 2002 SCC 42 at

para. 26 and *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)* 2004 SCC 19 at paras. 6–8. He also observed:

> In *Society of Fort Langley*, the Court of Appeal said at para. 18, after referring to s. 4(1):
>
> > [18] Frankly, the Court can take the hint – municipal legislation should be approached in the spirit of searching for the purpose broadly targeted by the enabling legislation and the elected council, and in the words of the Court in *Neilson*, "with a view to giving effect to the intention of the Municipal Council as expressed in the bylaw upon a reasonable basis that will accomplish that purpose".
>
> The Court must consider both the purpose and effects of the bylaw. The purpose is determined by examining both intrinsic evidence, such as the preamble or the general purposes stated in the resolution authorizing the measure, and extrinsic evidence, such as that of the circumstances in which the measure was adopted. The effects are determined by considering both the legal ramifications of the words used and the practical consequences of the application of a bylaw. The fact that a measure has merely incidental effects on area within the powers of another level of government does not render the measure *ultra vires*: *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23 at paras. 36 and 37. [At paras. 33–4; emphasis added.]

This reasoning has obvious parallels to true constitutional questions of legislative authority arising between Parliament and provincial legislatures under ss. 91 and 92 of the *Constitution Act*, *1867* (U.K.), 30 & 31 Vict. c. 3 (reprinted in R.S.C. 1985, App. II, No. 5.)

[24] The chambers judge also instructed himself that the purpose of a bylaw "must be taken from its wording and the minutes and public submissions surrounding its adoption, with the primary record being the material before council when it made the decision." We were told that the extrinsic evidence admitted in this case, including the correspondence between Surfrider and City officials, was admitted below without objection, presumably as material that was before the Council and thus part of the "circumstances in which the measure was adopted." When we raised the question of its admissibility during argument, counsel did not take up this point and were apparently content to have it considered as extrinsic evidence and used in this way.

[25] The chambers judge referred to *Peachland (District) v. Peachland Self Storage Ltd.* 2012 BCSC 1872, *aff'd.* 2013 BCCA 273, in which ss. 8 and 9 were considered. The petitioner in that instance had sought a declaration that an "Earthworks Control Bylaw" enacted by the District of Peachland was invalid. The bylaw amended an earlier bylaw which made it unlawful, with some exceptions, for anyone to move, deposit or remove soils from any land within the District without a permit. The amendment added the following clause:

> No permit shall be issued that authorizes more than 200m^3 of soil to be removed in any calendar year from any parcel of land.

Section 9(1)(e) of the *Community Charter* at that time required Provincial approval for:

> (e) bylaws under section 8(3)(m) that
>
> > (i) prohibit soil removal, or
> >
> > (ii) prohibit the deposit of soil or other material, making reference to quality of the soil or material or to contamination.

[26] Mr. Justice Betton in the Supreme Court of British Columbia carried out a review of the applicable principles of statutory interpretation in *Peachland* and stated at the outset of his analysis that:

> ... Resolution of this issue turns on whether the Bylaw is properly categorized as prohibitory within the meaning intended by s. 9 of the *Community Charter.* The Legislature has decreed by enacting ss. 9(1) and (3) that there is a provincial interest in bylaws that, *inter alia*, prohibit soil removal. Thus, if the Bylaw prohibits soil removal, it requires Ministerial approval. [At para. 34; emphasis added.]

[27] Relying in part on this court's decision in *Cannon Contracting Ltd. v. Mission (District of)* (1994) 100 B.C.L.R. (2d) 111, Betton J. concluded that as suggested by its title ("Spheres of Concurrent Authority"), s. 9 "ensures consultation and co-management where municipal and provincial interests intersect." In his analysis, the obligation in s. 9(3) to obtain Provincial approval fostered a co-operative approach to matters of "mutual interest" and manifested the

"principle of municipal-provincial relations espoused in s. (2)(1)(c) of the *Community Charter*." (At para. 43.) He continued:

> ... The specific power to prohibit soil removal is contained in s. 9(1)(e). As stated in s. 4(2), "that aspect of the general power that encompasses the specific power may only be exercised subject to any conditions and restrictions established in relation to the specific power". Thus, while the municipal power to address soil removal must be interpreted broadly, the specific power to prohibit soil removal, even in the guise of a regulation, must be exercised subject to the requirement to obtain Ministerial approval. [At para. 49; emphasis added.]

Ultimately, he ruled that the amendment to the District's Earthworks Control Bylaw required ministerial approval because it *prohibited* soil removal within the meaning of s. 9(1)(e) of the *Community Charter*. Such approval not having been obtained, the bylaw was declared invalid.

[28] The City in the case at bar sought to rely on a regulation to the *Community Charter*, B.C. Reg. 144/2004, entitled "Spheres of Concurrent Jurisdiction – Environment and Wildlife Regulation". Subsection 2(1)(a) thereof stated that under s. 8(3)(j) of the statute, a municipality may "regulate, prohibit and impose requirements in relation to polluting or obstructing, or impeding the flow of, a stream, creek, waterway, watercourse, waterworks, ditch, drain or sewer." In the City's submission, if Bylaw 18-008 was characterized as intended for the protection of the environment, this regulation nevertheless authorized the City to pass the Bylaw without Provincial approval. The chambers judge declined to give the regulation that broad an interpretation and said that in any event, he did not find it necessary to do so. In his analysis, the relevance of the regulation lay in the fact that in "specifying the activities a bylaw may regulate for protection of the natural environment, it also provides some guidance as to what kind of activities may be sufficiently similar that any municipal regulation of them would require similar provincial approval." He continued:

