

JAN 22 2018

No. \_\_\_\_\_  
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

*Re: In the matter of the Judicial Review Procedure Act, RSBC 1996 Ch. 241*

BETWEEN:

Canadian Plastic Bag Association

PETITIONER

AND:

The Corporation of the City of Victoria

RESPONDENT

**PETITION TO THE COURT**

**ON NOTICE TO:**

The Corporation of the City of Victoria  
1 Centennial Square  
Victoria, B.C.  
V8W 1P6

**AND TO:**

The Attorney General for the  
Province of British Columbia  
PO Box 9290  
Victoria, B.C.  
V8W 9J7

This proceeding is brought for the relief set out in Part 1 below, by the Canadian Plastic Bag Association, the persons named as petitioner in the style of proceedings above. If you intend to respond to this petition, you or your lawyer must:

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- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
  - (i) 2 copies of the filed response to petition, and
  - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

**Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.**

**TIME FOR RESPONSE TO PETITION**

A response to petition must be filed and served on the petitioner,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: The Law Courts 800 Smithe Street Vancouver, B.C. V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the petitioner is: Stevens Virgin 1700-1040 W. Georgia Vancouver, B.C . V6E 4H1 <b>Attention: N. Baker</b>
(3)	The name and office address of the petitioner's lawyer is:  Same as above

### **CLAIM OF THE PETITIONER**

#### **Part 1: ORDERS SOUGHT**

1. A declaration that Checkout Bag Regulation Bylaw No. 18-008 is *ultra vires* the City of Victoria and the powers conferred pursuant to the *Community Charter* [SBC 2003] Ch. 26.
2. An order quashing Checkout Bag Regulation Bylaw No. 18-008.
3. Costs; and
4. Such further and other relief that this Honourable Court deems just.

#### **Part 2: FACTUAL BASIS**

##### **The Parties**

1. The Petitioner, Canadian Plastic Bag Association (the "CPBA"), is an incorporated non-profit advocacy organization representing a wide range of manufacturers and distributors of plastic shopping bags throughout Canada including British Columbia.
2. The Corporation of the City of Victoria (the "City") is a municipal corporation incorporated pursuant to the *Community Charter*, S.B.C. 2003 c. 26 having a business office at 1 Centennial Square, Victoria, BC V8W 1P6.
3. CPBA members service a variety of retail sectors such as supermarkets, department stores, discount stores, drug stores and convenience stores throughout British Columbia, including the City of Victoria.
4. CPBA members are committed to operating in conformity with sound environmental practice and the principles of product stewardship. CPBA members work co-operatively with retailers and government to pursue the three R's (Reduce, Reuse, and Recycle) in their own operations and with respect to the products that they produce.

5. CPBA members have a substantial interest in the manufacture, supply, distribution and sale of plastic bags in Victoria and will, wholly and individually, be significantly impacted by the plastic bag ban imposed by the City of Victoria.

**Background to the adoption of Bylaw No. 18-0018**

6. In or about March 23, 2017 Victoria City Council began consideration of a possible ban on plastic retail bags. The City's website set out the proposed "roadmap" for the reduction of single-use plastic retail bags as follows:

**Single-Use Plastic Retail Bag Reduction Project - Proposed 'Roadmap'**

From April to September 2017, the City will work with the community to explore ways to reduce single-use plastic retail bag use, which will include stakeholder workshops for business, industry, advocate and resident groups to share their unique perspectives related to future bag reduction regulations; working with business stakeholders to promote a set of voluntary commitments / pledges to reduce retail bag use such as detailed reporting of bag usage, improved signage and education, retail bag take-back programs, reusable bag donation centres, and voluntary bag fee/ban actions; and developing and implementing a design competition for a City of Victoria sustainable reusable retail bag, with a financial reward of \$2,000 to be funded through the solid waste management budget.

Staff will report back to Council in October 2017 with a draft bylaw prior to the final opportunity for public comment on the issue of single-use plastic retail bag reduction regulations. The City will work with the CRD to draft a model bylaw for a phased in ban of plastic bags that could be adopted by Councils across the region. An opportunity for public comment will be held in November before the model bylaw is considered for adoption.

