

PLAN FOR THE BAN: WHAT THE FEDERAL COURT'S DECISION ACTUALLY MEANS FOR YOUR BUSINESS - YOUR QUESTIONS ANSWERED

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The Federal Court recently made a big statement through its ruling in [Responsible Plastic Use Coalition v. Canada \(Environment and Climate Change\) 2023 FC 1511](#) (the “**Decision**”), where it struck down the Federal Government's decision to add "plastic manufactured items" (“**PMIs**”) to the List of Toxic Substances in Schedule 1 of the [Canadian Environmental Protection Act, 1999](#) (“**CEPA**”) for being unreasonable and unconstitutional. While this ruling comes as a relief to many in the Canadian plastic industry, the consequences of the Decision that many are taking away from recent news headlines may be unwarranted as the Decision itself does not change the legislation currently in effect.

This bulletin provides a brief summary of the Decision and goes on to answer your most burning questions about what the Decision actually means for businesses who manufacture, distribute, sell, supply or use plastic products in Canada. To jump right to your questions – [click here](#).

The Federal Government has announced its intention to appeal the Decision.

Background

In 2018, the Canadian Council of Ministers of the Environment published a [Canada-wide Strategy on Zero Plastic Waste](#) aimed to address plastic pollution by 2030. Following several studies, including one commissioned by Environment and Climate Change Canada (“**Environment Canada**”) that called for strategic intervention against the environmental, human health and economic impacts of plastics, Environment Canada published two documents in 2020: (i) a [Science Assessment of Plastic Pollution](#) that recognized the lack of standardized methods for monitoring micro-plastics and emphasized the potential harm caused by macro-plastics; and (ii) a [Discussion Paper](#) proposing an integrated management approach to plastics and seeking input on proposed regulations.

Ultimately, the Federal Government, on the recommendation of Environment Canada, issued the [Order Adding a Toxic Substance to Schedule 1 to the Canadian Environmental Protection Act, 1999](#) on April 23, 2021

that immediately added PMIs to the List of Toxic Substances in Schedule 1 of CEPA (the “**Order**”). By classifying PMIs as a toxic substance under CEPA, Environment Canada now had broad authority to take risk management actions to mitigate any adverse environmental effects of plastics. One of the first actions taken under this authority was the enactment of the *Single-use Plastics Prohibitions Regulations* (“**SUP Regulations**”) banning or restricting the manufacture, import and sale of certain single-use plastic products, which came into effect on December 20, 2022. For more on the issuance of this Order, read our bulletin [here](#).

The Applicants, Responsible Plastic Use Coalition (a not-for profit corporation comprising of companies from the plastic industry who do business in Canada) together with several important players in the petrochemical and plastics industry, brought an application before the Federal Court for judicial review of the decision to issue the Order.

However, prior to the hearing of the application, the Federal Government repealed Schedule 1 of CEPA and re-enacted it with all of the same listed substances, including PMIs. This meant that the relief sought by the Applicants, in part to quash the decision listing PMIs in Schedule 1, was no longer available as a form of relief despite PMIs remaining listed in Schedule 1 due to the re-enactment. Despite arguments that the application was now moot, the Federal Court determined that there nonetheless remained value to the existing controversy between the Applicants and Environment Canada regarding plastics regulation in Canada such that the application was still heard and a decision rendered.

Issue

The Applicants alleged that the Order did not comply with the statutory scheme under CEPA and challenged the decision to list PMIs as a “toxic substance” under Schedule 1 of CEPA without supporting scientific or risk assessments. They also alleged that the Order was unconstitutional, falling outside the scope of federal criminal law power.

Court’s Decision

The Federal Court ultimately concluded that the Order was both unreasonable and unconstitutional and quashed the Order declaring it invalid and unlawful. The Decision was based on the following key findings:

- To add a substance to Schedule 1 of CEPA, the Federal Government must be satisfied that the substance or class of substances meets the criteria for toxicity as prescribed by CEPA. The Court held that the Federal Government could not have been satisfied that all PMIs are toxic just because they are made of plastic without considering important factors such as the extreme variability in their shape, type and properties as well as the likelihood of them ending up in and causing harm to the environment. As these factors were not considered by the Federal Government, it lacked evidence to demonstrate that the

entire category of PMIs satisfied the toxicity requirements under CEPA. Hence, the Court held that the Federal Government acted beyond its statutory scope in listing PMIs under Schedule 1.

- Importantly, the Court noted that Environment Canada had already made findings and conducted such analysis with respect to the products subject to the SUP Regulations, found to be “environmentally problematic”, while other PMIs considered were not found to meet this threshold because they either were not prevalent in the environment or were not known or suspected to cause environmental harm. The broad category of PMIs includes items where there is no reasonable apprehension of them causing environmental harm. However, it remains open to Environment Canada to study and assess the environmental risks associated with other products in the PMIs category.

Your Questions Answered

Does the Decision mean that the addition of PMIs to Schedule 1 of CEPA has been struck or is no longer in effect?

No, because of the re-enactment of CEPA following the Order, the Order was not the legislative tool that added PMIs to Schedule 1 in its current form. Therefore, while the Decision quashes the Order, it does not have the effect of striking PMIs from Schedule 1 of CEPA as it currently stands. In other words, **PMIs are currently still listed in Schedule 1 of CEPA.**

Does the Decision render the SUP Regulations invalid?

No, since the Decision did not result in the striking of PMIs from Schedule 1 of CEPA, which provides Environment Canada with authority to regulate PMIs and enact the SUP Regulations, it did not render them invalid. **Businesses who manufacture, distribute, sell, supply or use the six categories of single-use plastic products subject to the SUP Regulations should continue to comply with the SUP Regulations and not make any changes to their existing compliance plans.**

Importantly, the SUP Regulations arise from an analysis conducted by Environment Canada that identified the six single-use plastic products subject to the ban as “problematic plastics”. This is the evidence missing from the much broader category of PMIs that the Court took issue within its Decision. Had just these six products been added to Schedule 1 rather than PMIs, the application may not have been successful – this specific issue is subject to a separate challenge (also filed by the Responsible Plastic Use Coalition) that is before the Court but has not yet gone to a hearing.

Does the Decision impact the timelines in the SUP Regulations?

No, **the SUP Regulations and their timelines remain in effect** and it is reasonable to anticipate that the Federal Government will take additional steps (possibly the enactment of new legislation or amendments to

CEPA) to ensure the constitutionality of the SUP Regulations. For more information on the timelines for the SUP Regulations, read our bulletin [here](#).

Is the Federal Government going to amend CEPA again in response to the Decision?

No such announcement has been made as of the date of this Bulletin. However, in light of the findings in the Decision, it is certainly possible that the Federal Government may amend CEPA to replace PMIs in Schedule 1 with a narrower list of plastic products where there is more evidence that they are likely to enter and cause harm to the environment. Given that Canada is a signatory to the world's first global plastics pollution treaty, along with 174 other states, it is unlikely to resile from its stated intention to keep pace with the control and reduction of plastic pollution and waste in Canada alongside global leaders. For more on the UN global plastics treaty, read our bulletin [here](#).

If you have additional questions on how these changes may impact your business, please contact the authors of this bulletin.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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