Plastic Bags, Coffee Cups and Water Bottles (oh my!) – Environmental Initiatives Impacting Municipalities

By: Michael Pacholok[1]
Solicitor, City of Toronto Legal Department

Introduction

As the environmental movement continues to forge ahead, citizens around the world are increasingly becoming more aware of how their daily lives are impacting the environment. While some citizens are making the necessary changes to help reduce their impact on the environment, it becomes apparent that not everyone is doing their fair share. As a result, citizens look to their governments for the help that is needed to ensure that more is being done for the environment.

Municipalities throughout North America are responding to this for obvious reasons. Municipal actions have the most direct impact on the daily lives of its citizens. Further there has been recognition by the Courts that municipalities have a role in environmental regulation and that municipalities are a "trustee of the environment."[2]

As a trustee of the environment, municipalities are also attempting to deal with the amount of waste created by its residents and how best to deal with that waste. Recycling and composting are key tools to help deal with the amount of waste generated but obviously those tools are not a silver bullet solution until all of the items we use can all be recycled or composted. The residual waste that can't be recycled or composted is being buried in landfills, for the most part, or incinerated. Municipalities are attempting to look at what is remaining in that residual waste to determine if there is a better solution for items found within. A portion of that residual waste is every day packaging items including items such as plastic bags from any retail shopping store.

This paper will examine the City of Toronto's ("Toronto") current attempts to deal with some of these packaging materials, including the ubiquitous plastic bag, the coffee cup and the water bottle. I will outline Toronto's approach on each of these items, including a discussion of the legislative authority and the current state of affairs with respect to Toronto's approach.

Getting to 70% Waste Diversion[3]

To understand why Toronto is moving to regulate items like plastic bags and coffee cups, you need to first understand Toronto's waste diversion goal. In June, 2007, Toronto City

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[1] With thanks to Jim Anderson, Marilyn Brown, Matthew Green and Amy Murakami.
[2] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)* [2001] S.C.J. No. 42 at paragraph 27, herein referred to as "Spraytech."
[3] For more information on the City's getting to 70% goal, please visit Target 70 at: http://www.toronto.ca/target70/index.htm.

Council adopted a report from the General Manager, Solid Waste Management Services ("SWMS"), entitled "Proposed Initiatives and Financial Model to Get to 70% Solid Waste Diversion by 2010" (the "Getting to 70% Report").[4] The Getting to 70% Report is an ambitious blue-print for Toronto to move from 42% waste diversion to 70% waste diversion in two and a half years. The amount of waste Toronto generates each year is approximately 885,000 tonnes. To reach 70%, Toronto has to find ways to divert 613,000 tonnes of waste.

The primary tool to achieve this was to establish a solid waste fee, or more appropriately, a fee charged to residents based on the amount of waste they disposed of as garbage (the "Pay-as-you-throw Fee".) To determine the Pay-as-you-throw Fee for households, Toronto offers each household the choice of four different size garbage bins. The larger the bin, the more the resident would have to pay. For those residents who live in apartments or condos, the Pay-as-you-throw Fee would be based on the total volume of waste disposed of each year by that building, divided by the number of units in that building. The Pay-as-you-throw Fee would only be based on the amount of garbage that was thrown out and not on the amount of recycling or organic materials that were also placed at the curb for pick-up. The City also provided those in household homes with four sizes of recycling bins to pick from, with the intent that a household would pick the smallest garbage bin they could to accommodate their needs, with the largest recycling bin that would also meet their needs.

For example, a family of four in a household residence could pick a medium sized garbage bin and an extra-large recycling bin. Based on the medium sized garbage bin, that household would be charged annually $248.00 for the garbage that was set out for collection. If for some reason, the resident had, on occasion, more garbage than could fit within the garbage bin they selected, they could purchase a garbage bag tag (at $3.10 a tag) to place on the garbage bag for pickup.

The collected fee would be used to pay for all the activities done by SWMS (collection, haulage, processing of materials, maintenance of landfills, etc.) and as a result, SWMS would effectively receive no money through property taxes. At this point in time however, Toronto can not effectively remove SWMS budget from property taxes, thus each property owner pays twice (once with their property taxes, once for the Pay-as-you-throw Fee.) To compensate residents for paying twice, Toronto provides a credit reflecting the average amount each property owner pays in property taxes that are attributable to SWMS services. For people living in houses, the credit amount is $209, thus in the example above, the family that received a medium sized garbage bin would only pay $39.00 each year.

The overall point of the Pay-as-you-throw Fee is to create a financial incentive to reduce the amount of garbage set out for collection. This is accomplished by visibly indicating

[4] Toronto Staff Report to Executive Committee, "Proposed Initiatives and Financial Model to Get to 70% Solid Waste Diversion by 2010", May 14, 2007, online: http://www.toronto.ca/legdocs/mmis/2007/ex/bgrd/backgroundfile-3799.pdf.

what each resident pays for SWMS services, as opposed to having it hidden within the overall property tax bill.