7. At the March 23, 2017 Committee of the Whole meeting, the Committee considered a staff report dated March 14, 2017 from Fraser Work, the Director of Engineering and Public Works ("March 2017 Report"). Under the heading "CRD and Provincial Programs", the March 2017 Report states that the Capital Regional District ("CRD") and the Province support efforts to reduce the use of plastic bags but have not identified any intent to adopt any regulations banning them. The Staff Report further states:

... In correspondence with staff from the Ministry of Community, Sport and Cultural Development, the Province's perspective on bag reduction programs has been stated as follows:

*"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. "*

8. According to the minutes of a March 23, 2017 meeting of the Committee of the Whole, the Committee directed staff to engage in a consultation process between April and September 2017 and then report back to Council in October 2017.

9. On October 26, 2017, Council approved a motion to consider a new single-use checkout bag bylaw that would prohibit businesses from distributing plastic bags to customers.

10. At the October 26, 2017 meeting, Council considered an October 23, 2017 Staff Report ("October 2017 Report"). The October 2017 Report includes the following:

The single-use plastic bag is a 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.

(...)

It remains clear that regulatory intervention is needed now to curb this common business practice that creates avoidable waste and its associated municipal costs. The proposed bylaw regulating checkout bags represents a legislative intervention that intends to not only limit the use of disposable checkout bags, but will also signal to businesses that they must respond to community needs and values to support the sustainability and well-being in our community. Only a wholesale shift to sustainable, reusable bags will reduce landfill, pollution and litter risks from checkout bags in our community.

(...)

11. The city staff power point presentation made at the October 26, 2017 meeting characterizes the “problem” and “ideal outcome” as follows:

- Problem: too many plastic bags in landfills and as litter
- Ideal Outcome:
  - A wholesale shift to reusable bags
    - made and managed sustainably, reused well over 100 times

12. On December 14, 2017 the Committee of the Whole considered a December 7, 2017 Report regarding “Single-Use Checkout Bag Regulation – Draft Bylaw Feedback” and other documents attached to the Agenda.

13. On December 14, 2017 Council gave first, second and third reading to Bylaw No. 18-008.

14. Under the heading “Latest News”, the City’s website states:

Victoria City Council passed first, second and third reading of the proposed Checkout Bag Regulation Bylaw on December 14, 2017, and will consider it for adoption at the January 11, 2018, Council meeting. The bylaw is proposed to take effect July 1, 2018.

15. The City’s webpage regarding the plastic bag ban also includes a section entitled “frequently asked questions”, which includes the following:

**Why is reducing the amount of plastic bags important?**

- 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.

### **Why is the City developing a new bylaw to reduce single-use checkout bags?**

The purpose of the draft Bylaw is to reduce the volume of plastic bag waste entering our landfill, our waste collection systems, and littering our community. This bylaw aims to reduce single-use plastic bags that quickly become waste after only a few uses.

16. On January 11, 2018 the City adopted Checkout Bag Regulation Bylaw No. 18-008 (the "Bylaw"). Section 2 of the Bylaw sets out the applicable definitions including:

"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;

"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;

17. Section 3 of the Bylaw provides:

#### **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.

18. According to the City's website, the City has imposed a mandatory fee for paper and reusable bags because "fees are a proven mechanism to promote sustainable business and consumer habits, while avoiding overuse of any bag type".

19. The City's website further explains that while businesses are prohibited from dispensing plastic bags (subject to the exemptions in section 4 of the Bylaw) they may provide paper and reusable bags as long as the businesses charge their customers a mandatory minimum fee for such bags. The mandatory fees for paper and reusable bags may be used as businesses see fit but they must be collected.

### **Part 3: LEGAL BASIS**

1. This is an application brought pursuant to section 623 of the *Local Government Act* [RSBC 2015] Ch. 1 (the "LGA") and the *Judicial Review Procedure Act*, [RSBC 1996] Ch. 241 (the "JRPA") to review the City's decision to adopt Bylaw No. 18-008.

2. The Petitioner seeks a declaration that the Bylaw is *ultra vires* and an order quashing the Bylaw.

3. Pursuant to section 623 of the LGA an application to the Supreme Court to set aside a municipal bylaw may be made by (a) an elector of the municipality or (b) a person interested in a bylaw. Section 623(2) provides:

(2) On an application under subsection (1), the Supreme Court may

(a) set aside all or part of the municipal instrument for illegality, and

(b) award costs for or against the municipality according to the result of the application.