> In addition to the provision referred to above, dealing with pollution and obstruction of waterways, the regulation also permits municipalities to regulate or prohibit, subject to certain exceptions, the application of pesticides. It addresses activities of parties specifically involved in activities that may directly affect the natural environment.
>
> For example, the regulation would permit a municipality to prohibit or impose restrictions on a building project that could obstruct or pollute a nearby stream, to specify what materials may or may not be directly discharged into the sewer system, and to define what form of pesticides, if any, homeowners may apply to their lawns and gardens.
>
> I find that, in order to be considered a bylaw for the protection of the natural environment within the meaning of ss. 8(3)(j) and 9(1)(b) of the [*Community Charter]*, a bylaw must similarly regulate the conduct of parties directly engaged in activities that are considered to have a negative environmental impact.
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> The bylaw at issue addresses the transaction in which a merchant packages the goods purchased by a customer. Although a plastic checkout bag may ultimately find its way into the natural environment, that is the result of subsequent actions by the customer or by others who subsequently come into possession of the bag. It is not the inevitable, direct or immediate result of the transaction that Bylaw 18-008 seeks to regulate.
>
> For that reason, I find that Bylaw 18-008, in its immediate effect, is properly characterized as a business regulation, rather than a bylaw for protection of the natural environment. [At paras. 44–8; emphasis added.]

[29] The chambers judge distinguished *Peachland* on the basis that the Court there was interpreting a single municipal power in s. 8 of the *Community Charter* that was subject to "concurrent jurisdiction" in s. 9. There had been no suggestion in *Peachland* that the subject bylaw had been enacted under a different power under s. 8 to which s. 9 did not apply. The judge interpreted s.(8)(7)(a), which refers to powers to "regulate, prohibit and impose requirements", to mean that a "bylaw properly enacted under one of the enumerated powers is valid whether or not it may also be interpreted as engaging one or more of the others." (At para. 52.) He acknowledged that the impetus for Bylaw 18-008 had come from Surfrider, which had expressed broad environmental concerns that extended well beyond the City. However, Surfrider's initial presentation had been followed by a two-year process in the course of which Council had obtained further information from City staff. The process had identified "specific municipal concerns related to matters such as waste collection systems, sewers, drainage, and litter control", which purposes had been specifically "identified" in Mr. Work's final report, even though the report also referred to broader environmental concerns.

[30] The judge referred to *Koslowski v. West Vancouver (Municipality)* (1981) 26 B.C.L.R. 210 (S.C.), a decision of Chief Justice McEachern, as he then was. In *Koslowski*, the municipality had considered a change to its zoning bylaw

that would prevent the residential development of certain property. The owners obtained an interim injunction to prevent that bylaw from being enacted. The City then enacted a bylaw to expropriate the property "for sewerage and drainage purposes". The City had installed a sewer line running the length of the property some years earlier but had not acquired an easement at that time. The City had strongly opposed the residential development of the property and had focused on sewers only when the rezoning failed. The Court held, however, that the existence of another purpose in addition to that stated in the bylaw ("for the purpose of acquiring a site for a system of sewerage and drainage works") did not render the bylaw illegal. In response to the argument that the City's predominant purpose had been "beyond its power", the Chief Justice stated:

> ... The fact that council had more than one purpose, and the fact that one of its purposes may have been its predominant purpose, and beyond its power, does not prevent council from acting lawfully if it also has an honest purpose that is within its statutory powers.
>
> Where is the line to be drawn? When there is more than one purpose, as in this case, the test of predominant purpose may not be appropriate to determine legality because it is not always possible to ascertain the predominant purpose, or the scales may be weighted only slightly one way or the other. In my view, legislative action should be upheld in most cases as long as the court is satisfied that council does in fact have a lawful purpose and it acts in good faith. In such circumstances good faith is a proper test by which to judge the conduct of council. If council acts in good faith, and it has one or more lawful purposes, then its enactments should not be set aside. [At 222; emphasis added.]

[31] The judge also referred to International *Bio Research v. Richmond (City)* 2011 BCSC 471, where Savage J., as he then was, adopted similar reasoning in connection with a bylaw that banned the sale of dogs from retail stores. The petitioner claimed that the bylaw had been made "on a specious, wholly inadequate factual basis, improperly motivated, enacted in bad faith, discriminatory, and … completely unreasonable." (At para. 3.) Savage J. did not agree: he ruled that the City had had the authority to regulate and prohibit the sale of dogs in stores and to establish "rules respecting what must or must not be done" in relation thereto. He observed that bylaws are presumed to be enacted in good faith and for proper purposes and that "Richmond need have only one proper purpose for the Bylaw to be valid, even if members of Council may have had other motivations." The bylaw was found not to *prohibit* retail pet stores, but to *regulate* them; and (more importantly for our purposes) it was found to be "in relation to business." It was therefore ruled *intra vires*. (At para. 43.)

[32] The chambers judge found no evidence of bad faith in the case at bar. In his words:

> … Although some members of council may have been motivated by broad environment concerns, council's attention was properly drawn to ways in which discarded plastic bags impact municipal facilities and services. Council decided that those issues could be addressed by prohibiting a specific form of consumer transaction. It is true that City staff were unable to quantify the degree to which plastic bags impacted those municipal facilities and services, but the question of whether the bylaw was a reasonable response to the identified municipal problem is not before me. The petition seeks only a finding that the bylaw is *ultra vires* and I find it to be a valid exercise of the City's business regulation power. [At para. 58; emphasis added.]