Another major tool is to improve the diversion rates within apartments and condos. As of 2006, apartments and condos had approximately 13% diversion, as compared to households which had approximately 58% diversion (for an overall City diversion rate of 42%). To improve the diversion rates within apartments and condos, the City is implementing two new tools. First, the City's organics collection program will be expanded to apartments and condos. This involves apartments and condos purchasing organic collection bins for each apartment/condo unit, and having each apartment and condo set up a collection point for the organic materials. To accommodate the increased collection of organics materials, the City is building two new organics materials processing facilities. Second, the City will attempt to make recycling more convenient for residents in apartments and condos by providing additional recycling carts to be placed in strategic locations throughout an apartment or condo, as well as providing smaller recycling containers to be used in each unit.

The City has also increased the materials that are allowed to be recycled in the City's recycling program. The new materials that were added include plastic retail shopping bags and foam polystyrene. Additional tools to help achieve the goal of 70% diversion include: expanding the City's reuse centres; providing more education on the City's diversion by-laws; improving collection services to townhouses; and developing processing facilities to process residue waste.

If the City is successful in doing all that I mentioned above, by the end of 2010, the City will achieve a diversion rate of approximately 69%. To attempt to get that last 1% of diversion (approximately 10,000 tonnes), the City set up the "In-Store Packaging Waste Reduction Working Group" (also referred to as the "In-Store Packaging Working Group.")

The In-Store Packaging Working Group was composed of various members of City of Toronto Council, staff from SWMS and representatives from industry groups. The mandate of the In-Store Packaging Working Group was to investigate ways to reduce the use of certain types of packaging at the source – i.e. in the store. The targeted materials included plastic bags, coffee cup and plastic take-out food containers. The preferred solution from City staff's view was to find an industry led initiative with concrete plans that would demonstrate a real reduction in the use of these materials. After a few meetings of the In-Store Packaging Group and individual conversations between industry representatives and SWMS it, unfortunately, from the SWMS point of view, became clear that an industry led initiative would not be sufficient to achieve the source reduction SWMS was looking for. Given that an industry solution did not appear to be viable, the solution would have to be imposed on the industry by the City through regulation.

In-Store Packaging Report

With a realization that what was needed was government regulation, SWMS prepared a report entitled the "Proposed Measures to Reduce In-Store Packaging Waste and Litter, Municipal Hazardous and Special Waste and Plastic Water Bottles" (the "In-Store Packaging Report"). The In-Store Packaging Report was sent to Toronto's Public Works and Infrastructure Committee on November 12, 2008, and most parts of the In-Store Packaging Report went on to Council for full debate on December 1 and 2, 2008.[5]

The In-Store Packaging Report sets out the environmental issues with plastic bags, coffee cups and plastic take-out food containers, the proposed policy to address the environmental issue of each of the above mentioned items and a summary of various other policy ideas that were considered but ultimately not chosen. The In-Store Packaging Report also deals with additional issues beyond in-store packaging, including water bottles and municipal hazardous and special waste.

With respect to plastic bags, coffee cups and plastic take-out food containers, the In-Store Packaging Report outlines that these materials were having the following environmental and associated impacts on the City:

Depleting Landfill Capacity

The City's Green Lane Landfill has a volume capacity of 14.85 million cubic meters of non-hazardous solid waste and daily cover. Plastic bags, coffee cups and plastic take-out food containers, all intended as single-use disposable packaging materials, are primarily being managed in the waste stream through landfill disposal and, therefore, taking up much valuable space.

It is estimated by Stewardship Ontario that residents of the City on average use about 8.8 plastic bags per household per week in Toronto. The In-Store Packaging Report states that "this represents a total generation in Toronto of 457.6 million plastic retail shopping bags per year and, with each bag weighing 6 grams, 2745.6 tonnes per year, which is approximately 6,900 cubic meters of landfill capacity per year."[6]

There was no data on the amount of disposable coffee cups consumed by the residents of Toronto, however SWMS staff estimated that 1 million hot drink cups are used in Toronto each day. Using this estimate, staff estimated that "the total generation of hot drink cups to be approximately 15,400 cubic meters of landfill capacity per year."[7]

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[5] Toronto Staff report to Public Works and Infrastructure Committee, "Proposed Measures to Reduce In-Store Packaging Waste and Litter, Municipal Hazardous and Special Waste and Plastic Water Bottles" October 29, 2008, online: http://www.toronto.ca/legdocs/mmis/2008/pw/bgrd/backgroundfile-17097.pdf

[6] *Ibid.*, at page 8.

[7] *Ibid.*, at page 8.

