

LIDSTONE & COMPANY
BARRISTERS AND SOLICITORS

MEMORANDUM

TO: Clients
FROM: Alex Lidstone and Robin Phillips
DATE: June 21, 2018
RE: Case News: Victoria's Plastic Bag Ban Upheld / No
"Development Freeze" Where Site Profile Opt-Out

This memo summarizes two recent court decisions of relevance to local governments in BC. The first decision clarified municipalities' ability to regulate businesses' use of single-use plastic bags. The second confirmed that the "development freeze" found in section 557(2) of the *Local Government Act* does not apply to local governments that have opted out of receiving site profiles under the *Contaminated Sites Regulation*.

**I. VICTORIA'S SINGLE-USE PLASTIC BAG BAN BYLAW UPHELD -
Canadian Plastic Bag Association v Victoria (City), 2018 BCSC 1007**

Earlier this week, the Supreme Court of British Columbia upheld the City of Victoria's (the "City") single-use plastic bag bylaw as being within the City's ability to regulate in relation to business.

A. Background

- The City enacted *Checkout Bag Regulation Bylaw* (the "Bylaw"), which limits the kind of bags businesses can provide to only paper and reusable varieties.¹
- The Bylaw comes into force on July 1, 2018, with the imposition of fines beginning on January 1, 2019.
- The Canadian Plastic Bag Association (the "Petitioner") challenged the Bylaw on the basis of the City's purported lack of authority to enact it.

B. Court Action

- The Petitioner argued that the bylaw was enacted under the City's authority to regulate in relation to "protection of the natural environment," an area of concurrent authority with the Province that requires ministerial approval. The Petitioner argued that since there is

¹ See section 3 of the Bylaw.

no evidence of the City seeking approval of the Province, the Bylaw should be quashed.

- In contrast, the City argued the Bylaw was enacted under its power to regulate “in relation to business.” Specifically, it claimed the bylaw regulates the specific transaction of providing a checkout bag to customers.
- The Petitioner also argued the Bylaw is a regulation involving solid waste, which is a power given to regional districts, not municipalities, under the *Environmental Management Act*.
- Furthermore, the Petitioner argued the City does not have the authority to impose the fees included within the Bylaw.

C. Decision

- The Court held the direct effect of the Bylaw is to regulate checkout bag transactions, as it is only from subsequent actions of the customer that a bag may enter the natural environment. As such, the Bylaw is classified as a business regulation, and any environmental purpose is merely supplementary.
- The Court confirmed that a bylaw need only have one lawful purpose and that as long as a council acts in good faith, the fact other members of council have other motives does not invalidate the bylaw.
- Regarding the solid waste argument, the Court found the Bylaw acts to prevent the creation of solid waste, which effectively avoids the need for management. Thus, it is not relevant to the *Environmental Management Act*.
- Finally, the Court held that the Bylaw’s fees are not unlawful as they at no point get remitted to the City.

D. Implications

- This decision provides a clear route and precedent for other municipalities interested in introducing their own single-use plastic bag bans.

II. “DEVELOPMENT FREEZE” DOES NOT APPLY TO LOCAL GOVERNMENTS THAT DO NOT RECEIVE SITE PROFILES – *Gibsons Alliance of Business and Community Society v Gibsons (Town)*, 2018 BCSC 448

A recent decision from the BC Supreme Court has confirmed that the “development freeze” found in section 557(2) of the *Local Government Act* does not apply to local governments that have opted out of receiving site profiles under section 4(4) of the *Contaminated Sites Regulation*.

A. Background

- A developer obtained three development permits from Gibsons (the “Town”) for a mixed-use development on Gibsons Harbour.
- The Town had opted out of administering site profiles under the *Contaminated Sites Regulation* (the “CSR”) pursuant to the *Environmental Management Act*.
- The developer submitted a site profile to the Ministry of the Environment pursuant to the *Environmental Management Act*. This site profile was followed by a detailed site investigation as well as other Province-determined steps for site remediation.
- The Town issued three development permits to the developer, all of which addressed soil contamination and authorized the developer to excavate and remove contaminated soils and sediments.
- The permits required the developer to remediate the property in accordance with a plan developed by the developer’s environmental consultant.

B. Court Action

- The Gibsons Alliance of Business and Community Society (the “Society”) argued that the development permits should not have been issued pursuant to section 557(2)(e) of the *Local Government Act* because the Province had not yet received and accepted a notice of independent remediation for the site.
- Through parallel proceedings before the Environmental Appeal Board, the Society made a contradictory argument stating that the Province had received and accepted a notice of independent remediation from the developer’s environmental consultant.

C. Decision

- The Court found, since the Town has opted for the exemption under section 4(4) of the CSR, section 557(2) does not apply to its development permit issuing process, whether or not the Province had accepted a notice of independent remediation.
- In addition to this conclusion, the Court also held that the Society’s judicial review petition was an abuse of process because parallel proceedings were still ongoing in front of the EAB, and, in fact, contained contradictory arguments compared to the petition.
- Lastly, the Court stated it would have exercised its discretion to refuse relief pursuant to sections 8 and 9 of the *Judicial Review Procedure Act* on the basis that the developer was working cooperatively with the Province to address site remediation; issuing the Permits in this case caused no harm to the public interest or any substantial wrong or miscarriage of justice.

D. Implications

- This decision has now confirmed that the 'freezing' provisions in the *Local Government Act* do not apply if a local government has opted out of receiving site profiles.
- Local governments that have opted out of receiving site profiles may not take the position that they cannot issue permits until a 'release' has been issued by the Province.
- Local governments that have opted out retain the ability to manage developments through applicable local government legislation but may have a limited ability to respond to contaminated sites.