He also rejected the argument that in passing the Bylaw, the City was regulating and/or prohibiting in relation to solid waste — an authority given to regional districts, rather than individual municipalities, by the *Environmental Management Act*, S.B.C. 2003, c. 53. ("*EMA*") He concluded that the *EMA* had no application given his view that the Bylaw did not deal with any aspect of the definition of "management" contained in the statute, in relation to solid waste. Rather the Bylaw was aimed at preventing the *creation* of certain waste and avoiding the need to "manage" same.

[33] Finally, the chambers judge rejected the argument that because the Bylaw compelled businesses to charge a minimum fee for paper and reusable bags, it violated s. 193 of the *Community Charter*, which prohibited the imposition of taxes or fees by municipalities except as authorized by provincial legislation. He found that the Bylaw did not impose a fee or tax, since the funds collected by businesses for reusable bags remained funds of the businesses. This conclusion is not challenged on appeal.

[34] In the result, the chambers judge found that the Bylaw in its immediate effect was "properly characterized as a business regulation, rather than a bylaw for the protection of the natural environment."

On Appeal

[35] On appeal, the Association asserts that the chambers judge erred in finding that the Bylaw was a valid exercise of the City's power to regulate 'in relation to' business under s. (8)(6). Specifically, the petitioner asserts:

> (a) the Checkout Bag Bylaw is, in pith and substance, a bylaw in relation to public health and the protection of the natural environment, under paragraphs 8(3)(i) and (j) of the *Community Charter*, respectively, and the City was not empowered to adopt the bylaw absent compliance with subsection 9(3) of the *Community Charter*; or, alternatively,
>
> (b) the City's power to regulate businesses under subsection 8(6) (or other provisions of the *Community Charter*) does not include:
>
> (i) the power to prohibit the sale or provision of plastic bags, as set out in the Plastic Bag Ban; or
>
> (ii) the power to impose a requirement that businesses charge customers a Checkout Bag Fee.

[36] The City in its factum responds that the chambers judge did not commit reversible error because:

> a. The Bylaw is, in pith and substance, a valid regulation in relation to business and does not require provincial approval under section 9 of the *Community Charter*;
>
> b. The Bylaw regulates, rather than prohibits, use and distribution of checkout bags by business; and
>
> c. the Bylaw does not impose requirements within the meaning of section 8 of the *Community Charter* but prescribes rules as to what must or must not be done in the course of a business checkout transaction.

It will be noted that both parties employed the language of constitutional law — in particular, "pith and substance" — in describing the first issue.

Standard of Review

[37] The petitioner acknowledges, correctly, that the issues it raises are matters of statutory interpretation and of law, and therefore attract a standard of review of correctness. (See *United Taxi Drivers' Fellowship* at para. 5.) The City acknowledges this principle but also says that the "formulaic assignment" of a label to the issues on appeal is not appropriate and that the determination of the pith and substance of a bylaw involves the examination of evidence surrounding its adoption, its operation and Council's intentions, and that a "more deferential standard should apply" on this point. I agree that the more deferential standard of unreasonableness applies to conclusions of fact or mixed fact and law (where no extricable question of law arises) that may form part of the "characterization", or determination of the pith and substance, of a law. In this case, for example, the chambers judge found as a matter of fact that no bad faith had been shown on the part of the Council; and in my respectful view, the petitioner would have to demonstrate that such finding was unreasonable if it wished to challenge it on appeal. However, the *overall* determination of the "dominant character" of a law remains a question of law.

Principles of Interpretation

[38] Both parties agree that in interpreting the *Community Charter*, a court must give the statute a large, fair and liberal interpretation and must read the words of the statute not only in their "grammatical and ordinary sense" but harmoniously with the scheme of the statute, its object, and the intention of the Legislature: see *United Taxi Drivers' Fellowship* at para. 8. This is codified by s. 4 of the statute, which states:

> **4** (1) The powers conferred on municipalities and their councils under this Act or the *Local Government Act* must be interpreted broadly in accordance with the purposes of those Acts and in accordance with municipal purposes.
>
> (2) If
>
> (a) an enactment confers a specific power on a municipality or council in relation to a matter, and
>
> (b) the specific power can be read as coming within a general power conferred under this Act or the *Local Government Act*,
>
> the general power must not be interpreted as being limited by that specific power, but that aspect of the general power that encompasses the specific power may only be exercised subject to any conditions and restrictions established in relation to the specific power.

[39] The *Community Charter* also emphasizes in its opening sections that the public is best served when municipalities and the Province "respect the jurisdiction of each" and "work towards harmonization of Provincial and municipal enactments, policies and programs" (S. 2(1).) Section 2 goes on to state the principles on which the relationship is based, including:

> (f) the authority of municipalities is balanced by the responsibility of the Provincial government to consider the interests of the citizens of British Columbia generally;
>
> (g) the Provincial government and municipalities should attempt to resolve conflicts between them by consultation, negotiation, facilitation and other forms of dispute resolution.