SWMS also had to estimate the amount of plastic take-out food containers that were disposed of per year and estimated it to represent approximately 21,500 cubic meters of landfill capacity per year.[8]

In total, based on those assumptions, SWMS staff believes that each year plastic bags, coffee cups and polystyrene take-out food containers add 43,800 cubic meters of landfill capacity to Green Lane Landfill, which represents about 5% of Green Lane's capacity each year.[9]

Reducing Litter

Source reduction of plastic bags, coffee cups and plastic take-out food containers will also decrease the amount of litter on the streets of Toronto, as the materials represent up to 26.5% of litter found.[10]

Beyond the environmental impacts, the In-Store Packaging Report also outlines the importance of the 3Rs hierarchy, in that the first approach should always be to find a way to reduce the amount of packaging before moving to reuse and then finally to recycling. Following the first R means that there are fewer trucks needing to collect the materials, which leads to lower emissions and a reduction in gas consumption and less waste managed at landfills and at recycling facilities which also leads to less energy consumed.[11] While the In-Store Packaging Report focuses on reduction as a primary goal, it does not ignore that reduction can't solve the entire problem and does provide recommendations for reuse and recycling.

The In-Store Packaging Report was amended by the City's Public Works and Infrastructure Committee and then further amended by City of Toronto Council on December 1 and 2, 2008.[12] The following sets out what happened to specific parts of the In-Store Packaging Report.

<u>Plastic Bags</u>

The In-Store Packaging Report initially recommended that starting on June 1, 2009, Toronto would require all retailers that provide plastic retail shopping bags to its customers to provide a minimum discount of $0.10 for each plastic retail shopping bag not taken or used by the customer. The retailer would also be under the requirements to provide signage that this by-law was in effect, show the discount on the receipt and allow customers to use reusable containers in lieu of the plastic retail shopping bags.[13]

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[8] *Ibid.*, at page 8.
[9] *Ibid.*, at page 9.
[10] *Ibid.*, at page 9.
[11] *Ibid.*, at page 9.
[12] See Toronto City Council Decision Document, pages 90 to 96 - http://www.toronto.ca/legdocs/mmis/2008/cc/decisions/2008-12-01-cc27-dd.pdf
[13] *Supra* note 5, see page 1 and pages 11 to 13.

Finally, starting on June 1, 2009, all retailers would also be banned from distributing plastic retail shopping bags that are not compatible with Toronto's recycling program.[14] Non-compatible bags included bio-degradable plastic bags, compostable plastic bags and any plastic bags that also contained string or other non-plastic fittings (such as a string handle).[15] While bio-degradable plastic bags seem like an ideal environmental solution to the plastic bag problem, from SWMS's perspective, bio-degradable bags could not effectively be distinguished from normal plastic retail shopping bags, and if bio-degradable plastic bags were placed in the recycling stream, any recycled product would be of lesser or substandard quality due to the bio-degradable nature it would possess. SWMS was informed by their end markets that they were not willing to take the risk of having biodegradable plastics mixed in with normal plastics that are recycled.

Ultimately at City Council, the discount concept was changed. In its place, the City now requires all retailers, starting on June 1, 2009, to charge a minimum of $0.05 to the customer for each plastic bag that was taken. The change from a $0.10 discount to a $0.05 charge was endorsed by parts of the effected retail industries, such as the Canadian Council of Grocery Distributors. The requirement to provide signage of this policy, to show this on the receipt and to ban non-compatible plastic bags remained the same, with the exception that the ban did not begin until June 1, 2010.

The money that is collected by the retailers is not to be remitted to Toronto, but instead kept by the retailers. Council encourages retailers to use the money raised from the charge to be used for environmental initiatives, however that decision is up to the retailers. Most retailers are indicating that they do not want the money and will be donating the money to a charity. Further, Council also endorsed the goal of a 70% reduction in the use of plastic retail shopping bags (from 2006 data) by 2012 in the retail sector.

Overall, the charge and the ban on non-compatible plastic bags were considered by staff and Council as a less drastic approach to dealing with the problems created by plastic retail shopping bags than the potential alternative of banning plastic retail shopping bags from distribution by retailers.

Coffee Cups

With respect to coffee cups, the In-Store Packaging Report recommended that all retailers who sell hot drinks in a single-use disposable hot drink cup (which was defined as the cup, the plastic or polystyrene lid and, if applicable, the sleeve)[16] be required to provide a minimum discount of $0.20 to all customers who used a reusable mug when they ordered their hot drink as oppose to taking the single-use disposable hot drink cup. The offering

[14] *Supra* note 5, at page 2 and pages 11 to 13.
[15] Appendix A, Plastic Bags, to *supra* note 5, see http://www.toronto.ca/legdocs/mmis/2008/pw/bgrd/backgroundfile-17098.pdf
[16] Appendix B, Hot Drink Cups, to *supra* note 5, see http://www.toronto.ca/legdocs/mmis/2008/pw/bgrd/backgroundfile-17099.pdf

of the discount was to be prominently displayed, as well as displayed on any receipts issued.[17] This requirement was to take effect on June 1, 2009.

Starting on December 31, 2009, Toronto would ban the sale or distribution of single-use hot drink cups that were not compatible with Toronto's blue bin program.[18] A hot drink cup was not compatible if it is made of at least two material types, such as a polystyrene lid and a paper fibre body.

