

LIDSTONE & COMPANY

BARRISTERS AND SOLICITORS

MEMORANDUM

TO: Clients
FROM: Don Lidstone, Q.C.
DATE: September 14, 2020
RE: Single Use Plastic Bylaws
FILE: 99999 - 044

The Province of British Columbia has announced that the Minister of Environment will now likely approve municipal bylaws banning single use plastic items. This addresses the concern arising from the quashing of Victoria's bylaw by the BC Court of Appeal on the basis that the bylaw was environmental in nature and therefore required ministerial approval.

The Minister has approved the Saanich single use plastic item ban bylaw, and has indicated that bylaws of Tofino, Richmond, Ucluelet and others will soon have approval.

The Supreme Court of Canada declined to hear the appeal of *Corporation of the City of Victoria v Canadian Plastic Bag Association* (2019, BCCA). Therefore, that BC Court of Appeal decision stands as the test for determining whether a bylaw whose primary purpose falls within an environmental sphere of concurrent jurisdiction with the provincial government has been properly enacted under the *Community Charter* and the *Spheres of Concurrent Jurisdiction - Environment and Wildlife Regulation*.

The BCCA decision informs the way in which municipalities across British Columbia should approach implementing environmental jurisdiction bylaws which restrict or prohibit single use plastics by saying in effect that all bylaws whose primary purpose is protection of the natural environment must seek ministerial approval or enact bylaws under the concurrent jurisdiction authority of s. 9(3) of the *Community Charter*. Following the provincial announcement Saturday, that ministerial approval can now be expected for single use plastic item bylaws.

While it is also the law that if the true primary purpose of a bylaw is not protection of the natural environment then the ministerial approval is not required, it is more straightforward to proceed with an environmental bylaw for single use plastic items than to craft and adopt a bylaw under the business, solid waste or health powers of

municipalities (in respect of which ministerial approval is not necessarily required). To determine whether a regulatory bylaw is valid, that is if it was enacted for a business/health/solid waste purpose or if its primary purpose is environmental protection, a review of staff reports, history of the bylaw, public hearings and the bylaw itself would be undertaken by the courts. Accordingly, the Ministry's announcement is welcome news for many municipalities considering plastic bylaws.

The Ministry announced further that within six to eight months the Province will also enact a new regulation under the *Spheres of Concurrent Jurisdiction - Environment* authority of section 9 of the *Community Charter* to expressly empower municipalities to ban prescribed single use items without any provincial approval (including "shopping bags, straws, foam takeout containers").