[40] The purpose of the requirement in s. 9(3) for provincial approval would appear to be as suggested by the Court in *Peachland* — to ensure, "consultation and co-management where municipal and provincial interests intersect." Presumably, this is part of the 'scheme' of the statute that must be considered in its interpretation. The petitioner also emphasizes the fact that municipalities are creatures of statute and possess only the powers delegated to them by provincial legislatures. In the words of Chief Justice McLachlin in *Catalyst Paper Corp. v. North Cowichan (District)* 2012 SCC 2, "This means that they must act within the legislative constraints the province has imposed on them. If they do not, their decisions or bylaws may be set aside on judicial review." (At para. 11.)

[41] As we have seen, cases such as *Koslowski* and *International Bio Research* demonstrate that where a bylaw is enacted in good faith and the municipality has a purpose that, broadly speaking, can be said to fall within the enabling legislation, it will (absent any other statutory restriction) be upheld — even though there may also be other underlying purposes and even though individual members of the council may have had other motivations. Cases construing the meaning of "business" in the context of the *Community Charter* and similar enactments have given the term a broad meaning. In addition to *International Bio Research*, reference may be made to *Re Try-San International Ltd. and City of Vancouver* (1978) 83 D.L.R. (3d) 236 (B.C.C.A.), *lve. to app. dism'd.* [1978] S.C.R. xii, in which massage parlours were prohibited from using nude attendants and were required to charge certain fees; and *1114829 B.C. Ltd. v. Whistler (Municipality)* 2019 BCSC 752, in which owners of rental properties were required to rent only through certain "pooling" arrangements.

[42] Setting aside s. 9 for the moment, then, Bylaw 18-008 might well be justified as having *a* "lawful purpose" in relation to "business." (See *Koslowski* at 222.) In this instance, however, we must consider s. 9, which makes environmental protection a matter of "concurrent authority" and *prima facie* at least, requires provincial approval for a bylaw that regulates "in relation to ... protection of the natural environment." If the "*true character*" of the bylaw is found to relate to the protection of the environment, the second issue is whether properly interpreted, the requirement for approval is negated by another provision of the *Community Charter* or a regulation thereunder, as the City contends.

"Pith and Substance"

[43] It is trite law that "pith and substance" refers in constitutional law to the "true character" or "dominant characteristic" of an impugned law and that the determination of pith and substance involves an examination of the purpose and effects of the law, including its effects on the rights of citizens and practical consequences: see generally Peter Hogg, *Constitutional Law of Canada* (5th ed., Supp. 2016), at §15.5. The doctrine is essentially the opposite of the principle applied in *Koslowski*: here, the focus *is* on "*predominant* purpose" rather than the existence merely of *a* legitimate purpose which could justify a bylaw standing alone. Here, a choice must be made between two sources of delegated authority — the authority to "regulate in relation to business" under s. 8(6) and the (concurrent) authority to "regulate, prohibit and impose requirements in relation to ... protection of the natural environment" under ss. (8)(3)(j) and 9(1)(b). I agree with counsel's submission that this issue should be resolved with reference to the "true nature and character" of the Bylaw. As in the federal/provincial context, this principle reflects the fact that the different "fundamental powers" listed in s. 8 are not watertight compartments but overlap considerably; and that a bylaw that properly belongs to one heading may "incidentally affect" others: see *Canadian Western Bank v. Alberta* 2007 SCC 22 at para. 29.

[44] Before turning to the purpose and effects of Bylaw 18-008, however, I turn to two related matters that arise from the chambers judge's reasoning.

B.C. Reg. 144/2004

[45] As seen above, the chambers judge found guidance in B.C. Reg. 144/2004 in seeking to interpret "what the legislation means when it refers to a bylaw for protection of the natural environment." He noted that s. 2(1)(a) of the Regulation (which I have included in Schedule II) referred to waterways, ditches, drains and sewers, and elsewhere to the application of pesticides. Thus it addressed "activities of parties specifically involved in activities that may directly affect the natural environment". (My emphasis.) From this he reasoned that in order to come within ss. (8)(3)(j) and 9(1)(b) of the *Community Charter*, the Bylaw would similarly have to "regulate the conduct of parties directly engaged in activities that are considered to have a negative environmental impact." (At para. 46; my emphasis.)

[46] With respect, I see no reason why a regulation imposing requirements in relation to drains, ditches or sewers would be restricted to regulating the activities of parties involved only in activities that "directly" affect the environment. The judge cited no authority for this proposition and I find it difficult to believe that a bylaw with indirect or "incidental" effects would fall outside the regulation by virtue of that fact.

[47] The judge went on to find that because Bylaw 18-008 regulated only the providing of checkout bags by merchants to customers and did not *directly* regulate "subsequent actions" by customers in relation to the environment, it was not properly characterized as relating to the protection of the environment. At most, he said, any environmental purpose was "additional" to the purpose and effect of regulating particular business transactions. (At para. 49.)

The Environmental Management Act

[48] In answer to this reasoning, the petitioner referred in its factum to the broad reach of the *EMA*. Section 5 of the *EMA* states that the duties and powers of the "minister" thereunder "extend to any matter relating to the management, protection and enhancement of the environment", including the development of policies for the management, protection and use of the environment; providing information to the public about the quality and use of the environment; preparing and publishing policies, strategies, objectives, guidelines and standards for the protection and management of the environment; and establishing environmental management plans for specific areas of the Province, which plans may include flood control, drainage, water resource management, and waste management. (See s. 5.)