4. Section 2(2) of the JRPA provides:

(2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:



- (a) relief in the nature of mandamus, prohibition or certiorari;
- (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

### **Standing**

5. The Petitioner is a “person interested in a bylaw”. The test to determine whether a person has standing under the JRPA is the same test under section 623 of the LGA. The applicant must have sufficient interest in the decision that is subject to review and not be a mere busy body. A society or association whose members are interested in a bylaw has standing to challenge the bylaw.

*Saanich Inlet Preservation Society v. Cowichan Valley (Regional District)*,  
[1983] 4 W.W.R. 673 (B.C.C.A) paras. 15 and 25

*Abbotsford Families United v. Abbotsford (City)*, 2009 BCSC 463

### **Standard of Review**

6. The applicable standard of review for determining whether the City has the authority to adopt the Bylaw is correctness.

*New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9

*Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 18

*Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, 2014  
BCCA 271

7. The process for determining municipal jurisdiction is an exercise in statutory construction. The modern purposive approach to statutory interpretation requires that sections of the Act be given such fair, large, and liberal interpretation as best ensures the attainment of its objects. This approach requires that the words of the sections be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the legislative scheme, the object of the scheme, and the intention of the legislature.

*Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, *supra*.

*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559

8. Municipalities are “creatures of statute” and only have the powers expressly or impliedly conferred upon them by the legislature. In *Catalyst Paper Corp. v. North Cowichan (District)* 2012 SCC 2, the Supreme Court of Canada stated:

Municipalities do not have direct powers under the Constitution. They possess only those powers that provincial legislatures delegate to them. 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.

### **The Legislative Scheme**

#### **The Community Charter**

9. Part 2 of the *Community Charter* [SBC 2003] Ch. 26 sets out the municipal purposes and powers of local governments. The fundamental powers of local governments are set out in section 8.

10. Section 8(3) provides that Council may, by bylaw, regulate, prohibit and impose requirements in relation various matters including: (i) public health and (j) the protection of the natural environment. In addition, section 8(6) authorizes Council to, bylaw, regulate in relation to business.

11. Section 8(10) provides:

#### **(10) Powers provided to municipalities under this section**

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

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

12. Section 9 sets out the spheres of concurrent authority. Recognizing the Provincial interest in certain specific matters referred to in section 8, a council may not adopt a bylaw to which this section applies unless certain conditions are met.

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*];

(c) bylaws under section 8 (3) (k) [*animals*] in relation to wildlife;

(d) bylaws under section 8 (3) (l) [*buildings and other structures*] establishing standards that are or could be dealt with by the Provincial building regulations;

(e) bylaws under section 8 (3) (m) [*removal and deposit of soil and other material*] 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.

(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 by or under a provision of this Act other than section 8, or

(c) a bylaw that is authorized by or 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).

(6) If

(a) a regulation or agreement under this section is amended or repealed, and

(b) the effect of the amendment or repeal is that bylaws that previously did not require authorization under subsection (3) would now require that authorization,

those bylaws affected that were validly in force at the time of the amendment or repeal continue in force as if they had been approved by that minister.

### **Spheres of Concurrent Jurisdiction – Environmental and Wildlife Regulation**

13. The Province has enacted the *Spheres of Concurrent Jurisdiction – Environment and Wildlife Regulation* B.C. Reg. 144/2004 (the “Regulation”). Section 2(1) of the Regulation provides that 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.*

14. Under subsection (1)(b) municipalities may also 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*

15. The Regulation does not authorize municipalities to regulate, prohibit or impose requirement in relation to the sale or dispensing of plastic bags.

### **The Environmental Management Act**

16. Part 3 of the *Environmental Management Act*, [SBC 2003] Ch. 53 (the “EMA”) sets out local government and regional district powers relating to Municipal Waste Management. Section 24 authorizes municipalities to submit waste management plans regarding municipal liquid waste. Section 25, however, permits regional districts to make bylaws regulating the management of municipal solid waste or recyclable material. A Waste Management Plan is “a plan that contains provisions or requirements for the management of recyclable material or other waste or a class of waste within all or a part of one or more municipalities”.

17. Although section 32 of the EMA gives the Greater Vancouver Sewerage and Drainage District the power to make bylaws to prohibit, regulate or otherwise control the introduction into the environment of municipal solid waste, other regional districts only have the authority to control municipal solid waste if the Lieutenant Governor in Council has conferred the authority to make bylaws to prohibit, regulate or otherwise control the introduction into the environment of municipal solid waste.

