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Court rules federal cabinet acted outside their authority by broadly designating plastic manufactured items as toxic

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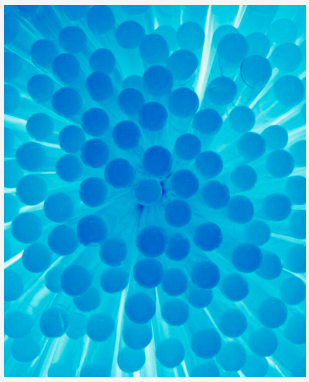

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On November 16, 2023, in *Responsible Plastic Use Coalition v. Canada (Environment and Climate Change)*, the Federal Court ruled that the federal cabinet acted outside their authority when they issued an order (the Order) adding "Plastic Manufactured Items" (PMI) to the list of toxic substances in Schedule 1 of the *Canadian Environmental Protection Act, 1999* (CEPA).[1]

The Court held that it was both unreasonable and unconstitutional to add PMI to Schedule 1 because it is too broad of a category. The Court also found the decision of the Minister of the Environment and Climate Change to refuse requests to establish a Board of Review under CEPA before the Order was issued to be unreasonable, because of a lack of justification and transparency in that decision.

The Court quashed the Order and declared it invalid as of the date it was registered (April 23, 2021). This decision serves as a rare rebuke of Cabinet decision making, and an important contribution to constitutional and environmental law in Canada. Nevertheless, the federal government intends to appeal the decision and remains intent on continuing to regulate plastics.

Reasonableness of the Order

The Court found that the Order listing the broad category of PMI on the list of toxic substances in Schedule 1 was unreasonable because Cabinet could not, as a matter of fact, have been satisfied that all PMI included within the scope of the Order were toxic within the meaning of CEPA.

The Court reviewed the scheme and relevant provisions of CEPA and concluded that, to be added to Schedule 1, Cabinet must be satisfied that a substance or class of substances:

- fits within the meaning "substance" or "class of substances" in CEPA (the First Requirement); and
- is toxic, within the meaning of CEPA (the Second Requirement).

On the First Requirement, the Court concluded that PMI as a category appears broader than

the definition of "substance" in paragraph 3(1)(f) of CEPA, which the government relied upon to argue the Order was reasonable.

On the Second Requirement, the Court found that the Order was overly broad when considered within the scheme for toxic substances under Part 5 of CEPA and its interpretation by the Supreme Court of Canada in *R. v. Hydro-Québec*. The Court noted that Part 5 of CEPA provides a triage tool to "weed out from the vast number of substances potentially harmful to the environment or human life those only that pose significant risks of that type of harm". Consistent with the CEPA's objective, the Court noted that only substances that are toxic in "the real sense" (i.e., beyond mere potential harm) may be listed in Schedule 1.

While the breadth of the Order was based on the statement in the accompanying Regulatory Impact Analysis Statement (RIAS) that "all plastic manufactured items have the potential to become plastic pollution", the RIAS referred to only a small number of specific items (ropes, nets, cable ties, plastic bags, packaging rings) reported in the scientific literature to demonstrate adverse effects on some animals. In the Court's view, Cabinet could not have been satisfied from the scientific evidence that all PMI are toxic within the meaning of CEPA. By listing the broad category of PMI on the list of toxic substances in Schedule 1, Cabinet acted outside its authority under CEPA, making the Order unreasonable.

Reasonableness of the decision to refuse a Board of Review

Under CEPA, a notice of objection may be filed with the Minister to request a Board of Review (BOR) in certain circumstances, including within 60 days of the required publication of a proposed order in the *Canada Gazette*. The establishment of a BOR is at the discretion of the Minister.

When the proposed Order was published in the *Canada Gazette,* 52 requests were made for a BOR, and 62 notices of objection (the Objections) were filed with the Minister, arguing, among other things, that Environment and Climate Change Canada's (ECCC) Science assessment of plastic pollution did not provide sufficient evidence that all PMI covered by the Order were toxic. The Minister's response to the Objection did not respond to this argument.

The Court viewed this as a "central argument" that challenged the sufficiency of the science on which the Order was based. The failure to address this argument left uncertainty as to whether the Minister considered it when refusing to establish a BOR – a lack of transparency and completeness that caused the Minister's decision to refuse a BOR to be unreasonable.

Constitutionality of the Order

The applicants also challenged the constitutionality of the Order as being outside the federal criminal law power under subsection 91(27) of the *Constitution Act, 1867*.