[49] There are several provisions in the *EMA* that relate to packaging, containers and disposable products. Section 11, for example, prohibits any person from using or selling packaging, product containers or disposable products or any material used therein contrary to the *EMA* or regulations thereto. Under s. 21, the Lieutenant Governor and Council may make regulations, including

> (h) prescribing for the purpose of section 6(2) [*waste disposal*], industries, trades and businesses;
>
> ...
>
> (j) regulating litter including the sale, return and reuse of beverage containers and packaging materials or classes of beverage containers and packaging materials ....
>
> ..
>
> (l) respecting the minimum content of material derived from recyclable material that must be contained in types or classes of packaging and products sold in British Columbia;
>
> (m) prescribing packaging, product containers or products or classes of products for which a charge, including a deposit, handling fee, levy or core charge, must be paid or for which a refund must be given, and prescribing the amount of the charge or refund ....
>
> ...
>
> (o) prohibiting or restricting the use of packaging or classes of packaging or product containers or classes of product containers;
>
> ...

> (q) requiring prescribed industrial, commercial and institutional operations or classes of operations to develop and implement a waste reduction and prevention plan for packaging, product containers or any other material or substance, and prescribing the contents of the plan;
>
> ...
>
> (t) requiring prescribed manufacturers, distributors or users of packaging, product containers or any other materials or substances to conduct environmental life cycle profiles using a model approved by a director; ...

The Minister is empowered under s. 22 to make regulations establishing practices for industries, trades and businesses relating to a very wide variety of matters, including prohibiting or restricting the use of packaging or classes of packaging or product containers.

[50] It is apparent that the Province takes an active part in regulating and managing not only the disposal of waste but environmental protection generally; and that in so doing, it collaborates with municipalities, businesses, and various other bodies and formulates various schemes, programs and agreements. The regulation of packaging is obviously part of the complicated web of legislation, including several related regulations such as the *Recycling Regulation*, B.C. Reg. 449/2004. It requires that producers of packaging and paper products enter into "producer responsibility plans" approved by a Director under the *EMA*, to achieve a 75% "recovery rate" and providing *inter alia* for collecting and managing products, giving consumer access to collection facilities or collection services, making consumers aware of collection facilities and "eliminating or reducing the environmental impacts of a product throughout the product's life cycle". Section 5(3) of the Regulation contemplates a "pollution prevention hierarchy" such that pollution prevention is not undertaken at one level unless or until all feasible opportunities for pollution prevention have been taken at a higher level.

[51] From this, one can understand that the Province might wish to have the right to approve, or withhold approval of, municipal bylaws relating to environmental protection in order to ensure that a patchwork of different municipal laws does not hamper provincial environmental programs.

Purpose and Effects

[52] The City submits that the purpose of Bylaw 18-008 is as set out in its preamble:

> The purpose of this Bylaw is to regulate 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.

This is said to reflect "the collective intention of the Victoria City Council behind adoption of the Bylaw." In terms of effects, the City points out that the Bylaw regulates actions of "business operators" only, rather than actions of customers or consumers of checkout bags and that it prescribes "what must or must not be done", thus coming within the scope of "regulate" contained in the Schedule to the *Community Charter*.

[53] The petitioner contends on the other hand that the "key provision" of the Bylaw, s. 3, suggests that its true purpose is not to regulate business or businesses, but to "prohibit and impose requirements" for the protection of the environment. As stated in its factum:

> The City's use of those powers, ones available under subsection 8(3) – but not subsection 8(6) – suggests that the intention (if any) to regulate business is subordinate or only incidental to the bylaw's driving purpose, *i.e.*, to protect the global environment from the harmful effects of checkout bags by prohibiting any distribution of one form of packaging (plastic bags) and imposing minimum prices for the sale and distribution of other forms of packaging (paper and reusable bags). [Emphasis added.]

With respect to the extrinsic evidence, the petitioner emphasizes that the whole process that led to the adoption of the Bylaw was initiated by Surfrider, an organization dedicated to the protection of the global marine environment. The Bylaw was then supported and publicized as a measure to curtail wasteful practices that have local consequences (on

drains and waterways) but also as a broader measure that is necessary for the future health of oceans and beaches around the world.

[54] As for the effects of the Bylaw, these are obviously felt by “businesses” as the source of “Checkout Bags” for the carrying of purchased items. But it would be inaccurate to say that the main effects are those felt by businesses. It is surely consumers as users of disposable plastic bags who are affected most, and who are the ‘targets’ of the Bylaws. It is on them that the onus falls to use receptacles that are less harmful to the environment at a time when the scourge of plastic waste in our oceans has risen to public consciousness. In other words, while “Business” and “Businesses” are affected by the Bylaw, that effect is incidental. The City did not set out to prohibit some types of checkout bags and encourage other types in order to interfere with or somehow improve business transactions. Rather, it set out to slow down and ultimately end the harm caused by plastics in waterways both local and global. Its success will be measured by an evaluation of whether the amount of plastic in waterways locally and globally begins to decrease — not by any commercial yardstick, such as whether businesses continue to sell goods or not. In other words, the Bylaw imposes requirements and some prohibitions in order to protect the natural environment — a term encompassing both local and global conditions. Certainly an objective observer would in my view regard the bylaw as an environmental measure rather than a ‘business’ or commercial one.