While a hot drink cup is made of components that are capable of being recycled, in Toronto recycling of these components is not currently possible. The In-Store Packaging Report indicates that the body of a hot drink cup is made up of a similar wet-strength paper fibre as is found in polycoat paper milk or juice containers.[19] The associated paper mills that process polycoat containers, could also process hot drink cups if it was possible to ensure that the polystyrene or plastic lid was removed from the hot drink cup prior to its arrival at the paper mill. Any additional contamination would be unacceptable for these processors. As stated in the In-Store Packaging Report, "[b]ased on the multiple and complex "points of entry" into the Toronto recycling program (i.e., residential Blue Bin, public space recycling, used by Toronto residents and visitors alike) [SWMS staff] are not confident that we could provide this assurance even if a public education program were in place."[20]

Although the first part of the policy is to impose a mandatory discount to customers who use a reusable mug for their hot drink purchase, it was ultimately the proposed ban of non-compatible hot drink cups that proved to be the most controversial part of this recommended policy. Intensive lobbying at the Public Works and Infrastructure Committee, on November 10, 2008, resulted in the hot drink cup policy being referred back to SWMS staff for further consultation with stakeholders on achieving the reduction goals in the In-Store Packaging Report and investigating how to make hot drink cups compatible with the blue bin program.

Since that decision, SWMS staff have been in detailed consultation with the respective stakeholders in order to determine the most feasible way to achieve source reduction of hot drink cups. The consultation was premised on the fact that there were three areas where potential change could occur to make the cups recyclable including: changing the cup (e.g., find a paper lid), changing the recycling facility in order to capture and sort the two materials (cup and lid) more effectively, or changing the end-markets by finding buyers for the resulting materials. With respect to changing the lid from polystyrene to paper, one company in the US was discovered who had created a paper coffee cup lid for the U.S. Navy. While one example has been found, whether that product can be commercially viable still remained a question.

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[17] *Supra* note 5, see page 2.
[18] *Ibid.*
[19] Appendix D, Other Policy Options Explored, to *supra* note 5, see http://www.toronto.ca/legdocs/mmis/2008/pw/bgrd/backgroundfile-17101.pdf at pages 1 to 4.
[20] *Ibid.*

In order to assist in the consultation, SWMS staff also retained three consultants to examine the existence of potential end-markets that could take post-consumer, polycoated, paper cup products (including lids and sleeves), as well as an analysis of Toronto's recycling facility design and ways to improve how the facility could capture the cups now and finally an analysis of the tools that could be use to influence customer behaviour change to drive source reduction.

At the time of writing this paper, SWMS staff are still working on the report back to Council on what to do with hot drink cups. The hot drink cup report is scheduled to be at the Public Works and Infrastructure Committee meeting on June 3rd and then at Council on July 6 and 7, 2009.

Water Bottles

The issue of water bottles was not part of the original Getting to 70% Report. Council, however, directed that SWMS prepare a report that examines the impact water bottles are having on Toronto's recycling and landfill capacities and recommending ways to deal with the problem.[21] According to the Federation Council of Municipalities, although plastic water bottles are recyclable, between 40 to 80% of plastic water bottles end up as litter or directly in the garbage and are sent to landfill as opposed to being recycled.[22]

The In-Store Packaging Report recommended that:

1. Toronto ban the sale of plastic bottled water at Civic Centres immediately, keeping in mind existing contracts at cafeterias and vending machines; and
2. Toronto will, by the end of 2011, improve access to tap water at all other City facilities and, when there is adequate access, will stop selling plastic bottled water at those civic facilities.

Key reasoning behind this policy is that Toronto's drinking water is excellent and drinking water from a tap is preferable than using a single-use disposable plastic water bottle. But for this policy to be successful, each City facility must have adequate access to tap water to justify the displacement of the sale of bottled water, which may require reinvestment in water fountain infrastructure.

The move to limit access to plastic bottled water at municipal facilities, schools and universities has been gaining moment over the last year and half. On March 7, 2009, the Federation of Canadian Municipalities passed a resolution that supports all of its members to "phase out the sale and purchase of bottled water at their own facilities where appropriate and where potable water is available.[23]" In Canada alone, the Polaris

[21] Motion 183 of Toronto City Council December 11, 12 and 13, 2007, online: http://www.toronto.ca/legdocs/mmis/2008/ex/comm/communicationfile-5125.pdf
[22] Federation of Canadian Municipalities, News Release "The Federation of Canadian Municipalities encourages reduced bottled water use at municipal facilities" (March 7 2009) online: http://www.fcm.ca/english/View.asp?mp=1&x=1083
[23] *ibid.*

Institute reports that 33 municipalities have phased out water bottles at their facilities, as of April 16, 2009.[24]

Legislative Basis

The obvious question that arises from Council enacting the plastic bag policy and the water bottle policy and considering the hot drink cup policy, at least from a lawyer's perspective, is: what is the legislative authority that Toronto is relying on to implement these items? After all, the plastic bag policy is somewhat unique, at least in Canada.

To understand the legislative authority that Toronto is relying on, you have to appreciate that on January 1, 2007, the *City of Toronto Act, 2006*[25] ("COTA") came into force. COTA is the primary piece of legislation from which Toronto derives its authority and the *Municipal Act, 2001*[26] no longer applies to Toronto.