Relying on extrinsic evidence of the preliminary RIAS for the Order and the collection of government reports and studies that preceded the Order, the Court found that the Order's pith and substance is to list PMI on CEPA's list of toxic substances so that PMI could be regulated to manage the potential environmental harm associated with their becoming plastic pollution.

The Court then considered whether the Order's pith and substance falls within the federal criminal power, which requires it to satisfy three elements: (1) a criminal law purpose; (2) a prohibition; and (3) a penalty.

The Court concluded that the Order's pith and substance did not have a criminal law purpose. To employ the criminal law power, the Court explained that what is being restricted must actually be dangerous. Otherwise the restriction is mere economic regulation that falls outside the criminal power. CEPA is intended to be limited to substances that are toxic in "the real sense" from other substances that are potentially harmful or pose significant risks to the environment or human life. The Court found that the Order lacked a criminal law purpose because it captured the "broad and all-encompassing nature of the category of PMI", including items with no reasonable apprehension of environmental harm, which eliminates the screening mechanism of toxicity that grounded the criminal law power under CEPA.

Finally, the Court considered whether the Order's constitutionally could be upheld under the national concern doctrine of the federal power of peace, order, and good government (POGG). The Court found that the national concern doctrine was not a justiciable issue because it was not raised by the parties themselves, but by Alberta and Saskatchewan as interveners. In any event, the Court held that the Order could not be upheld under the POGG power because it would fail the national concern test, as it lacked a singleness, distinctiveness, and indivisibility that clearly distinguished it from matters of provincial concern and there was no evidence of provincial inability to address the issue.

Practical takeaways

After issuing the Order on June 22, 2022, the federal Cabinet issued the *Single-use Plastics Prohibition Regulations* under CEPA (Plastics Regulations), which provide for restrictions on the manufacture, import, export, and sale of single-use plastics. In a previous Osler Update, we advised that the Plastics Regulations represent a shift in the regulation of plastic products across Canada. The Responsible Plastic Use Coalition (among others) has also challenged the Plastics Regulations on constitutional and administrative law grounds.[2] However, that challenge has not yet been heard. Unlike the Order, the Plastics Regulation is more targeted, but this decision will likely affect the outcome of that challenge. The Plastics Regulation lists six categories of single-use plastics, which are set to be banned by the end of 2025. It remains to be seen whether the narrower approach of the Plastics Regulation will withstand judicial scrutiny.

Despite these and other challenges, the federal government has targeted the regulation of plastics for some years. Plastics regulation coincides with international efforts, including the United Nations' current goal of drafting a Global Plastics Treaty, which is planned to be completed by the end of 2024. As such, notwithstanding the Federal Court's decision, the federal government will likely continue to prioritize plastics regulation. The Minister, Steven Guilbeault, has already indicated the federal government will appeal the decision.

In addition to the implementation of the Plastics Regulations, the Court's decision in this case and, in the Supreme Court's recent decision in the *IAA Reference*, which we discussed here, may also have implications for the addition of other substances to the list of toxic substances in Schedule 1 and other federal environmental initiatives planned under CEPA, including the *Clean Electricity Regulations*, which has been criticized for intruding on provincial jurisdiction.[3]

In rejecting the argument that the Order could be upheld under the POGG power, the Court noted that the Supreme Court of Canada previously held in *Hydro-Quebec* that CEPA falls under the federal government's criminal law power, which means that an order made under CEPA must similarly fall under the criminal law power. An order under CEPA cannot be justified under the national concern doctrine. As a result, the Court's decision that the criminal law power requires a restriction of something that is actually dangerous "in the real sense", may influence how a future court interprets the constitutionality of the *Clean Electricity Regulations* and other additions to Schedule 1.

Lastly, the parties disputed which remedies were available in the case. They agreed that declaratory relief was available, but disagreed as to whether any further relief may be ordered, and specifically whether this decision had the effect of treating PMI as if it had never been added to Schedule 1. The Federal Court agreed with the respondents that transposing powers to the court to "add" or "delete" substances from the current Schedule 1 resided with Cabinet and would exceed the court's statutory jurisdiction. The Court's discussion of available remedies on an application for judicial review may inform future challenges, but also sheds light on the implications of this particular decision: namely, that it does not have the effect of removing PMIs from Schedule 1 of CEPA, and further government action will be required.

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[1] As discussed in a previous Osler Update, including what is included in the defined term PMI.

[2] *Petro Plastics Corporation Ltd et al v. Canada (Attorney General)*, Court File No. T-1468-22.

[3] As discussed in a previous Osler Update.