See also Part 9, Division 4 of the LGA

**The City does not have the jurisdiction to prohibit businesses from providing plastic bags to their customers**

18. The Bylaw states that the purpose of the Bylaw is “to regulate the business use of single use checkout bags to reduce the creation of waste and associate 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”.

19. In adopting the Bylaw, the City is purporting to regulate businesses but it is doing so for the purpose of regulating in relation to the natural environment. It is also regulating/prohibiting in relation to municipal solid waste.

20. Pursuant to section 9(3) of the *Community Charter*, the City has no authority to adopt a bylaw regulating businesses in order to protect the natural environment unless the Bylaw is:

- (a) in accordance with a regulation under subsection 9(4),
- (b) in accordance with an agreement under subsection 9(5), or
- (c) approved by the minister responsible.

21. Just as a municipality cannot use its business licencing powers to regulate the use of land, the City cannot use its business licencing powers to regulate, prohibit or impose conditions for the protection of the environment without first complying with section 9 of the *Community Charter*.

*Central Saanich v. Amaryllis Enterprises Inc.* (1991) 7 MPLR 162

*Peachland District v. Peachland Self Storage Ltd.*, 2013 BCCA 273

*Windset Greenhouses v. Delta (Corp. of)*, 2003 BCSC 570

22. In *Peachland District v. Peachland Self Storage*, supra., the B.C. Court of Appeal noted that the purpose of section 9(3) of the *Community Charter* is to safeguard "provincial interests".

23. The provisions of the EMA regarding Regional Districts' powers over the regulation and prohibition of Municipal Solid Waste further supports the conclusion that the City has no authority to prohibit businesses from dispensing plastic bags.

**The City does not have the jurisdiction to permit only Paper and Reusable Bags or to compel businesses to charge a minimum fee for such bags**

24. The City of Victoria does not have the jurisdiction under its business licencing powers or otherwise to only permit Paper and Reusable Bags or to compel businesses to charge their customers a minimum fee for such bags. There is no authority to require businesses to charge a fee to its customers for the purpose of promoting "sustainable business and consumer habits".

- (a) Part 7 of the *Community Charter* addresses municipal revenue and how fees and taxes may be imposed and collected by municipalities.
- (b) Section 193 of the *Community Charter* provides that a municipality must not impose fees or taxes except as expressly authorized in the *Community Charter* or other applicable Act.
- (c) Section 194 of the *Community Charter* authorizes Council to, by bylaw, impose a fee in respect of (a) a service of the municipality (b) the use of municipal property or (c) the exercise of authority to regulate, prohibit or impose requirements.

25. The City has no authority to compel a business to charge consumers a mandatory fee or tax for Paper and Reusable Bags which is ultimately retained by the business.

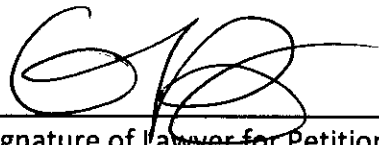
26. Accordingly, the Bylaw must be quashed.

**Part 4: MATERIAL TO BE RELIED ON**

1. *Community Charter*, S.B.C. 1953, c. 55;
2. *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241;
3. *Local Government Act*, [RSBC 2015], Ch. 1
4. Rules 2(1)-(2), 14-1, and 21-3(1) of the Supreme Court Civil Rules;
5. The inherent jurisdiction of the court;
6. Affidavit #1 of A. Horncastle sworn January 15, 2018;
7. Affidavit #1 of G. Maldoff sworn January 16, 2018.

The petitioner estimates that the hearing of the petition will take 1 day.

Dated: January 18, 2018

  
\_\_\_\_\_  
Signature of Lawyer for Petitioner, Nathalie Baker

***To be completed by the court only:***

Order made

☐ in the terms requested in paragraphs \_\_\_\_\_ of Part 1 of this notice of application

☐ with the following variations and additional terms:

◆

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature of ☐ Judge ☐ Master

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION FOR  
SERVICE OUTSIDE BRITISH COLUMBIA**

The plaintiff(s) claim(s) to serve this pleading/petition on the defendant(s), ♦, outside British Columbia on the ground that: ♦