The province, in consultation with Toronto, designed COTA to recognize Toronto's need to have broader powers to be able to respond to and deal with various problems and to enhance the City's ability to provide good government. Section 2 of COTA states the purpose of COTA as:

> The purpose of this Act is to create a framework of broad powers for the City which balances the interests of the Province and the City and which recognizes that the City must be able to do the following things in order to provide good government:
>
> 1. Determine what is in the public interest of the City.
> 2. Respond to the needs of the City.
> 3. Determine the appropriate structure for governing the City.
> 4. Ensure that the City is accountable to the public and that the process for making decisions is transparent.
> 5. Determine the appropriate mechanisms for delivering municipal services in the City.
> 6. Determine the appropriate levels of municipal spending and municipal taxation for the City.
> 7. Use fiscal tools to support the activities of the City.[27]

Based on the various caselaw indicating that municipality's powers were to be interpreted broadly, the province included subsection 6(1) which states:

> The powers of the City under this or any other Act shall be interpreted broadly so as to confer broad authority on the City to enable the City to govern its affairs as it considers appropriate and to enhance the City's ability to respond to municipal issues.[28]

Section 8 of COTA sets out Toronto's broad and general authority:

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[24] Andrea Cleland, "Choose tap water" *Inside the Bottle* (April 16, 2009), online: Inside the Bottle http://www.insidethebottle.org/choose-tap-water
[25] S.O. 2006, chapter 11, Schedule A.
[26] S.O. 2001, chapter 25
[27] *Supra* note 25, at section 2.
[28] *Supra* note 25, at subsection.6(1).

8. (1) The City may provide any service or thing that the City considers necessary or desirable for the public.

(2) The City may pass by-laws respecting the following matters:

1. Governance structure of the City and its local boards (restricted definition).

2. Accountability and transparency of the City and its operations and of its local boards (restricted definition) and their operations.

3. Financial management of the City and its local boards (restricted definition).

4. Public assets of the City acquired for the purpose of exercising its authority under this or any other Act.

5. Economic, social and environmental well-being of the City.

6. Health, safety and well-being of persons.

7. Services and things that the City is authorized to provide under subsection (1).

8. Protection of persons and property, including consumer protection.

9. Animals.

10. Structures, including fences and signs.

11. Business licensing.[29]

While COTA provides for a number of broad areas in which Toronto could exercise its broad authority, nowhere in COTA are there any provisions related to plastic bags, coffee cups, water bottles or even to packaging in general. This primarily leaves any ability to deal with packaging, before it enters the City's waste system, under one of the broad powers set out in subsection 8(2). In this case the most logical broad power to rely on would be paragraph 5 of subsection 8(2), Toronto's ability to pass by-laws respecting the economic, social and environmental well-being of the City power (the "Environmental Well-Being Power").

It should be pointed out that plastic bags, coffee cups and water bottles that enter the City's waste system can be dealt with another the City's broad authority to pass by-laws respecting services provided by the City. For example, the City could indicate whether one of those materials should be put into the recycling stream or into the waste stream and set up fines for those who do not comply.

Scope of the Environmental Well-Being Power

The scope of the Environmental Well-Being Power seems almost as endless as the environment itself. The power itself is new, at least in this specific form, and as a result untested by the courts as to the scope of the power. Arguably the power is recognition by

[29] *Supra* note 25, at subsection.8(1) and 8(2).

the province of the important role a municipality has as trustee of the environment. As with all municipal powers, however, the environmental well-being power is not an unlimited power.

The courts have specifically highlighted limitations in a number of cases, such as in Spraytech and in *Croplife Canada v. Toronto (City)*[30] ("Croplife.")

In Spraytech, Justice L'Heureux-Dubé for the majority stated that:

> courts faced with an impugned by-law enacted under a [general welfare] provision…must be vigilant in scrutinizing the true purpose of the by-law. In this way, a municipality will not be permitted to invoke the implicit power granted under a "general welfare" provision as a basis for enacting by-laws that are in fact related to ulterior objectives, whether mischievous or not.[31]

Further, L'Heureux-Dubé stated that the test for whether a municipal enactment was "passed for a municipal purpose" is "a reasonable connection to the municipality's permissible objectives."[32]

In the concurring opinion by Justice Lebel in Spraytech, Justice Lebel stated:

> It is not enough that a particular issue has become a pressing concern in the opinion of a local community. This concern must relate to problems that engage the community as a local entity, not a member of the broader polity. It must be closely related to the immediate interests of the community within the territorial limits defined by the legislature in a matter where local governments may usefully intervene.[33]

Based on the above mentioned statements, Toronto and other municipalities should keep in mind that the courts will scrutinize the true purpose behind the use of a general power like Environmental Well-Being and that the problem that is being addressed should be a problem that engages the community in a local way.

Besides the limitations on which the courts have pronounced, COTA also contains a codified version of the common law's conflict test as addressed by the Supreme Court of Canada in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*[34] and in Croplife[35]. Specifically section 11 states:

11. (1) A city by-law is without effect to the extent of any conflict with,

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[30] (2005), 75 O.R. (3d) 357.
[31] *Supra* note 2 at para. 20.
[32] *Supra* note 2 at para. 26.
[33] *Supra* note 2 at para 53.
[34] [2005] 1 S.C.R. 188.
[35] *Supra* note 30 at page 9.