Other Community Charter Provisions

[55] Turning then to the second major issue, the City contends that that s. 9(2) of the *Community Charter* “expressly recognizes” that a bylaw can be adopted under more than one authority and that the requirement for provincial approval does *not* apply to bylaws enacted under an authority *other than* those listed in s. 9(1). The *latter* statement is correct, and bylaws enacted under s. (8)(3)(j), dealing with protection of the natural environment, are listed in s. 9(1). However, the notion that the statute recognizes (for example in s. 9(2)) that a bylaw can be adopted under more than one heading runs counter to the “pith and substance” principle, which counsel for both parties recognized must be determined when a contest arises between a concurrent head of authority and an ordinary one. It would be absurd if, by simply attaching a different label to a bylaw, a municipality could avoid an express requirement of the *Community Charter*. Indeed, the broad interpretation of municipal powers mandated by s. 4 of the *Community Charter* confirms that substance is to prevail over form in the characterization of bylaws.

[56] Section 9(2) provides that for certainty, s. 9 (which contains the requirement for ministerial approval) does *not* apply to a bylaw under s. 8 that is “under a provision *not* referred” to in s. 9(1) or is “in respect of” a matter to which s. 9(1) does *not* apply. This is so “even if the bylaw could have been made under an authority” to which s. 9 applies. Section 9(2) is very badly drafted, but in my view it is clear that since environmental protection *is* listed in s. 9(1), and the Bylaw relates in pith and substance to environmental protection, subsection (2) does not apply. Subsection (3) *does* apply. It states:

> (3) Recognizing the Provincial interest in matters dealt with by bylaws referred to in subsection (1), a council may not adopt a bylaw to which this section applies unless the bylaw is
>
> (a) in accordance with a regulation under subsection (4),
>
> (b) in accordance with an agreement under subsection (5), or
>
> (c) approved by the minister responsible.

[57] It follows in my view that the approval of the Minister of Environment was required for Bylaw 18–008 of the City of Victoria. The fact that the Bylaw might have been validly enacted *in the absence of s. 9* in the guise of a bylaw relating to business does not detract from the fact that in pith and substance, this Bylaw was intended for the protection of the natural environment and that that is its primary effect.

[58] I share the view expressed in *Ontario (Attorney General) v. OPSEU* [1987] 2 S.C.R. 2, that a court should be “particularly cautious” in invalidating an enactment on the basis that it engages the jurisdiction of some other level of

government when its validity is not contested by that same government. This is especially the case when, as in this case, the law in question has an objective that most reasonable people would endorse. However, a court must strive to give meaning to all the words of a statute. I conclude that the chambers judge erred in law in failing to characterize properly the Bylaw and in holding that in order to be “in relation to” environmental protection, the Bylaw had to regulate the conduct of persons “directly engaged in activities that are considered to have a negative environmental impact.” (At para. 46.) It is on all consumers — everyone — that Bylaw 18-008 is intended to have its effect. Section 9(3) applies to the Bylaw and the approval of the Minister was required as a condition of its becoming valid and enforceable.

[59] In the result, I conclude that we must allow the appeal and quash the Bylaw. While the City’s intentions in passing the Bylaw were no doubt reasonable, we must give effect to the clear instructions of s. 9(3) requiring the Minister’s approval. Whatever the reason for not seeking that approval in July 2018, it will now presumably be sought.

[60] We are indebted to counsel for their helpful submissions.

“The Honourable Madam Justice Newbury”

I AGREE:

“The Honourable Madam Justice Garson”

I AGREE:

“The Honourable Madam Justice Fisher”

SCHEDULE I

NO. 18-008

CHECKOUT BAG REGULATION BYLAW
A BYLAW OF THE CITY OF VICTORIA

The purpose of this Bylaw is 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.

Contents

Under its statutory powers, including sections 8(6) of the *Community Charter*, the Council of the Corporation of the City of Victoria, in an open meeting assembled, enacts the following provisions:

Title

1 This Bylaw may be cited as the "Checkout Bag Regulation Bylaw”.

Definitions

2 In this Bylaw

"Checkout Bag" means:

(a) any bag intended to be used by a customer for the purpose of transporting items purchased or received by the customer from the business providing the bag; or

(b) bags used to package take-out or delivery of food

(c) and includes Paper Bags, Plastic Bags, or Reusable Bags;

"Business" means any person, organization, or group engaged in a trade, business, profession, occupation, calling, employment or purpose that is regulated under the Business Licence Bylaw or the Cannabis Related Business Regulation Bylaw and, for the purposes of section 3, includes a person employed by, or operating on behalf of, a Business;

"Paper Bag" means a bag made out of paper and containing at least 40% of post consumer recycled paper content, and displays the words "Recyclable" and "made from 40% post-consumer recycled content" or other applicable amount on the outside of the bag, but does not include a Small Paper Bag;

"Plastic Bag" means any bag made with plastic, including biodegradable plastic or compostable plastic, but does not include a Reusable Bag;

"Reusable Bag" means a bag with handles that is for the purpose of transporting items purchased by the customer from a Business and is

(a) designed and manufactured to be capable of at least 100 uses; and

(b) primarily made of cloth or other washable fabric;

"Small Paper Bag" means any bag made out of paper that is less than 15 centimetres by 20 centimetres when flat.

Checkout Bag Regulation

3 (1) Except as provided in this Bylaw, no Business shall provide a Checkout Bag to a customer.

(2) A Business may provide a Checkout Bag to a customer only if:

(a) the customer is first asked whether he or she needs a bag;

(b) the bag provided is a Paper Bag or a Reusable Bag; and

(c) the customer is charged a fee not less than

(i) 15 cents per Paper Bag; and

(ii) $1 per Reusable Bag.