(a) a provincial or federal Act or a regulation made under such an Act; or

(b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or a provincial or federal regulation.

(2) Without restricting the generality of subsection (1), there is a conflict between a city by-law and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument.[36]

Application to Plastic Bags, Coffee Cups and Water Bottles

The legislative basis for the charge for plastic bags, the discount for hot drink cups and the ban of non-compatible plastic bags and non-compatible hot drink cups is Toronto's ability to pass by-laws under the Environmental Well-Being Power. SWMS has set out the local environmental issue that Toronto is seeking to address and what the expected results from these policies should be to improve Toronto's environmental well-being. The policies for plastic bags and hot drink cups do not conflict with any provincial or federal legislation or regulation. Further the policies do not frustrate the purpose of any provincial or federal legislation. No Ontario or federal legislation deals with plastic bags or what material a coffee cup needs to be made from. As mentioned above, the City allowing residents to put plastic retail shopping bags into the recycling stream would fall under the City's ability to pass by-laws respecting services that the City provides, which also means that legally, the City could ban residents from adding plastic bags to the recycling stream although practically this would be almost impossible to enforce.

At this time, of course, Toronto City Council has only approved the plastic bag policy. Whether the hot drink cup discount and ban will come into force in the future is unknown. With respect to the plastic bag policy, Toronto officially passed the by-law that implements the plastic bag policy on March 31, 2009 (by-law 356-2009, attached as Attachment 1). At the time of writing this paper, no legal challenge has come to my attention with respect to by-law 356-2009.

Unlike the policies for plastic bags and hot drink cups which primarily rely on the Environmental Well-Being Power, the water bottle policy relies on Toronto's general power to procure goods and services for itself and its natural person power to enter into contracts and negotiate those contracts. On that basis, Toronto is in no danger of being challenged on the basis that there is no legislative authority to stop selling bottled water within city-owned facilities.

Application to other Jurisdictions in Canada

Out of the In-Store Packaging Report, at this time until, only the plastic bag policy is underpinned by reliance on the Environmental Well-Being Power and the general caselaw that sets out that municipality's powers are to be interpreted broadly. Consequentially, the plastic bag policy is the controversial use of Toronto's powers (that is until City Council decides what policy to pursue for hot drink cups), given that the

[36] *Supra* note 25 at section 11.

water bottle policy is a policy that can be adapted by any Canadian municipality without question.

For other municipalities in Ontario who are considering following Toronto's lead on plastic bags, those municipalities only need to look to subsections 10(2) and 11(2) of the *Municipal Act, 2001*[37] to find the same Environmental Well-Being Power as is set out in COTA. For other municipalities across Canada, the ability to implement a similar plastic bag policy depends on the respective legislation. My research has shown that only B.C., under subsection 8(3)(j) of the *Community Charter*[38] (although also note that the purpose of a municipality is to foster "the economic, social and environmental well-being of its community"[39]) and in Quebec under section 19 of the *Municipal Powers Act*[40] have a specific provision that discusses a municipalities ability to pass by-laws related to environmental matters. Of course, given that Toronto is arguably pushing the envelope on the scope of the Environmental Well-Being Power, it may be wise for other municipalities to wait and see what happens here in Toronto with respect to plastic bags before enacting a similar policy.

If there are other municipalities interested in exploring the plastic bag policy that Toronto has enacted, I would point out that while Toronto pointed to a couple of local environmental issues, there are still other environmental issues that may be more appropriate for a particular municipality, keeping in mind the limitation discussed in Spraytech about the need for the municipality to address a local problem. For example a local environmental issue caused by plastic bags or polystyrene products, that Toronto did not discuss, is the contribution to the deaths of terrestrial and marine wildlife.[41] Other environmental impacts caused by plastic bags and polystyrene products that arguably would not be considered a local environmental issue include:

- Contribution to global warming;[42] and
- Contribution to the growth of the Great Pacific Garbage Patch[43]

For other examples of regulating plastic bags see:

- Town of Leaf Rapids, Manitoba – Ban on Plastic Bags - http://www.townofleafrapids.ca/aboutus.htm

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[37] *Supra* note 26 at subsections 10(2) and 11(2).
[38] S.B.C. 2003, c. 26
[39] *Ibid.*, at section 7(d).
[40] R.S.Q. c. C-47.1
[41] See "Blowing in the Wind: Global moves against shopping bags" *CBC News* (March 28, 2007) online: http://www.cbc.ca/news/background/environment/shoppingbags.html and also see "Alternatives to Disposable Shopping Bags and Food Service Items, Volume 1" (January 29, 2008) prepared by Herrera Environmental Consultants, Inc., for Seattle Public Utilities, page 2-3, online: http://www.seattle.gov/util/stellent/groups/public/@spu/@csb/documents/webcontent/spu02_014616.pdf
[42] Herrera Environmental, *ibid.*
[43] See "The Great Pacific Garbage Patch" *Oprah.com* (April 23, 2009) online: http://www.oprah.com/article/oprahshow/20090422-tows-ocean-pollution and "Now and Forever: The Styrofoam dilemma" by Catherine Solyom, *Canwest News Service* (April 22, 2009) online: http://www.canada.com/life/blueskies/forever+Styrofoam+dilemma/1522634/story.html

- Regional Municipality of Wood Buffalo – Plans to Ban Plastic Bags by 2010 - http://www.woodbuffalo.ab.ca/municipal_government/media_releases/2009/mar12.PlasticBagBan.asp?subnav=161
- City of Seattle – Green Fee (tax) of 20 cents on each bag - http://www.seattle.gov/util/Services/Recycling/Reduce,_Reuse_&_Exchange/ProposedGreenFee/index.htm
- San Francisco – Plastic Bag Ban - http://www.sfgov.org/site/sf311csc_index.asp?id=71355
- Ireland's Plastic Bag Tax - http://www.environ.ie/en/Environment/Waste/PlasticBags/

Also see Toronto's Packaging Waste Reduction Forum website on different views on what to do about packaging: http://www.toronto.ca/garbage/packagingforum/index.htm

Conclusion

Municipalities across North America are trying to find ways to deal with packaging, whether it is through bans, taxation or other creative endeavours. In Canada, it is clear that municipalities have a role to play in regulating and dealing with environmental issues. Toronto is attempting to see how far the Environmental Well-Being Power under COTA can go in dealing with plastic bags and in the near future, potentially coffee cups.

Only time will tell whether the courts agree that Toronto has the legislative authority to engage in this type of environmental regulation and what impacts the actual policies may have on the overall environmental well-being of Toronto. Until then, municipalities will still attempt to find the best ways to tackle these and other environmental issues whether it be simply by policy or by regulation.

Attachment 1 – By-law 356-2009 (not an official version)

Authority: Public Works and Infrastructure Committee Item 20.1, adopted as amended,
by City of Toronto Council on December 1, 2 and 3, 2008
Enacted by Council: March 31, 2009

CITY OF TORONTO

BY-LAW No. 356-2009

To adopt a new Municipal Code Chapter 604, Packaging, respecting the establishment of a charge on plastic bags taken by customers of retail business establishments and to ban the use of non-compatible plastic bags from distribution by retail business establishments so as to further the environmental well-being of the City of Toronto.

WHEREAS on June 19, 20 and 22, 2007, City Council adopted the goal of achieving a 70% solid waste diversion rate by 2010; and

WHEREAS City Council, at the same meeting, formed the In-Store Packaging Waste Diversion Working Group to explore strategies to achieve source reduction of certain types of in-store packaging material, such as plastic retail shopping bags, which reduction will contribute to achieving the 70% diversion goal; and

WHEREAS Stewardship Ontario's 2005 waste audit data estimated that there is an average of 8.8 plastic retail shopping bags generated per household per week in Toronto which represents a total generation of 457.6 million plastic retail shopping bags into the waste stream in Toronto per year; and

WHEREAS the City's Green Lane Landfill is permitted by the Ministry of the Environment to accept a total of 14.85 million cubic metres of non-hazardous solid waste and daily cover; and

WHEREAS currently the majority of plastic retail shopping bags are managed through landfill disposal, representing approximately 6,900 cubic metres of landfill capacity per year; and

WHEREAS plastic retail shopping bags are also found as litter in City streets; and

WHEREAS plastic retail shopping bags do not degrade significantly over time; and

WHEREAS the 3Rs hierarchy of reduce, reuse, recycle is an integral component to achieving the 70% goal; and

WHEREAS the reduction in the use of plastic retail shopping bags by Torontonians has a number of environmental benefits for the City including extending the life of the City's Green Lane Landfill, decreasing the amount of litter found throughout the City of Toronto, and lowering gas consumption and emissions; and

WHEREAS on December 1, 2 and 3, 2008, City Council adopted, as amended, a 3Rs strategy for plastic retail shopping bags to assist in the goal of achieving a 70% waste diversion rate by 2010; and

WHEREAS the reduction strategy for plastic retail shopping bags is to require all retailers to charge a minimum of five cents ($0.05) for each plastic retail shopping bag taken or requested by a customer and to communicate that charge to the customer; and
WHEREAS the reuse strategy for plastic retail shopping bags is to continue to encourage Torontonians to reuse plastic retail shopping bags in the City's Green Bin program and to require all retailers to accept reusable containers brought by customers to carry their purchases; and

WHEREAS the recycle strategy for plastic retail shopping bags is to ban the sale or distribution of non-compatible plastic retail shopping bags, such as biodegradable plastic shopping bags, within the City so as to prevent them from entering the recycling program and contaminating the end-market recycled product, and to expand the City's blue box recycling program to include the ability to recycle plastic retail shopping bags; and

WHEREAS subsection 6(1) of the *City of Toronto Act, 2006* provides that the powers of the City shall be interpreted broadly so as to confer broad authority on the City to enhance the City's ability to respond to municipal issues; and