(3) For certainty, no Business may:

(a) sell or provide to a customer a Plastic Bag; or

(b) provide a Checkout Bag to a customer free of charge.

(4) No Business shall deny or discourage the use by a customer of his or her own Reusable Bag for the purpose of transporting items purchased or received by the customer from the Business.

Exemptions

4 (1) Section 3 does not apply to Small Paper Bags or bags used to:

(a) package loose bulk items such as fruit, vegetables, nuts, grains, or candy;

(b) package loose small hardware items such as nails and bolts;

(c) contain or wrap frozen foods, meat, poultry, or fish, whether pre-packaged or not;

(d) wrap flowers or potted plants;

(e) protect prepared foods or bakery goods that are not pre-packaged;

(f) contain prescription drugs received from a pharmacy;

(g) transport live fish;

(h) protect linens, bedding, or other similar large items that cannot easily fit in a Reusable Bag;

(i) protect newspapers or other printed material intended to be left at the customer's residence or place of business; or

(j) protect clothes after professional laundering or dry cleaning.

(2) Section 3 does not limit or restrict the sale of bags, including Plastic Bags, intended for use at the customer's home or business, provided that they are sold in packages of multiple bags.

(3) Notwithstanding section 3(2)(c) and 3(3)(b), a Business may provide a Checkout Bag free of charge if:

(a) the Business meets the other requirements of section 3(2);

(b) the bag has already been used by a customer; and;

(c) the bag has been returned to the Business for the purpose of being re used by other customers.

(4) Section 3 does not apply to a Checkout Bag that was purchased by a Business prior to the first reading of this Bylaw.

Offence

5 (1) A person commits an offence and is subject to the penalties imposed by this Bylaw, the Ticket Bylaw and the *Offence Act* if that person:

(a) contravenes a provision of this Bylaw;

(b) consents to, allows, or permits an act or thing to be done contrary to this Bylaw; or

(c) neglects or refrains from doing anything required be a provision of this Bylaw.

(2) Each instance that a contravention of a provision of this Bylaw occurs and each day that a contravention continues shall constitute a separate offence.

Penalties

6 A person found guilty of an offence under this Bylaw is subject to a fine:

(a) if a corporation, of not less than $100.00 and not more than $10,000.00; or

(b) if an individual, of not less than $50.00 and not more than $500.00

for every instance that an offence occurs or each day that it continues.

Severability

7 If any provision or part of this Bylaw is declared by any court or tribunal of competent jurisdiction to be illegal or inoperative, in whole or in part, or inoperative in particular circumstances, it shall be severed from the Bylaw and the balance of the Bylaw, or its application in any circumstances, shall not be affected and shall continue to be in full force and effect.

Consequential Amendment to the Ticket Bylaw

8 The Ticket Bylaw No. 10-071 is amended by inserting, immediately after Schedule Y, the Schedule 1 attached to this Bylaw as the new Schedule Z.

Transition Provisions

9 (1) Section 3(2)(c)(i) is amended by deleting “15 cents” and substituting “25 cents”.

(2) Section 3(2)(c)(ii) is amended by deleting “$1” and substituting “$2”.

(3) Section 4(4) is repealed.

Effective Date

10 This Bylaw comes into force on July 1, 2018 except sections 5 and 9 which come into force on January 1, 2019.

READ A FIRST TIME the **14th** day of **December** 2017.

READ A SECOND TIME the **14th** day of **December** 2017.

READ A THIRD TIME the **14th** day of **December** 2017.

ADOPTED on the **11th** day of **January** 2018.

“CHRIS COATES”
CITY CLERK

“LISA HELPS”
MAYOR

Schedule 1

Schedule Z
Single Use Checkout Bag Regulation Bylaw
Offences and Fines

Column 1 – Offence	Column 2 – Section	Column 3 – Set Fine	Column 4 – Fine if paid within 30 days
Providing a Checkout Bag to a Customer except as provided in the bylaw	3(1)	$100.00	$75.00
Providing a Checkout Bag without asking whether a customer wants one	3(2)(a)	$100.00	$75.00
Providing a Checkout Bag that is not a Paper Bag or Reusable Bag	3(2)(b)	$100.00	$75.00
Charging less than a prescribed amount for a Checkout Bag	3(2)(c)	$100.00	$75.00
Selling or providing a Plastic Bag	3(3)(a)	$100.00	$75.00
Providing Checkout Bag free of charge	3(3)(b)	$100.00	$75.00
Denying or discourage use of customer's own Reusable Bag	3(4)	$100.00	$75.00

SCHEDULE II
(Emphasis by underlining added.)

Community Charter

Fundamental Powers

8 (1) A municipality has the capacity, rights, powers and privileges of a natural person of full capacity.

...

(3) A council may, by bylaw, regulate, prohibit and impose requirements in relation to the following:

(a) municipal services;

(b) public places;

...

(g) the health, safety or protection of persons or property in relation to matters referred to in section 63 [*protection of person and property*];

(h) the protection and enhancement of the well-being of its community in relation to the matters referred to in section 64 [*nuisances, disturbances and other objectionable situations*];

...

(j) protection of the natural environment;

(4) A council may, by bylaw, regulate and impose requirements in relation to matters referred to in section 65 *[signs and other advertising]*.

...

(6) A council may, by bylaw, regulate in relation to business.