WHEREAS subsection 8(1) of the *City of Toronto Act, 2006* provides that the City may provide any service or thing that the City considers necessary or desirable for the public; and

WHEREAS City Council has the authority to pass by-laws respecting matters related to the economic, social and environmental well-being of the City under subsection 8(2) of the *City of Toronto Act, 2006*; and

WHEREAS the scope of the by-law making power under section 8(3) of the *City of Toronto Act, 2006* includes the power to regulate or to prohibit and to require persons to do things respecting a matter;

The Council of the City of Toronto HEREBY ENACTS as follows:

1. Schedule "A" to this By-law is enacted as Chapter 604, Packaging, of The City of Toronto Municipal Code.

2. Except as provided in Section 3, this by-law comes into force on June 1, 2009.

3. Section 604-4 of Chapter 604, Packaging, comes into force on June 1, 2010.

ENACTED AND PASSED this 31st day of March, A.D. 2009.

SANDRA BUSSIN,
Speaker

ULLI S. WATKISS
City Clerk

(Corporate Seal)

SCHEDULE "A" TO BY-LAW No. 356-2009

Chapter 604

PACKAGING

ARTICLE I
Plastic Bags

§ 604-1. Definitions.

As used in this chapter, the following terms shall have the meanings indicated:

BIODEGRADABLE PLASTIC BAG or COMPOSTABLE PLASTIC BAG — Any bag which is composed of, in whole or part, biodegradable plastic, Oxo-biodegradable plastics, Plastarch material, polylactide or any other plastic resin composite that is intended to degrade at a faster rate than non-biodegradable plastic film.

DOOR-HANGER BAG — A bag designed to hold flyers, coupons or other advertisements and intended to be left on the door of homes.

LAUNDRY-DRY CLEANING BAG — A bag used by dry-cleaners to cover and protect clothing after the laundering or dry-cleaning process.

NON-COMPATIBLE PLASTIC BAGS — Bags that are not compatible with the City's blue bin recycling program and includes:

A. biodegradable plastic bags or compostable plastic bags; and

B. plastic retail shopping bags which contain metal grommets, string, cord, cloth or other non-plastic material.

PLASTIC RETAIL SHOPPING BAG — A bag made of plastic film, designed to carry customer purchases from a retail business establishment but does not include:

A. bags used by customers inside retail business establishments to package bulk items such as fruit, vegetables, nuts, grains, candy or small hardware items such as nails and bolts;

B. bags used to contain or wrap frozen foods, meat or fish, flowers or potted plants, whether pre-packaged or not;

C. bags used to protect bakery goods;

D. bags provided by pharmacists to contain prescription drugs;

E. newspaper bags;

F. door-hanger bags;

G. laundry-dry cleaning bags; or

H. bags sold in packages containing multiple bags intended for such uses as garbage bags, pet waste bags, yard waste bags, or recycling bags.

RETAIL BUSINESS — The selling or offering for sale of goods or services by retail.

RETAIL BUSINESS ESTABLISHMENT — The premises where a retail business is carried on.

REUSABLE CONTAINER — Other than a plastic retail shopping bag, a bag, box or other container that is specifically designed and manufactured for multiple reuse and is:

A. made of cloth or other machine washable fabric; or

B. made of other durable material suitable for reuse.

§ 604-2. Reusable containers.

Persons carrying on a retail business in a retail business establishment shall accept the use of any reusable container for the transportation of purchased items by the customer from the retail business establishment in lieu of plastic retail shopping bags.

§ 604-3. Charge for plastic retail shopping bags.

A. Persons carrying on a retail business in a retail business establishment who offer or provide plastic retail shopping bags to customers shall charge a minimum of five cents ($0.05) for each plastic retail shopping bag requested or taken by customers.

B. Persons carrying on a retail business in a retail business establishment who offer or provide plastic retail shopping bags to customers, as described in subsection A, shall:

(1) provide prominent signage of the City’s requirement to impose the charge on customers at the point of sale; and

(2) indicate on the customer transaction receipt, if one is issued, the number of plastic retail shopping bags used by the customer and the total amount charged.

C. Persons carrying on a retail business in a retail business establishment who do not offer or provide plastic retail shopping bags to customers shall offer or provide alternatives, such as cardboard boxes or paper bags, at no charge to the customer.

D. Persons carrying on a retail business in a retail business establishment that offer or provide plastic retail shopping bags to customers and offer or provide other alternatives such as cardboard boxes or paper bags to customers shall also comply with § 604-3C.

E. Subsections 604-3C and 604-3D do not prevent persons carrying on a retail business in a retail business establishment from offering or providing reusable containers for free or for a charge.

§ 604-4. Prohibition on non-compatible plastic bags.

Persons carrying on a retail business in a retail business establishment are prohibited from offering or providing to customers non-compatible plastic bags, designed to carry customer purchases from the retail business establishment.

§ 604-5. Offences.

Every person who contravenes any of the provisions of this chapter is guilty of an offence.