(7) The powers under subsections (3) to (6) to regulate, prohibit and impose requirements, as applicable, in relation to a matter

(a) are separate powers that may be exercised independently of one another,

(b) include the power to regulate, prohibit and impose requirements, as applicable, respecting persons, property, things and activities in relation to the matter, and

(c) may not be used to do anything that a council is specifically authorized to do under Part 14 [*Planning and Land Use Management*] or Part 15 [*Heritage Conservation*] of the *Local Government Act*.

...

(10) Powers provided to a municipalities under this section

(a) are subject to any specific conditions and restrictions established under this or another Act, and

(b) must be exercised in accordance with this Act unless otherwise provided.

Spheres of Concurrent Authority

9 (1) This section applies in relation to the following:

(a) bylaws under section 8(3)(i) [*public health*];

(b) bylaws under section 8(3)(j) [*protection of the natural environment*];

...

(2) For certainty, this section does not apply to

(a) a bylaw under section 8 [*fundamental powers*] that is under a provision not referred to in subsection (1) or is in respect of a matter to which subsection (1) does not apply,

(b) a bylaw that is authorized under a provision of this Act other than section 8, or

(c) a bylaw that is authorized under another Act,

even if the bylaw could have been made under an authority to which this section does apply.

(3) Recognizing the Provincial interest in matters dealt with by bylaws referred to in subsection (1), a council may not adopt a bylaw to which this section applies unless the bylaw is

(a) in accordance with a regulation under subsection (4),

(b) in accordance with an agreement under subsection (5), or

(c) approved by the minister responsible.

(4) The minister responsible may, by regulation, do the following:

(a) establish matters in relation to which municipalities may exercise authority as contemplated by subsection (3)(a), either

(i) by specifying the matters in relation to which they may exercise authority, or

(ii) by providing that the restriction under subsection (3) only applies in relation to specified matters;

(b) provide that the exercise of that authority is subject to the restrictions and conditions established by the regulation;

(c) provide that the exercise of that authority may be made subject to restrictions and conditions specified by the minister responsible or by a person designated by name or title in the regulation.

(5) The minister responsible may enter into an agreement with one or more municipalities that has the same effect in relation to the municipalities as a regulation that could be made under subsection (4).

B.C. Reg. 144/2004 Deposited March 26, 2004
M71/2004

SPHERES OF CONCURRENT JURISDICTION - ENVIRONMENT AND WILDLIFE REGULATION

[includes amendments up to B.C. Reg. 235/2008, August 7, 2008]

Definitions

1 In this regulation:

"Act" means the *Community Charter*;

"alien invasive species" means the species listed in sections 1 and 2 of the Schedule;

"dangerous wildlife" has the same meaning as in the *Wildlife Act*;

"excluded pesticide" has the same meaning as in the Integrated Pest Management Regulation, B.C. Reg. 604/2004.

[am. B.C. Regs. 326/2005, s. (a); 235/2008, s. 1.]

Municipal jurisdiction in relation to the environment and wildlife

2 (1) For the purposes of section 9 (4) (a) (i) of the Act, a municipality may,

(a) under section 8 (3) (j) of the Act, regulate, prohibit and impose requirements in relation to polluting or obstructing, or impeding the flow of, a stream, creek, waterway, watercourse, waterworks, ditch, drain or sewer, whether or not it is located on private property,

(b) regulate, prohibit and impose requirements in relation to,

(i) under section 8 (3) (j) of the Act, the sale of wild flowers,

(ii) subject to subsection (2), under section 8 (3) (j) of the Act, the application of pesticides, except excluded pesticides, for the purpose of maintaining outdoor trees, shrubs, flowers, other ornamental plants and turf on a parcel or a part of a parcel if the parcel or part is used for residential purposes, or on land vested in the municipality,

(iii) under section 8 (3) (j) and (k) of the Act, the control and eradication of alien invasive species, and

(iv) under section 8 (3) (k) of the Act, the control of wildlife species listed in Schedule B or C to the Designation and Exemption Regulation, B.C. Reg. 168/90, and

(c) under section 8 (3) (k) of the Act, regulate, prohibit and impose requirements respecting the feeding or attracting of dangerous wildlife or members of the family Cervidae.

(2) For the purposes of section 9 (4) (b) of the Act, a municipality may not exercise the authority under subsection (1) (b) (ii) of this regulation in relation to the application of pesticides

(a) for the management of pests that transmit human diseases or impact agriculture or forestry,

(b) on the residential areas of farms,

(c) to buildings or inside buildings, or

(d) on land used for agriculture, forestry, transportation, public utilities or pipelines unless the public utility or pipeline is vested in the municipality.

(3) For the purposes of subsection 9 (4) (b) of the Act, the exercise of the authority under subsection (1) (c) is subject to the condition that the bylaw must exempt from its application all the following:

(a) a person who is engaging in hunting or trapping wildlife in accordance with the *Wildlife Act* and its regulations;

(b) a farm operation, as defined in section 1 of the *Farm Practices Protection (Right to Farm) Act*, that

(i) is conducted on, in or over land anywhere in British Columbia, and

(ii) meets the requirements set out in section 2 (2) (a) and (c) of that Act;

(c) a facility for the disposal of waste that is operated in accordance with the *Environmental Management Act* by a municipality, a regional district, an improvement district that has as an object the disposal of sewage or refuse or the provision of a system for the disposal of sewage or refuse or the Greater Vancouver Sewerage and Drainage District.

[am. B.C. Regs. 326/2005, s. (b); 235/2008, ss. 2 to 4.]